Behavioural standards in contracts and English contract law

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Catherine Mitchell*

Abstract: Behavioural standards, that is, stipulations that parties will act according to principles of good faith, loyalty, trustworthiness and the like, appear regularly in commercial contracts. Contract law doesn't appear to take them very seriously. Legal reticence over enforcement is understandable, given the difficulty of determining what the parties hope to achieve by including these provisions in their agreements. This article examines some aspects of behavioural standards and the contract law response to them. It suggests some reasons why contract law adopts a cautious approach to enforcement, and argues that, while often not appearing to create any kind of legal obligation, such provisions may play an important role in the interpretation of the agreement, particularly in what might broadly be identified as 'relational' contract settings.

Introduction

In *Yam Seng Pte Ltd v International Trade Corp Ltd*[1] Leggatt J offered an account of when the law might imply a duty of good faith in commercial contracts. In justifying the implication, he emphasised some of the finer qualities necessary to make business relationships work: [2]

> ...a high degree of communication, co-operation and predictable performance based on mutual trust and confidence ... 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.

While accepting that the role and scope of any implied term is sensitive to contract context, the Court of Appeal's otherwise equivocal response to *Yam Seng* in *Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust*[3] indicates that English law still maintains no general good faith duty exists outside the categories of contractual relationship where the duty is established.[4] This places responsibility squarely on the parties to contract for such duties, and this in turn invites an examination of how contract law responds to commercial parties' attempts to render explicit in the contract the implicit qualities that Leggatt J describes. Surprisingly, and in contrast to the implied term of good faith, this phenomenon appears little scrutinised by contract law scholars. This may be because very few decisions turn on the operation of express stipulations of good faith and

*Reader in Private Law, Law School, University of Birmingham, UK.

[1][2013] EWHC 111.

[2][2013] EWHC 111 at [142]. See also *D & G Cars v Essex Police* [2015] EWHC 226; *Bristol Ground School Ltd v Intelligent Data Capture Ltd* [2014] EWHC 2145.

[3][2013] EWCA Civ 200; see also *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789 at [45].

[4]Chiefly insurance contracts, partnerships and the implied term of mutual trust and confidence in the employment contract: *Malik and Mahmud v Bank of Credit and Commerce International SA* [1998] AC 20; [1997] UKHL 23.

the like, and they rarely come up for consideration by appellate courts. Alternatively, they may be thought to raise few issues of principle. Given its commitment to freedom of contract and party autonomy,[5] English contract law should encounter little difficulty enforcing express terms to act in good faith or co-operate with a contracting partner during performance. Yet English law appears reluctant to accord these provisions much importance, tending to: (i) dismiss them on the basis that the parties' dispute generally concerns the main performance obligations (specific and measurable outcomes from performance) to which the operation of the standard is irrelevant;[6] (ii) dismiss them on the basis that 'breach' of the standard is subject only to informal social sanctioning rather than legal enforcement;[7] or (iii) interpret them so restrictively that they are emptied of any significance as an attempt to oust the common law default of self-interested commercial dealing in favour of collaborative and co-operative models of contracting.[8]

With the aim of displacing this sceptical legal view, this article examines the use of what it calls 'behavioural standards' in contracts. The next section isolates the particular kind of behavioural standard with which the article is primarily concerned and examines the legal response to it. The third section considers English law's difficulties with behavioural standards, dividing these broadly into matters of interpretation and matters of contract law principle. The fourth section considers how the law might accord greater significance to these standards in legal reasoning. It is suggested that, to the extent that behavioural standards are a response to the constraints on parties presented by the contracting environment, such as uncertainty and project complexity, there are some contracting contexts where the law should accord them greater significance, and should facilitate their use by developing coherent principles of interpretation and enforcement.

Behavioural Standards and the Contract Law Response

Contract terms that stipulate a quality to be demonstrated, rather than an outcome to be reached, come in many different forms and pursue different aims. They may operate as a protective measure for one party, giving grounds for termination if the other party's behaviour does not meet the requisite standard. 'Morals' clauses in 'talent' contracts, for example, stipulate the conditions under which lucrative contracts for celebrity endorsement of products and so on, can be brought to an end if the celebrity transgresses.[9] In a slightly different vein, parties may commit to deploying their 'reasonable

[5] Values forcefully reasserted in three recent decisions from the UK Supreme Court: *Arnold v Britton* [2015] AC 1619; [2015] UKSC 36; *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] 3 WLR 1843; [2015] UKSC 72; *Cavendish Square Holding BV v Talal El Makdessi* [2015] 3 WLR 1373; [2015] UKSC 67.

