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Ellis & Ors v John Benson Ltd [2025] EWHC 2096 (KB): Good Faith Implied, Breaches Proven, Counterclaims Out of Road

Ellis & Ors v John Benson Ltd [2025] EWHC 2096 (KB)

Date: 6 August 2025

Judge: Mr Justice Freedman

Key Words:

Franchise Agreements, Implied Terms, Good Faith & Fair Dealing, Relational Contracts, Employment Relationship Hallmarks, Inequality of Bargaining Power, Repudiatory Breach, Abusive & Intimidating Environment, Racism, Sexism, & Homophobia, Control over Franchisees, Unilateral Contract Variation, COVID-19 Impact, Affirmation of Contract

Summary

Twenty former franchisees terminated their driving school contracts in 2020, alleging JBL and its MD, Mr. Benson, breached implied duties of good faith by creating an abusive, intimidating environment and through other misconduct [1–3]. JBL denied any implied terms and counterclaimed for substantial damages [2].

The High Court trial addressed three preliminary issues [4]:

1. Were duties of good faith and fair dealing implied?
2. Were express or implied terms breached?
3. Were the contracts lawfully discharged, and if so, by whom?

The court found [507]:

- Good faith and fair dealing were implied in fact.
- JBL breached these duties.
- The breaches were repudiatory; the Claimants lawfully terminated and did not waive this right.

Key Themes:

A. Implied Duty of Good Faith [249–253, 282]

1. English Law and Good Faith [249–265]

- No universal duty of good faith.
- Relational contracts—long-term, trust-based agreements—can justify implication (*Yam Seng; Globe Motors; Sheikh Al Nehayan; Bates*).
- Duty requires honesty, cooperation, and avoiding conduct that undermines the deal.

2. Comparative Insights [266–277]

- Australia/Canada: broader acceptance of good faith (*Paciocco; Esso*).
- England: cautious but moving toward wider use.

3. Tests for Implication [278–280]

- **In fact:** for business efficacy or obviousness.
- **In law:** for certain relationship types, like employment.

4. Application [288–298]

- Long terms, unequal bargaining power, and dependency made the duty essential.

5. Outcome [301–307]

- Duty analogous to employment trust and confidence.
- Entire agreement clauses didn't exclude it.
- This was a relational contract requiring fairness and good faith.

B. Hallmarks of Employment [49, 217, 230(3)(4), 251, 291(4)-(6)]

1. Analysis [217–227]

- High control over pricing, marketing, and working practices.
- No ability to delegate; obligations to prioritise JBL's interests.

2. Inequality [291(5), 297–300]

- Dependency and imbalance justified implied duties.

3. Relational Contract [307–311]

- Loyalty and control required good faith for commercial coherence.

4. Conclusion [313–318]

- Contracts closer to employment than commercial franchises, justifying implied duties.

C. Inequality and Vulnerability

- **No negotiation [35–39]**: Take-it-or-leave-it contracts, no time for advice.
- **Structural imbalance [224–230]**: Individuals with little experience or capital, often requiring

guarantors.
- **Hard-sell tactics [236–240]**: Business model anticipated early exits and leveraged guarantors.
- **Judicial finding [309]**: Agreements were “very seriously imbalanced.”

D. Abusive and Intimidating Culture

1. Aggression [14–18, 85–92, 109–111]

- Sarcasm, shouting, and public humiliation created a “toxic” environment.

2. Racism, Sexism, Homophobia [330–345]

- Derogatory comments, racial slurs, and homophobic insults.

3. Findings [346–354]

- Hospitality didn’t excuse intimidation or abuse.

4. Control [352–354]

- Threats of exclusion, public shaming, and punitive actions breached trust and good faith.

E. Control over Franchisees

- **Structural control [49–68]**: Personal contracting, car approvals, fixed pricing, centralised referrals.
- **Operational control [55–63]**: Weekly fees, advertising restrictions, strict branding.
- **Employment-like obligations [217–222]**: Full-time devotion, no outside work, operational compliance.
- **Advertising restrictions [369–374, 430–437]**: Arbitrary bans on personal numbers and price advertising.
- **Event demands [442–445]**: Compulsory promotional attendance imposed further burdens.

F. Repudiatory Breach and Affirmation

1. Repudiatory Breach [458–474]

- JBL’s conduct went to the root of the contracts (*Hongkong Fir; Valilas; Force India; SK Shipping*).
- Cumulative breaches destroyed trust and confidence.