[6] *TSG Building Services v South Anglia Housing Ltd* [2013] BLR 484; [2013] EWHC 1151; *Mears Ltd v Shoreline Housing Partnership Ltd* [2015] EWHC 1396.

[7] *Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752.

[8] *Compass Group* [2013] EWCA Civ 200.

[9] See N B Kressler, 'Using the Morals Clause in Talent Agreements: A Historical, Legal and Practical Guide' (2005) 29 *Columbia J of Law and Arts* 235.

endeavours' or 'due diligence' towards the achievement of some outcome. 'Endeavours' provisions are generally intended to obviate the need for complete and final agreement on matters which lie outside the direct control of the parties or in circumstances where performance outcomes cannot be decided in advance with any certainty. A body of case law has developed in relation to these standards, and they are recognised as giving rise to enforceable obligations.[10] While issues may arise concerning the relationship between a stipulated contractual objective, such as a completion date, and a diligence requirement,[11] or what exactly a contractor must do to discharge an endeavours obligation,[12] these terms tend to produce less of an interpretative difficulty than abstract statements of the expected spirit of performance, since the contract will usually identify a more precise outcome to which the endeavours and diligence obligations are directed. Courts recognise their general efficacy in creating at least some level of obligation in this respect, although identifying breach and the appropriate level of damages may be problematic.[13]

In contrast to the 'morals' clause or the 'endeavours' clause the function of more general behavioural terms in the business-to-business contract is less clear. It's unlikely that the use of express duties of good faith and so on is directed towards policing the personal morals of individuals performing the agreement. More likely is that express duties of loyalty, or explicit requirements to display co-operative behaviour, are attempts to capture the spirit underlying the relationship between the parties that is expected to endure through performance. Another possibility is that these terms are not a reflection of an existing attitude towards the agreement and its performance, but are an attempt to encourage its development. The legal response to the use of these general standards varies. In line with the approach to endeavours obligations, if an express behavioural standard, such as good faith, is limited to the achievement of another specific contract objective then it is likely to be enforced. For example, a party's decision-making power or discretion over some aspect of the contract may be required to meet a standard of 'reasonableness', 'good faith' or to be exercised in a 'business-like' manner. Here the standard is not aspirational but functional in that it sets an objective constraint which limits the range of outcomes available to the decision-maker and which renders their decisions reviewable by a court.[14] Likewise, contract terms stipulating that any outstanding contract matters will be determined by future negotiations conducted in good faith may be enforceable where the good faith standard is limited to the achievement of some other specific obligation in an otherwise enforceable

[10] *Little v Courage Ltd* (1995) 70 P & CR 469; *P & O Property Holdings v Norwich Union Life Insurance* (1994) 68 P & CR 261; *Jet2.com Ltd v Blackpool Airport Ltd* [2012] EWCA Civ 417.
[11] *SABIC UK Petrochemicals Ltd v Punj Lloyd Ltd* [2013] EWHC 2916.
[12] *Rhodia International Holdings Limited v Huntsman International LLC* [2007] EWHC 292; *Yewbelle Ltd v London Green Developments* [2008] 1 P & CR 279; [2007] EWCA Civ 475; *CPC Group Ltd v Qatari Diar Real Estate Investment Co Ltd* [2010] EWHC 1535. See generally J W Carter, W Courtney and G Tolhurst, ''Reasonable Endeavours' in Contract Construction' (2014) 32 *JCL* 36 at 52; L Gorton 'Best Efforts' [2002] *JBL* 143 at 147.
[13] *Jet2.com* [2012] EWCA Civ 417; *Bristol Rovers (1883) Ltd v Sainsbury's Supermarkets Ltd* [2016] EWCA Civ 160.
[14] *Federal Mogul Asbestos Personal Injury Trust v Federal Mogul Ltd and others* [2014] EWHC 2002 at [120].

agreement.[15] This contrasts with behavioural standards mandating that the other party satisfy certain abstract requirements of other-regarding behaviour,[16] or that the commercial relationship will be underpinned by qualities of loyalty, co-operation and good faith. These appear much less likely to be legally enforceable.