2. Affirmation [488–499]

- Continuing payments or engagement did **not** equal affirmation.
- Claimants needed time for legal advice; breaches were ongoing.

3. Application [496–506]

- Payments were protective; fear of reprisals delayed action.
- Ms. Freeman’s delayed termination was reasonable.

4. Outcome [507]

- JBL's breaches were repudiatory; claimants lawfully discharged the contracts.

Background

- JBL founded in 1993, incorporated in 2004, grew to 100+ franchisees [9–10, 30–33].
- Most claimants had no prior experience; many had limited education and capital [10–12, 30–33].
- Over 30 years, ~70 franchisees exited early, often ending in litigation [64–65, 355–357].
- Contracts: long minimum terms (3–13 years), fixed fees, no early exits; heavy liabilities for breach, often exceeding £100k [40–48, 62–72, 419–421].
- Dispute escalated during COVID, fuelled by fee demands and unilateral "Frozen-Franchise" extensions [379–385, 402–403, 476–487, 468–474].

Legal Issues and Analysis

The court considered three preliminary issues, crucial to liability [4]:

(1) Implied Terms: Were the contracts subject to a duty of good faith and fair dealing?

Traditional View vs. Recent Developments. Historically, franchise agreements were treated as commercial (vendor/purchaser-type) contracts, so implying "trust and confidence" was rare. Recent CA authority (Quantum; Dwyer) looks to substance—standard forms, inequality of bargaining power—asking if the relationship is "more akin to employment" [4–7, 204–207, 209–216, 224–230, 240–245, 269–275, 288–297, 291–298, 301–305].

"Hallmarks of an Employment Relationship." The court found many such hallmarks [49–54, 76–79, 217–223, 285–289, 307–310]:

- Contracts personal to the individual franchisee.
- No right to delegate, sub-contract, or assign.
- Duty to devote "substantially the whole of your time and attention" and not run other businesses without consent.
- Limited practical holidays due to fixed weekly fees.
- Lessons "only in the name of the franchisor"; act in JBL's "best interests" and use "best endeavours" to build JBL's business.
- Tuition "in accordance with guidelines laid down by the Franchisor" (a rulebook).
- Lesson fees prescribed until January 2020.
- Significant operational control (mandatory office calls; no personal numbers on cars; head-office referrals).

Inequality of Bargaining Power. Established by [10–13, 35–39, 225–230, 237–240, 230–232, 425]:

- Sole individuals, often without business or ADI experience.
- Limited education and difficult work histories.
- Limited resources, frequent use of guarantors.
- Warning to seek legal advice ineffective; advice rarely taken; JBL did not insist—benefitting from the imbalance.

- “Hard sell” to sign immediately.
- Long minimum terms and heavy termination liabilities often not understood.

Implied in Fact, Not in Law. No settled precedent to imply good faith across all franchises; on these facts, implication satisfied the **officious bystander and business efficacy** tests—necessary and obvious for commercial/practical coherence [275–283, 288–291, 296–300, 309–310].

Scope of Implied Terms. JBL must not [204–207, 301–305, 314–319, 377, 439–441, 468–470]:

- **Substantially deprive** claimants of contractual benefits;
- **Undermine** the bargain;
- **Exercise discretion arbitrarily/capriciously**;
- Engage in conduct **commercially unacceptable** to reasonable and honest people;
- **Without reasonable/proper cause**, act in a way **likely to cause serious damage** to mutual trust and confidence.

BFA Code of Ethics. Inapplicable: JBL not a member; no proven industry custom [266–268].

(2) Breach of Express or Implied Terms: Were these terms breached?

Abusive and Intimidating Environment (Racism, Sexism, Homophobia) [323–338, 340–345, 346–351]:

- Derogatory comments about women (“wrinkled old bag,” “nasty piece of work”); slurs against Gypsies/Travellers (“pikes”); racist epithet for a Chinese ex-franchisee (“pussy chow mein”); racist comments about an Indian pupil (“smell like curry”) and about Ms. Freeman’s area (“full of Pakis and blacks”); homophobic jibes (“pansy,” “pussy”) and remarks about sexuality.
- Not sporadic—part of a culture the court found “toxic.”

Insulting and Abusing Franchisees [94–96, 106–122, 338–340, 352–354]:

- Ms. Freeman told she was “a bit fat.”
- Mr. Monk publicly humiliated over a roof-cone error.
- Mr. Stubbings chastised for clothing in a promo photo.
- Ms. Rusted and Ms. Thornton reduced to tears in tuition; “F*** off out of my office, you stupid cow.”