Consider *Fujitsu Services Ltd v IBM United Kingdom Ltd*.[17] The agreement provided that '...without prejudice to their other responsibilities under this Sub-Contract and their rights and liabilities under this Sub-Contract, the Parties agree...in carrying out their obligations under this Sub-Contract, to have regard to the partnering principles set out in Annex A.' The partnering principles stated that '[a]ll dealings between [the parties] will be open, honest, clear and reliable' and that the parties would '[w]ork together to achieve a relationship of mutual respect and trust'.[18] These principles were judged to carry no weight against a comprehensive set of excluding terms. The judge remarked, '[c]ommercial parties are entitled to and do rely on commercial "mores"; they can choose to rely on trust and to prefer not to expose themselves or each other to litigation in due course - for sound commercial and professional reasons'.[19] The behavioural standards were dismissed as expressing only a 'vision'[20] that was crowded out by the hard terms.[21] It is perhaps inevitable that in the context of a legal dispute, contract law favours enforcement of legal rights expressed with certainty over statements of aspiration, particularly if the agreement states the latter are subject to the former. But in circumstances where the behavioural standard clearly forms part of the binding contract to be read alongside other terms, the law still defaults to a restrictive interpretation of the standard.[22]

In *Portsmouth City Council v Ensign Highways Ltd*[23] a complete clause stipulated that 'PCC and [Ensign] shall deal fairly, in good faith and in mutual co-operation with one another and with Interested Parties.' The judge held that this good faith standard obligated PCC only in relation to the discharge of its 'best value' duty, since the standard was located amidst other terms dealing with this requirement. The term did not give rise to a general obligation to maintain a standard of good faith across all aspects of performance. This narrow interpretation defeated Ensign's argument that the contract's service failure points regime, which was the main issue of contention, had to be operated by

[15] Obiter dicta in *Petromec Inc v Petroleo Brasileiro SA Petrobas (No 3)* [2006] 1 Lloyd's Rep 121; [2005] EWCA Civ 891.
[16] *United Group Rail Services Ltd v Rail Corporation of New South Wales* (2009) 74 NSWLR 618; [2009] NSWCA 177 at [74].
[17] [2014] EWHC 752.
[18] See also clause 9.1 in the contract in *Excalibur Ventures LLC v Texas Keystone Inc and others* [2013] EWHC 2767 at [198]; *Berkeley Community Villages Ltd v Pullen* [2007] EWHC 1330 at [33].
[19] [2014] EWHC 752 at [87].
[20] [2014] EWHC 752 at [141].
[21] See also *Compass Group* [2013] EWCA Civ 200 at [154]; *TSG Building Services* [2013] BLR 484.
[22] The trial judge and Court of Appeal differed on this issue in *Compass Group* [2013] EWCA Civ 200 and [2012] EWHC 781.
[23] [2015] EWHC 1969.

PCC fairly and in good faith.[24] The narrow interpretation also resulted in the perverse conclusion that the express good faith requirement precisely *prevented* any wider application of co-operative principles to the agreement, since 'if there was an overarching duty of mutual co-operation, it is at least arguable that such [specific good faith] provisions would not be necessary.'[25]

The formalistic approach adopted by the judge in *Portsmouth* demonstrates the difficulties faced in English law by parties seeking to create a contractual framework underpinned by standards of good faith and co-operation via the mechanism of express terms, and raises questions about the law's capacity to facilitate collaborative contracting regimes. The remainder of the article confines discussion to the legal effectiveness of these abstract and general standards in contracts, and explores why English law is reluctant to enforce them. The most immediate difficulty is determining whether requirements of good faith, loyalty or trustworthiness are intended to be legally enforceable. But even if the standards pass a threshold test of enforceability by their inclusion in what look like binding contracts, there are related problems of giving such terms meaningful content, determining breach and remedy, and the problem of redundancy in the face of other express terms that stipulate more specific and certain obligations to achieve outcomes. These are considered further in the next section.

Why Are Behavioural Standards in Contracts Problematic?

Legal reluctance to enforce general behavioural stipulations is understandable. A contract law that avows commitment to upholding the intentions of the parties may find it difficult to identify why parties include these provisions. Even the relational theory of contract, which brought into sharp focus the reality of co-operation in business dealing, sheds little light on why behavioural standards may be included in contract documents. Behavioural standards could be an attempt to render in formal terms the implicit expectations that underlie the commercial relationship. But why would this be necessary if a relationship is already co-operative? And if it is not, can one really create trust and co-operation by including a contractual requirement to display these characteristics?[26] Attempting to contract for values of loyalty, flexibility and trustworthiness may appear at best contrived, and at worst may empty co-operative behaviour of much of its value by interfering with its natural development.[27]

Legal reticence over enforcement may reflect party ambivalence over why behavioural standards are included in contracts, since it is not immediately obvious why contract law should seek to restrict their operation and interpretation. Contractual duties to act with reasonable care and skill will be implied by law, and good faith and honesty obligations have similarly been implied where the

[24] [2015] EWHC 1969 at [29] and [92-6].
[25] [2015] EWHC 1969 at [93].
[26] D Campbell and D Harris 'Flexibility in Long Term Contractual Relationships: The Role of Cooperation' (1993) 20 *Journal of Law and Society* 166 at 173.
[27] *Yam Seng* [2013] EWHC 111 at [134-35]. See D Charny, 'Nonlegal Sanctions in Commercial Relationships' (1990) 104 *Harvard Law Review* 375 at 428; R E Scott, 'The Case for Formalism in Relational Contract' (2000) 94 *Northwestern University Law Review* 847 at 852.

facts demand it.[28] That express behavioural standards may pose a 'process' obligation rather than a 'result' obligation cannot be an obstacle. Many contract and fringe doctrines are directly concerned with policing the behaviour of a party during the contractual relationship (economic duress, estoppel). Express terms may stipulate the standard or criteria according to which a contractual discretion is to be exercised. Courts encounter little difficulty in assessing whether the standard has been reached.[29] In the absence of express stipulation, contract law uses implied terms to curb the arbitrary, capricious or irrational exercise of discretionary powers in contracts.[30] All these areas demonstrate common law engagement with the question of what constitutes reasonable conduct on the part of a commercial contracting party, and clearly accept that contracting is a process underpinned by standards of behaviour.[31] Yet it is also clear that English contract law has some difficulty with explicit behavioural standards in the contract scheme. There are many reasons for this, but two immediately suggest themselves: first, the problem of how to interpret the standard, and second, a more principled objection over the conflict between the values often expressed in the standard (such as loyalty and co-operation) and the self-interested ethic that is thought to characterise commercial contract law. These matters are explored further below.

Matters of Interpretation

Are behavioural standards legally binding?

The usual reason not to enforce a general behavioural standard is because the parties do not intend to be legally bound by it.[32] The issue of legal enforceability is not clear-cut however. Empirical evidence suggests that amongst the business community, contract compliance means honouring both formal and informal obligations.[33] Parties may therefore *believe* these commitments create obligations, even if this is legally questionable. The obvious way to ensure behavioural standards are not binding is to state this explicitly, or rank clauses as 'subject to' others.[34] This is not conclusive however, since a court may decide that the parties have waived a 'subject to' provision through conduct[35] and contract law often refuses to uphold written terms couched in seemingly unequivocal language in the light of

[28] *Yam Seng* [2013] EWHC 111; *D & G Cars* [2015] EWHC 226 at [176].
[29] *Federal Mogul* [2014] EWHC 2002.
[30] *Braganza v BP Shipping Ltd and another* [2015] 1 WLR 1661; [2015] UKSC 17; *Socimer International Bank Ltd (in liquidation) v Standard Bank London Ltd* [2008] 1 Lloyd's Rep 558; [2008] EWCA Civ 116. See generally R Hooley, 'Controlling Contractual Discretion' (2013) 72 *CLJ* 65 at 68ff.
[31] See statement in *Yam Seng* [2013] EWHC 111 at [134-154].
[32] *Rose & Frank Co v Crompton Bros* [1925] AC 445; *Yeoman's Row Management Ltd v Cobbe* [2008] 4 All ER 713; [2008] UKHL 55.
[33] B Burchell and F Wilkinson, 'Trust, Business Relationships and the Contractual Environment' (1997) 21 *Cambridge Journal of Economics* 217 at 233.
[34] *ABB Ltd v Bam Nuttall Ltd* [2013] EWHC 1983; *Fujitsu* [2014] EWHC 752.
[35] *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Productions)* [2010] 1 WLR 753; [2010] UKSC 14; *Reveille Independent LLC v Anotech International (UK) Limited* [2016] EWCA Civ 443.

party behaviour.[36] General statements concerning loyalty, partnership and so on appearing in memoranda of understanding, letters of intent, framework agreements, partnership charters and the like, may be interpreted as failing to create any contractual obligations because these instruments are intended to complement, rather than supplant, the formal contract structures.[37] While these soft instruments may give rise to binding obligations depending on the facts and behaviour of the parties,[38] this tends to be exceptional. The legal view may be that a collaborative contractual arrangement is best effected through specific contract measures that emphasise mutual interest over individual contractor interest, such as profit- or work-sharing arrangements, joint governance frameworks, information exchange regimes and non-adversarial dispute resolution processes, rather than general statements concerning contractor attributes or the values expected to underpin the commercial relationship.