Boasting about Actions Against Instructors/Guarantors [355–367, 470(3)]:

- Facebook posts boasting of lawsuits, “ruining lives,” “taking homes”—used to instil fear and enforce compliance; not neutral information.

Restrictions on Franchisees’ Ability to Market Themselves [53–57, 369–378, 430–443, 440–441]:

- **Personal mobile numbers on vehicles:** almost uniformly refused (save for “favourites”); arbitrary/capricious; breach of trust and confidence; deepened dependence on head-office referrals.
- **Publicising prices:** JBL set prices until Jan 2020; thereafter public criticism/sanctions (e.g., Facebook removal) when prices rose; arbitrary/capricious; breach of good faith.

Breaches Relating to COVID-19 [379–389, 396–400, 402–410, 411–415, 417]:

- **Fees during lockdown:** dismissive of pandemic concerns; fee-first approach—uncooperative, selfish, high-handed.
- **Unilateral "Frozen-Franchise" extensions:** fee suspension coupled with compulsory term-extension; not an offer but a peremptory imposition; not accepted; breach of good faith given existing long terms.

Other Allegations (Not Proven as Breaches) [422–425, 433–436, 446–457]:

- Business-model complaints (pupil supply; fee/price disparity): concerns, but evidence insufficient for breach.
- Alleged tax-evasion advice: suspicion raised by "cash" emphasis but not proved to civil standard.
- Pressure to enter longer agreements: not pleaded as duress/misrepresentation; relevant as context of imbalance.

(3) Lawful Discharge: Were the contracts lawfully discharged, and if so, by whom?

Repudiatory Breach [458–475]:

- Breaches **went to the root** and **deprived** claimants of substantially the whole benefit; repeated/continuing non-repudiatory breaches can **cumulatively** amount to repudiation, especially when linked or reflecting an overriding strategy; conduct was **"not nuanced or on a borderline"** and caused **serious damage** to the relationship.

No Affirmation by Claimants [490–506]:

- **Complex, long-term agreements** and the **"agony"** of termination required time and legal advice.
- JBL's conduct was **continuing** (unilateral variations; intimidation), not single events.
- Engagement via **without prejudice letters/mediation** was to assess position, not to affirm.
- **Fear of reprisal** justified anonymity and caution.
- **Ms. Freeman:** reasonably believed her contract was expiring; JBL's failure to clarify meant no affirmation.
- **Continuing payments** were protective; withholding risked putting claimants in repudiatory breach themselves.

Conclusion

The High Court resolved all three preliminary issues in favour of the Claimants [507]:

1. **Implied terms of good faith and fair dealing were implied in fact** into the franchise agreements.

2. **JBL was in breach of these implied terms**.

3. **JBL's breaches were repudiatory**, entitling the Claimants to terminate their agreements, and they did not waive this right.

This means the Claimants' terminations were lawful, and they are discharged from their franchise

agreements, including any counterclaims for damages by JBL [508].

Key Takeaway:

*The judgment underscores that **English courts are willing to look beyond contractual labels** (e.g. "franchise agreement" as a commercial contract) and scrutinise the substance of a long-term relationship to determine if it possesses "**hallmarks of an employment relationship**" or is a "relational contract." Where there is a **significant inequality of bargaining power, extensive control by one party, and a high degree of dependency and cooperation**, the court may imply a **duty of good faith and fair dealing (including mutual trust and confidence) in fact**, even if not expressly stated. Breaches of this implied duty, particularly through a sustained course of **abusive, intimidatory, or commercially unacceptable conduct**, can cumulatively amount to a **repudiatory breach**, allowing the weaker party to lawfully terminate the contract. This offers a potential avenue of protection for vulnerable individuals in ostensibly commercial agreements that operate more like employment relationships.*

Parting Thoughts

*In a word: **inevitable**. Once the court accepted that these were long-term, dependency-laden franchises run with iron-fisted control and a side order of public humiliation, the rest fell like dominoes. On the facts, a good-faith obligation was **implied in fact**—not because judges felt sentimental about driving lessons, but because without it the contracts had all the commercial coherence of a handbrake on fire. JBL then obligingly demonstrated how to breach that obligation: arbitrary price and marketing edicts; capricious discretion; racism, sexism and homophobia dressed up as banter; and a COVID "solution" that unilaterally stretched already long terms. Stitch those together and you don't get noise—you get **repudiation**.*