The restrictive approach to the operation of behavioural standards in contract law could be vindicated by two general findings about contracting behaviour emanating from the socio-legal literature. First, that in an 'endgame' situation where the commercial relationship is over, parties do not want their dispute resolved according to the norms that have informed their day-to-day conduct, but the strict legal obligations set out in the contract.[39] Second, that 'trust' and 'contract' operate as substitute systems of norms, providing parties with a choice of governance regimes.[40] A decision to adopt one precludes the operation of the other. While courts are well aware that flexible standards and expectations play a significant role facilitating contract performance, they recognise that '… parties to contracts often do things in the course of performance which is working well, which they might not strictly be obliged to do'.[41] On this basis courts may be justified in regarding partnering charters and the like, which eschew strict apportioning of legal rights and obligations, as the antithesis of traditional formal contracting and thus not their concern.

These arguments may carry weight, but they are not conclusive. They fail to explain why the parties might seek to formalise their expectations about standards of behaviour in the first place. The inclusion of express behavioural standards requiring parties to act in good faith, be honest, reliable and so on, appears paradoxical to the line of thinking that poses an 'either-or' understanding of formal and informal contract governance regimes. Dismissal of these behavioural standards as mere contract

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[36] *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA 396 (a 'no oral variation' clause did not prevent a variation by conduct).

[37] *Fujitsu* [2014] EWHC 752. See J Rigby et al, *Study on Voluntary Arrangements for Collaborative Working in the Field of Construction Services - Final Report Part 1: Main Report,* (Brussels: European Commission DG Enterprise and Industry, 2009) at para 7.4ff.

[38] *Dymocks Franchise Systems (NSW) Pty Ltd v Todd and Others* [2002] 2 All ER (Comm) 849; [2002] UKPC 50.

[39] L Bernstein, 'Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms' (1996) 144 *University of Pennsylvania Law Review* 1765 at1796ff.

[40] C Mitchell, 'Contracts and Contract Law: Challenging the Distinction between the 'Real' and 'Paper' Deal' (2009) 29 *OJLS* 675 at 684-5.

[41] Per Longmore LJ in *Tekdata Interconnections Ltd v Amphenol Ltd* [2010] 1 Lloyd's Rep 357; [2009] EWCA Civ 1209 at [18].

‘window-dressing’ also appears misplaced. It is plausible to suggest that use of behavioural standards may reflect a genuine desire amongst parties to embrace more collaborative models of contract, particularly in sectors traditionally associated with a competitive and adversarial contracting model, where a ‘partnership’ attitude is not expected to develop spontaneously, and where a contractual framework for the relationship remains appropriate.[42] Alternatively, use of such open-ended and flexible provisions may be a rational response to a high-risk project, or a contracting environment beset by economic uncertainty.[43] A set of aspirations concerning the contractual relationship may be the best that can be achieved if project outcomes are innovative and complex, and where it is difficult to identify what, exactly, constitutes successful performance. In such contracting environments it may be thought beneficial that expectations of flexibility, compromise and co-operation are made manifest on the face of the documents. Difficulties remain over whether behavioural standards can be given meaningful content or whether they are too uncertain to be enforced. In part, this issue depends on the relationship between the formal express terms and the behavioural standards, in particular whether the behavioural standard produces an independently enforceable obligation separate to the other contract objectives. This is examined below.

The relationship between the behavioural standard and the other contract terms

When an express good faith duty is attached to the performance of another contractual obligation, the good faith requirement is generally limited to the pursuit of the linked objective.[44] If the objective is achieved the good faith duty appears redundant. If the specific objective is not achieved, it is unlikely courts will interpret the behavioural standard as creating a separate and distinct obligation that generates an independent action for breach. There will be one breach – failure to achieve the specified outcome. Neither is it likely that any lapse in relation to a behavioural standard is regarded as an aggravating factor leading to a higher damages award for the breach (at least not in a business-to-business agreement). On this interpretation, any express behavioural duty is discharged by performing the contract in its essential respects.[45] This issue about breach is less clear cut in relation to general and independent behavioural standards which are intended to have overarching effect on the conduct of the agreement. Even if not directly tied to other contractual objectives, such standards will usually appear in the midst of other contract terms stipulating outcomes and expected results. Assuming the behavioural standard passes a threshold test of legal enforceability (it appears in the contractual

[42]The UK construction industry has sought to embrace partnering and collaborative contract models, rather than traditional sub-contracting on lowest-price tendering models: see Rigby et al, above n 37; C Davis, ‘Alliance Thriving Post-Recession’ (2015) 26 *Construction Law* 26.
[43] As in *Jet2.com* [2012] EWCA Civ 417.
[44] See for example *Compass Group* [2013] EWCA Civ 200.
[45] *Bristol Rovers* [2016] EWCA Civ 160.

documents without any 'subject to' or ranking provision), a question arises whether it carves out any additional obligations, and of what kind, to those appearing elsewhere in the contract.

Formal terms and behavioural standards could impose two severable obligations with breach of either giving rise to contractual remedies: the hard terms stipulate *what* is to be achieved, the general behavioural standard posits *how* it is to be achieved. Establishing separate and distinct obligations to achieve a result and to achieve it in a certain way is not straightforward however. Generally speaking, if breach of a performance obligation is established, the *manner* of breach - whether in good or bad faith - is neither here nor there, since even 'a deliberate contract breaker is guilty of no more than a breach of contract'.[46] One may say the same thing about the *manner* of performance. If exact performance obligations are discharged, it may be difficult to contend that a party has nevertheless failed to act in accordance with any express obligation to act in good faith or to co-operate.[47] In addition, it is unlikely that the exercise of a formal contractual right will be held to breach the spirit of the agreement expressed elsewhere. It is well known that implied terms cannot contradict the express terms of an agreement, but even express standards of good faith are rarely allowed to moderate the exercise of what are interpreted as absolute contractual rights, such as an express right to terminate.[48] One assumes the reason for this is to maintain certainty. Similarly, while it is entirely possible in principle to argue an independent behavioural standard has been breached by a shirking and unco-operative performance that nevertheless meets a specific objective, it is difficult to imagine a court assessing and awarding substantial damages for such a breach. The most appropriate sanction for a grudging performance may be the simple refusal to deal with that party again.

However, there are counter-arguments that can be made in favour of substantive and separate obligations. The law appears to have no difficulty in principle with terms that specify both a particular result and compliance with certain standards in achieving it. Granted, it may be difficult to determine whether breach has occurred if a contractor satisfies a contractual requirement to reach a standard of, say, reasonable care and skill, while not also achieving the specified result.[49] Whether the overlapping obligations can be read together, create separate obligations, or whether one or other takes precedence, are matters of contextual interpretation of the agreement. In a comprehensive written agreement containing specific and verifiable obligations to achieve measurable outcomes, and that requires little everyday interaction or co-operation between parties, a court may be correct to interpret any behavioural standard as an irrelevance. In other contract contexts, such as long-term complex

[46] May LJ in *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd* [1990] 1 QB 818 at 894.

[47] See *Bristol Rovers* [2016] EWCA Civ 160 at [98]; *TSG Building Services* [2013] BLR 484. Limited US authority suggests that a good faith obligation can form the basis of an independent cause of action even in the absence of another actionable breach of contract: P MacMahon, 'Good Faith and Fair Dealing as an Underenforced Legal Norm' (2015) 99 *Minnesota Law Review* 2051 at 2076-77.

[48] *Excalibur Ventures* [2013] EWHC 2767 at [331]; *TSG Building Services* [2013] BLR 484.

[49] Cf *MT Hojgaard A/S v E.ON Climate and Renewables UK Robin Rigg East Ltd* [2015] EWCA Civ 407.

projects requiring reliable information flows, co-ordination of activities and personnel over lengthy periods, adherence to expressed behavioural standards may carry more weight. In these contexts, the behavioural standards may signal expectations concerning conduct that encourages dialogue, acts of reliance and investment in the relationship and project. Similarly, innovative and collaborative projects may be undertaken in uncertain economic environments not conducive to long-term contingency planning and risk allocation.[50] In these environments, a claimant may well be able to establish that it is necessary for them to mandate that a certain attitude towards the project is developed and maintained. A requirement that participants put the project first to counteract short-term and self-interested mindsets could be regarded as an outcome properly pursued through contractual mechanisms. Behavioural standards may therefore be necessary to accord practical or commercial coherence to an agreement.[51]

Understood in this way, the appearance of behavioural standards raises the question of what interests may properly be protected or advanced through the medium of contractual obligations.[52] That someone perceives it is to their benefit to cultivate a certain attitude towards performance in a contract counterparty does not mean this end is best advanced through a contractual obligation enforceable in law. An assessment of the 'legitimate interest of the contractor' may determine what is permissible in this respect.[53] In relation to the penalty rule, for example, the United Kingdom Supreme Court has recently recognised that a party may not be neutral between contact performance and damages for breach. A legitimate commercial interest may lie in seeking to encourage performance over breach, and to protect this interest through contract terms.[54] Indeed in the penalty context the Supreme Court recognised that use of a liquidated damages clause may protect a party's legitimate interest in maintaining the loyalty of the other contracting party by discouraging that party from breaching the agreement.[55] Similar reasoning could be extended to behavioural standards. A behavioural standard should be enforceable as an independent contractual obligation if a contractor can establish that the standard has a commercial justification or is necessary to protect and pursue a legitimate interest.