*The defence? That the claimants "carried on" and paid fees, so they'd affirmed. The court wasn't buying it. When your counterparty's breaches are continuing, your contract is labyrinthine, the financial stakes are existential, and the boss is on Facebook boasting about taking people's homes, taking legal advice before jumping is prudence, not affirmation. Payments were protective, not permissive. Result: **good faith implied; breaches proved; contracts lawfully terminated; counterclaims out of road**.*

*Labels won't save you. If you run a franchise like an employment relationship—tight control, one-way risk, no real exit—expect the law to impose the **duty of good faith and mutual trust** to make the machine actually work. And if your management style relies on fear, favouritism and public shaming, don't be surprised when a judge calls it what it is: commercially unacceptable conduct that goes to the root of the bargain.*

#LegalUpdate #DDAlegal #UKLaw #DisputeResolution #ContractLaw #CaseLaw #KB #FranchiseLaw #ImpliedTerms #GoodFaith #FairDealing #RelationalContracts #ContractLaw #BreachOfContract #RepudiatoryBreach #EmploymentLawHallmarks #InequalityOfBargainingPower #FranchiseeRights #JohnBensonLtd #JBL #DrivingSchoolFranchise #HighCourtJustice #EnglishLaw #LegalPrecedent #CommercialContracts #DisputeResolution #Litigation

Authorities

Case Law:

1. Implication of Terms (Good Faith and Trust & Confidence)

• Yam Seng Pte Ltd v International Trade Corp Ltd [2013] EWHC 111 (QB)

◦ *This case established that a duty of good faith could be implied in fact into an exclusive long-term distributorship agreement. It suggested that English law might imply such a duty in "relational contracts," including franchise agreements, based on the presumed intention of the parties, requiring a high degree of communication, cooperation, trust, and loyalty necessary for business efficacy.*

• ***Sheikh Al Nehayan v Kent [2018] EWHC 333 (Comm)***

◦ *This judgment clarified that the obligation of good faith extended beyond mere honesty, encompassing acting with fidelity to the bargain, not undermining its substance, and acting reasonably with fair dealing, avoiding commercially unacceptable conduct. The implication of a duty of good faith was deemed essential to give effect to the parties' reasonable expectations and satisfied the business necessity test.*

• ***BCCI v Malik and Mahmud [1998] AC 20***

◦ *This case marked the first acceptance in the House of Lords of an implied term in law regarding mutual trust and confidence in employment contracts. It established this as a standardised term incidental to all employment contracts unless explicitly excluded or modified.*

• ***Russell v Cartwright [2020] EWHC 41 (Ch)***

◦ *This judgment suggested that the better approach to implying terms of good faith was to apply conventional tests (like those in Marks and Spencer) rather than first categorising a contract as "relational." It considered whether a reasonable reader would find the obligation of good faith obvious or essential for commercial or practical coherence.*

• ***Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another [2016] AC 742***

◦ *This case provided an authoritative restatement of the conventional tests for implying contractual terms, emphasising necessity or obviousness. It stated that implied terms were based on the notional reasonable people's intentions, not merely fairness, and that business necessity and obviousness could be alternative grounds for implication.*

• ***BP Refinery (Westernport) Pty Limited v Shire of Hastings (1977) 180 CLB 266***

◦ *This Privy Council case set out tests for the ad hoc implication of terms, which were referenced in the context of necessity and obviousness tests for implied terms.*

• ***Johnson v Unisys Ltd [2003] 1 AC 518***

◦ *This case articulated that it was no longer appropriate to equate a contract of employment with ordinary commercial contracts, suggesting that an employment contract could be described as a relational contract in modern terms.*

• ***Keen v Commerzbank AG [2007] ICR 623***

◦ *This judgment highlighted that employment constituted a personal relationship with dynamics distinct from business deals, generally involving an implied mutual duty of trust and confidence between employer and employee.*

• ***D & G Cars Ltd v Essex Police Authority [2015] EWHC 226 (QB)***

◦ *This case indicated that an obligation of "integrity" in a contract, akin to good faith, encompassed*

fair dealing and transparency, extending beyond definitive examples of dishonest behaviour and compromising mutual trust and confidence.

• Bates v Post Office [2019] EWHC 606 QB

◦ This judgment identified nine specific characteristics commonly expected in a relational contract, such as the absence of express terms preventing good faith, a long-term mutual intention, commitment to collaboration, and expectations of trust, confidence, and loyalty.