One such commercial justification may lie in the need to create and maintain a co-operative environment over the course of performance, particularly in long-term projects requiring on-going interaction between the parties in circumstances where they are required to react to shifting demands and priorities. Granted, one may not necessarily create the right mindset by writing duties of good

[50] R J Gilson, C F Sabel and R E Scott, 'Contract and Innovation: The Limited Role of Generalist Courts in the Evolution of Novel Contract Forms' (2013) 88 *New York University Law Review* 170; R J Gilson, C F Sabel and R E Scott, 'Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration' (2009) 109 *Columbia Law Review* 431 at 484; R J Gilson, C F Sabel and R E Scott, 'Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice and Doctrine' (2010) 110 *Columbia Law Review* 1377.
[51] *Marks & Spencer plc* [2015] 3 WLR 1843 at [21].
[52] A question posed in *Cavendish* [2015] 3 WLR 1373 at [39].
[53] See the House of Lords in *White and Carter (Councils) Limited v McGregor* [1962] AC 413; and *AG v Blake* [2001] 1 AC 268; [2000] UKHL 45.
[54] *Cavendish* [2015] 3 WLR 1373 at [23] and [32].
[55] *Cavendish* [2015] 3 WLR 1373 at [75].

faith and co-operation into a contract, but formalisation does at least make the expectations transparent, and censure more justifiable, in the event of a perceived failure to honour the standard. Some support for the separate enforceability of obligations of this kind occurs in *SABIC v Punj Lloyd Ltd.*[56] The court had to consider the relationship between an express term stipulating a construction contract completion date and another requiring 'due diligence' in the performance of the works. The court regarded these as separate obligations: first, an absolute obligation to complete the works by the contract completion date and second, to proceed with due diligence (interpreted as 'due industry, assiduousness, efficiency and expedition'[57]) in pursuing that objective.[58] Although linked, the court held that breach of the first obligation would not automatically constitute breach of the second. The contract end date was an obligation to *achieve a specific end* and 'due diligence' was an obligation *to make progress towards that end.*[59] Thus 'due diligence' was a flexible norm designed to set out expectations about how the parties would react to contingencies on daily basis in the light of the shifting priorities and constraints of the contract. Following this line of reasoning, two separable obligations could arise governing both the end objective of the contract and the continuing co-operative behaviour necessary to achieve that end objective.

Ascribing meaning to the standard: determining breach and loss

Although it is possible to develop an argument in principle for the general enforceability of behavioural standards in some contexts, difficulties remain in ascribing the standards meaningful content, identifying breach and developing the appropriate remedies. In relation to these issues, there are two difficulties. The first is the problem of policing commercial contracting behaviour and identifying the limits on the pursuit of commercial self-interest. Judges are unlikely to encounter difficulty in conferring a meaning on behavioural standards that reflects what English law would imply in any case, such as duties to act honestly.[60] A requirement to exhibit more nuanced forms of co-operative behaviour, such as disclosing relevant information, displaying loyalty towards a contracting partner or the project, raise more complex issues. What good faith requires, for example is generally regarded as flexible depending on the contract context. It can be interpreted as requiring only a very attenuated commitment to avoid forms of bad faith, such as fraud and dishonesty, to more expansive duties traditionally associated with fiduciary relationships. In the middle of this spectrum is the requirement that a party take some account of the other's commercial interests during

[56] [2013] EWHC 2916.
[57] *SABIC* [2013] EWHC 2916 at [27].
[58] *SABIC* [2013] EWHC 2916 at [24].
[59] *SABIC* [2013] EWHC 2916 at[20]. Similarly, in *Berkeley Community Villages* [2007] EWHC 1330 at [90] the judge interpreted an abstract good faith duty as not intended to achieve a specific outcome, but creating a contractual obligation to behave in a certain way.
[60] *Bristol Ground School Ltd* [2014] EWHC 2145.

performance, but not necessarily to prioritise them.[61] There are real difficulties here in scrutinising contractor conduct, and there is a clear danger of protracted and spurious arguments over what kind of behaviour crosses the line into breach of the standard. In response it may be conceded that these issues are difficult, but they are hardly novel for judges deciding contract cases. Judges are often required to interpret quite nebulous and open-ended obligations, such as a requirement to engage in 'friendly discussion' as the first stage in dispute resolution.[62] Similarly, day-to-day interactions between parties during performance may give courts a steer in animating vague provisions sufficiently to create enforceable obligations.[63] Since this point touches on more principled concerns over the commercial contracting process, it is considered further in 'Matters of Principle' below.