• Esso Australia Resources Ltd v Southern Pacific Petroleum NL [2005] VSCA 228

◦ This Australian case contained dicta suggesting that an implied term of good faith could arise as a matter of fact, particularly in unbalanced contracts, to protect a vulnerable party from exploitative conduct that subverted the contract's original purpose.

• Liverpool City Council v Irwin [1976] UKHL 1; [1977] AC 239

◦ This case was referenced for its relevance to policy concerns behind the implication of terms in law, particularly when the relative bargaining position of parties was an underlying concern and an agreement was one-sided.

• Crossley v Faithful & Gould Holdings Ltd [2004] EWCA Civ 293

◦ This case raised questions of reasonableness, fairness, and the balancing of competing policy considerations in the context of implied terms.

2. Nature of Franchise Agreements

• Dwyer (UK Franchising) Ltd v Fredbar Ltd and another [2022] EWCA Civ 889

◦ The Court of Appeal affirmed that a factual assessment was necessary to determine the reasonableness of restrictive covenants, noting that in some cases, unusual features like inequality of bargaining power, lack of experience, and foreseeable failure could make a franchise agreement more akin to an employment contract than a business sale.

• Quantum Actuarial LLP v Quantum Advisory Ltd [2021] EWCA Civ 227

◦ This judgment emphasised that courts should be cautious in substituting their objective view for the parties' subjective intentions, unless there was an inequality of bargaining power or an absence of independent legal advice for the weaker party.

• Braganza v BP Shipping Ltd [2015] UKSC 17

◦ This case discussed that contractual terms granting discretion to one party, especially where there was a significant imbalance of power (as often in employment contracts), implied a term that such discretion would not be exercised arbitrarily or capriciously, warranting intense scrutiny.

• Prontaprint v London Litho Limited [1987] FSR 315

◦ This case illustrated the traditional assumption in English law that franchise agreements were more akin to vendor/purchaser agreements rather than employment contracts, particularly in the context of post-termination restraints.

• Kall-Kwik (UK) Ltd v Rush [1996] FSR 114

◦ *Similar to Prontaprint, this case reinforced the traditional view of franchise agreements as commercial relationships, not employment, for the purpose of restraint of trade clauses.*

• ***Dyno Rod v Reeve [1998] FSR 148***

◦ *This judgment reiterated the traditional characterisation of franchise agreements as commercial rather than employment contracts, influencing the approach to post-termination restraints.*

• ***Bedfordshire CC v Fitzpatrick Contractors Ltd (1998) WL 1043273***

◦ *This case found it inapposite to import implied terms of trust and confidence, typically found in employment law, into a complex commercial agreement, reasoning that the presence of detailed express terms and the distinct nature of employment-specific statutory rights made such an implication unnecessary.*

• ***Jani-King (GB) Ltd v Pula Enterprises Ltd [2007] EWHC 2433 (QBD)***

◦ *This franchising case followed the reasoning of Bedfordshire CC v Fitzpatrick Contractors Ltd, refusing to imply a term of trust and confidence into a commercial agreement, noting that the relationship was closer to an ordinary commercial one.*

• ***Autoclenz v Belcher [2011] UKSC 41***

◦ *The Supreme Court ruled that despite contractual labels, the substance of the relationship could determine that agreements were, in fact, contracts of employment.*

• ***Uber BV v Aslam [2021] UKSC 5***

◦ *This case determined that the level of control exercised by Uber over its drivers meant they were "workers" under employment legislation, despite being labelled independent contractors. It also noted that inequality of bargaining power was not generally a reason to disregard ordinary contract law, unless legislation made it relevant.*

• ***Far Horizons Pty limited v McDonald's Australia Limited [2000] VSC 310***

◦ *This Australian case, in line with other Commonwealth authorities, implied a term of good faith and fair dealing as a legal incident into franchise agreements.*

• ***Renard Construction (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234***

◦ *This judgment was cited as supporting the implication of a term of good faith and fair dealing in contractual relationships in Australia.*

• ***Dymocks Franchise Systems (NSW) Pty Ltd v Todd and others [2002] UKPC 50***

◦ *The Privy Council reserved its opinion on whether an obligation of good faith should be implied into franchising agreements, declining to endorse or reject the New Zealand Court of Appeal's view on the matter.*

• ***Carewatch Care Services Ltd v Focus Caring Services Ltd and Grace [2014] EWHC 2313 (Ch)***

◦ *This case involved long-term franchising contracts where an implied duty of good faith was not found because specific express terms were interpreted as contradicting the alleged implied terms.*

• Acer Investment Management Ltd and another v The Mansion Group Ltd [2014] EWHC 3011 (QB)

◦ *This case was mentioned as another example of a long-term contract where implied terms of good faith were not implied.*

3. Repudiatory Breach and Affirmation

• Hong Kong Fir Shipping Ltd v Kisen Kaisha Limited [1962] EWCA Civ 7

◦ *This case established a key test for repudiatory breach, asking whether the breach deprived the injured party of substantially the whole benefit intended to be obtained from the contract.*

• Valilas v Januzaj [2014] EWCA Civ 436

◦ *This judgment stated that assessing whether a breach gave rise to a right to terminate required a multi-factorial assessment, considering the nature of the contract and relationship, the term, the kind and degree of breach, and its consequences for the injured party.*

• Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd [2007] HCA 61 (2007) 82 AJLR 345

◦ *This High Court of Australia decision described a breach "going to the root of the contract" as a conclusory description that accounted for the nature of the contract, the relationship it created, the term, the kind and degree of the breach, and its consequences for the other party.*

• Telford Homes (Creekside) Ltd v Ampurius Nu Holdings [2013] EWCA Civ 577

◦ *This case was referenced in Valilas v Januzaj for the multi-factorial assessment of repudiatory breach.*

• Force India Formula One Team Ltd v Etihad Airways PJSC [2010] EWCA Civ 1051

◦ *This Court of Appeal judgment considered that a series of repeated or continuing breaches of a sponsorship agreement could cumulatively amount to repudiation.*

• SK Shipping Europe Plc v Capital VLCC 3 Corp [2020] EWHC 3448 (Comm)

◦ *This case confirmed that a series of non-repudiatory breaches could cumulatively amount to renunciation or repudiation, especially if linked or reflecting an overriding strategy. It also clarified that an innocent party had a reasonable time to decide on election, and mere lapse of time did not necessarily equate to affirmation.*

• Morrow v Safeway Stores Plc EAT 21 September 2021

◦ *This case quoted Western Excavating v Sharp to affirm that conduct needed to be sufficiently repudiatory, going to the root of the contract, to justify a conclusion of constructive dismissal.*

• Western Excavating v Sharp 1978 IRLR 27

◦ *This case established that for constructive dismissal, the employer's conduct had to be a sufficiently repudiatory breach, going to the root of the contract. It also noted that an employee had to decide quickly whether to treat themselves as discharged, as continued employment could imply affirmation.*

• ***WE Cox Toner (International) Ltd v Crook [1981] ICR 823*** *at 829C-F*

◦ *This case articulated that employees faced with repudiatory breach were in a difficult position and were not necessarily deemed to have affirmed the contract by continuing to work for a limited time if they clearly objected to the conduct and were seeking other employment.*

• ***Marriott v Oxford and District Co-operative Society Ltd. (No. 2) [1970] 1 QB 186***

◦ *This Court of Appeal case held that an employee who protested a change in status and pay but continued to work and receive reduced pay while looking for another job, had not lost their right to claim dismissal.*

• ***Saunders v Paladin Coachworks Ltd. (1967) 3 ITR 51***

◦ *This case highlighted the significant risk of being held to affirm a contract if an employee accepted further performance (e.g., pay) from the breaching party after a repudiatory breach.*

• ***Bashir v Brillo Manufacturing Co. IRLR 295***

◦ *This case clarified that in the context of affirmation, it was not merely the delay itself that was fatal, but rather what transpired during that period of delay.*

• ***Air Canada v Lee [1978] IRLR 392***

◦ *This judgment affirmed that the law adopted a realistic approach, particularly in employment contracts, by allowing an innocent party a reasonable amount of time to decide whether to terminate the agreement following a breach.*

• ***Buckland v Bournemouth University [2010] EWCA Civ 121***

◦ *This case acknowledged the immense pressure on employees facing a repudiatory breach and stressed that the law carefully examined the facts before concluding that affirmation had occurred. A delay of seven months was not considered affirmation in that specific case.*

• ***Bliss v South East Thames Regional Health Authority [1985] IRLR 308***

◦ *This decision reversed a trial judge's finding, holding that an employee had not affirmed his contract merely by continuing to accept salary after a repudiatory breach.*

• ***Sheet Metal Components v Plumridge [1974] IRLR 86, [1974] ICR 373***

◦ *This case found that employees who continued to work for two months after an alleged repudiatory breach did not lose their right to claim constructive dismissal.*

• ***Lewis v Motorworld Garages Ltd [1986] ICR 157***

◦ *The Court of Appeal held that even if a party had previously waived repudiatory breaches, they could still rely on those earlier breaches if later conduct contributed to a further breach of an implied term, leading to termination.*

• ***McCormick v National Motor & Accident Ins Union (1934) 49 Ll L Rep 361, 365***

◦ *This case established that a party electing a course of action was entitled to a reasonable time to make that decision, with the length of time depending on the specific circumstances.*

• Scandinavian Tanker Trading Co AB v Flota Petrolera Ecuatoriana (The Scaptrade) [1981] 2 Ll Rep 425, 430

◦ *This judgment stated that mere lapse of time alone did not constitute an election unless its duration unequivocally demonstrated a decision to elect.*

• Amnesty International v Ahmed [2009] ICR 1450

◦ *This case clarified that discriminatory conduct, by itself, did not automatically make a breach repudiatory.*

4. Judicial Caution on Implied Terms

• UTB LLC v Sheffield United Ltd [2019] EWHC 2322 (Ch)

◦ *This judgment cautioned against the ambiguous use of the term "relational contract," noting that not all long-term contracts necessarily implied an enduring, undefined cooperative relationship or an obligation of good faith.*

• Globe Motors v TRW Lucas Varity Electric Steering [2016] EWCA Civ 396

◦ *This Court of Appeal decision qualified the Yam Seng approach, stating that implied duties of good faith were only possible in certain long-term contracts where the language, viewed against its context, permitted it, and that the bar for implication remained high, based on necessity rather than mere reasonableness.*

• Times Travel Ltd v Pakistan International Airlines [2021] 3 WLR 727

◦ *The Supreme Court, in this case, rejected a general principle of good faith dealing based on commercially unacceptable or unreasonable behaviour, considering it too radical and uncertain for English contract law.*

• Paciocco v Australia and New Zealand Banking Group Limited [2015] FCAFC 50

◦ *This Australian case, while summarising the content of good faith, affirmed that the duty did not require subordinating one party's interests to another's and did not import an equitable fiduciary notion of loyalty.*

• Candey Ltd v Bosheh [2022] EWCA Civ 1103

◦ *This case emphasised that merely being a long-term relationship did not automatically make a contract "relational" for the purpose of implying good faith, and that the elusive concept of good faith should not be used to bypass orthodox principles of English contract law.*

5. Standard of Proof for Serious Allegations

• In re H (Minors)(Sexual Abuse: Standard of Proof) [1996] AC 563, *586D-H per Lord Nicholls*

◦ *This House of Lords case provided guidance that the more serious an allegation (e.g., fraud), the stronger the evidence required to prove it, even though the overall burden remained the civil standard of proof (balance of probabilities).*

• Re B (Children) [2008] UKHL 35 per Lord Hoffmann at paras.13 and 15

◦ *This case reiterated the principle from In re H (Minors) regarding the strength of evidence*

required for serious allegations within the civil standard of proof.

Legislation:

Implication of Contractual Terms & Bargaining Power

• ***Unfair Contract Terms Act 1977***

◦ *Legal Point/Principle: Inequality of bargaining power is not generally treated as a reason for disregarding ordinary principles of contract law, except where Parliament has made it a relevant factor under legislation such as this Act. It is relevant in considering whether there is an implied term.*

• ***Companies Act 2006***

◦ *Legal Point/Principle: Section 172 includes a duty for company directors to have regard to various interests, including those of employees, fostering business relationships with suppliers and customers, and maintaining a reputation for high standards of business conduct. These duties did not override the need for decency and space for a franchisee following the death of his father.*

Statutory Protections against Harmful Conduct

• ***Protection from Harassment Act 1997***

◦ *Legal Point/Principle: This Act provides a source of protection, but the contractual implied terms serve a distinct purpose by offering remedies, such as the ability to terminate for repudiatory breach or claim loss of profit, which might not be available under this statute.*

• ***Equality Act 2010***

◦ *Legal Point/Principle: Similar to the Harassment Act, this Act offers statutory protection. However, contractual terms provide additional remedies, and the fact that conduct may be discriminatory does not automatically make it a repudiatory breach of contract.*

Comparative Franchise Legislation (Good Faith & Fair Dealing)

• ***Competition and Consumer (Industry Codes-Franchising) Regulations 2024 (Australia)***

◦ *Legal Point/Principle: These regulations feature a franchising code of conduct designed to regulate the behaviour of participants in franchising, address the imbalance of power between franchisors and franchisees, improve conduct standards (including disclosure), and set requirements for franchise agreements. Section 18 specifically imposes an obligation on each party to a franchise agreement to act in good faith, honestly, not arbitrarily, and cooperatively, without limiting or excluding this duty.*

• ***Franchise Disclosure Act 2024 (Saskatchewan, Canada)***

◦ *Legal Point/Principle: This Act includes a provision for fair dealing (section 4(1)), imposing a duty on each party to a franchise agreement to deal fairly in its performance and enforcement, including the exercise of rights under the agreement.*

• ***Arthur Wishart Act (Franchise Disclosure) Act 2000 (Ontario)***

◦ *Legal Point/Principle: This Act contains similar provisions regarding the duty of fair dealing in franchise agreements.*

Specific Professional Regulations

• ***Road Traffic Act 1988***

◦ *Legal Point/Principle: Section 135 pertains to who is entitled to refer to themselves as an instructor. An allegation that Mr Benson encouraged a claimant to refer to himself as an instructor contrary to this section was not proved.*

Legal Texts & Commentary:

1. Implied Terms and Good Faith

• ***Chitty on Contracts 35th Ed.***

◦ *The text submitted that there remained a degree of ambiguity in the approach of the courts in their application of the line of authority following Yam Seng Pte Ltd as to whether a term requiring good faith was implied in law or in fact. It was sometimes said to be implied in fact (as in Yam Seng Pte Ltd itself), but sometimes it appeared to be implied in law, as an incident consequential on a finding that the contract before the court was a "relational contract".*

◦ *It was also relied upon for the principle that an entire agreement clause did not generally affect or prevent the implication of a term as a matter of fact on the basis of necessity (or obviousness), as the implication was simply giving effect to the true intention of the parties.*

• ***Professor Davies and Lord Sales, "Controlling contract discretions: Wednesbury reasonableness, good faith and proper purposes" (extra-judicial article in 104 LQR 106, January 2024)***

◦ *Criticisms were made in this article regarding the nine criteria identified in Bates v Post Office for relational contracts. These criteria were questioned as being capable of featuring in many contracts that could not properly be described as "relational" or involving close collaboration and cooperation.*

• ***Elisabeth Peden, "Policy concerns behind implications of terms in law" (2001 LQR Vol 117 pp. 459-476)***

◦ *The article was considered in the context of policy concerns behind the implication of terms in law, raising questions of reasonableness, fairness, and the balancing of competing policy considerations.*

◦ *It specifically highlighted issues of the relative bargaining position of parties, noting that courts were more likely to impose an obligation on the party in the stronger position to protect the weaker party.*

◦ *This article was referred to in the case of Crossley v Faithful & Gould Holdings Ltd* **[2004] EWCA Civ 293** *(the correct paragraph is para. 36).*

• ***Lewison, The Interpretation of Contracts 5th ed (2011), para 6.09***

◦ *The text was cited to emphasise that, when approaching the issue of implied terms by reference to the officious bystander test, it was "vital to formulate the question to be posed by [him] with the utmost care".*

2. Contractual Termination / Repudiatory Breach

- ***Chitty on Contracts (35th Ed.) at 12-043***

    - *The text defined the "high bar" that had to be cleared for an innocent party to be entitled to terminate a contract due to repudiatory breach. It listed various expressions used to describe such circumstances, including that the breach must “go to the root of the contract,” “affect the very substance of the contract,” or “frustrate the commercial purpose of the venture.” It also cited Diplock LJ in Hongkong Fir, who stated that the test was whether the event deprived the party of "substantially the whole benefit" intended from the contract.*

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Adjudicator Assessor and Re-Assessor for the ICE and the CIArb
Arbitrator Assessor for the CIArb
ICE DRC Member
ICE DRC CPD Committee Chairman
Adjudicator Exam Question Setter for the ICE
CIArb Adjudication Panel Member since 2006
CIArb Arbitration Panel Member since 2006
CIC Adjudication Panel Member since 2010
Law Society Panel Arbitrator
RIBA Adjudication Panel Member since 2018
RICS Adjudication Panel Member since 2006
TECSA Adjudication Panel Member since 2012
FIDIC Adjudication Panel Member since 2021
ICE Adjudication Panel Member since 2021
RICS Dispute Board Registered since 2013

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