The problem of determining whether commercial conduct has breached a behavioural standard is connected to the second difficulty of assessing compensation, and in particular the operation of the general rule that damages are not available for non-pecuniary loss following a breach of a commercial contract. Even if an independent obligation to observe a behavioural standard is established, there may be few circumstances where a commercial contractor can make out a financial loss resulting from breach, as opposed to losses characterised as disappointment, inconvenience or general aggravation. A plethora of considerations exist in this area of law, making the effective enforcement of behavioural standards not just a matter of interpreting what the standard requires, but weighing a range of legal and policy matters concerning what constitutes adequate and fair compensation for loss, remoteness of loss, avoiding gratuitous benefits through damages awards,[64] preventing overcompensation and the general denial of punitive awards.

While the rule about non-pecuniary loss raises a formidable obstacle to enforcement, it is not decisive. First, there are a range of remedial responses, apart from damages awards, that may be appropriate in the enforcement of behavioural standards. Persistent failure to maintain a behavioural standard could be regarded as a sufficient to justify termination of the contract by the other party, even in circumstances where completion of the specific performance obligations is still some way off. Second, in relation to damages it may be possible to evidence a financial loss from breach of a behavioural standard that delays progress towards contract completion.[65] Some more specific behavioural duties (information-sharing, for example) could be less problematic in this respect than duties to display attributes such as trust, loyalty and good faith. Even if legal enforcement is imperfect in the sense that damages are hard to quantify this feature would hardly be unusual in the law of contract damages. Consumer contracts are often concerned with securing intangibles such as

[61] See S Whittaker 'Good Faith, Implied Terms and Commercial Contracts' (2013) 129 *LQR* 463 at 467-8, discussing the implications of the *Yam Seng* decision. See also *Barclays Bank PLC v Unicredit Bank AG & ANR* [2014] EWCA Civ 302 confirming that a party required to act in a 'commercially reasonable' way may put his own interests first; *Portsmouth CC* [2015] EWHC 1969 at [81].
[62] *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104.
[63] *Durham Tees Valley Airport v BMIBaby* [2011] 1 All ER (Comm) 731; [2010] EWCA Civ 485 at [55].
[64] See Lord Jauncey, *Ruxley Construction Ltd v Forsyth* [1996] 1 AC 344 at 357.
[65] Recognised by the Court of Appeal in *Durham Tees Valley Airport* [2011] 1 All ER (Comm) 731.

pleasurable amenity, peace of mind or the achievement of the consumer's idiosyncratic preferences. Contract law has conceded that substantial damages can follow from a contractor's failure to furnish pleasure, freedom from distress and so on, if it was contract term to secure these states of mind,[66] even though the approach to quantification of damages is necessarily *ad hoc* and awards rarely generous.[67] These claimants are generally unable to show any pecuniary losses flowing from breach however. There is the additional problem that in a commercial context breach may be endemic[68] and commercial contractors expected to face it with equanimity.[69] Given the possibility that a contractor is protecting a legitimate interest through use of behavioural standards this last point seems inapposite. If a contractor establishes that the standard has justifiably been made the subject of a primary performance obligation then they are entitled to some remedy if they suffer loss on breach. Difficulties of quantification of loss, or the common occurrence of breach, do not alter this. Ultimately, whether the claimant undertook an enforceable obligation to act in a particular way during the contract, and whether the claimant has been deprived of a contractual benefit from breach of the behavioural standard, are issues about interpretation. The courts have implied terms of co-operation[70] and good faith in long term agreements requiring day-to-day collaboration,[71] and also in relation to how a discretion is exercised. There would be little point in implying such terms if they could not be supported by remedies.

Matters of Principle

Matters of interpretation raise barriers for the reception of behavioural standards into law. It is arguable that these barriers are largely surmountable by receptive courts paying close attention to contracting context. A more intractable set of difficulties are presented by commercial contract law's institutional commitments. That is to say, the broad principles and values displayed by general contract law in its regulation and facilitation of business contracting, and in its assumptions about the contracting process. The following is not intended to be an exhaustive account, but examines only those attitudes that contribute to explaining the law's reticence towards the enforceability of behavioural standards.

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[66] *Farley v Skinner* [2001] 3 WLR 899; [2001] UKHL 49.

[67] Cases involving disappointing holidays (*Jackson v Horizon Holidays* [1975] 1 WLR 1468*; Jarvis v Swan's Tours Ltd* [1973] QB 233) are the classic authorities, but see also *Watts v Morrow* [1991] 1 WLR 1421; *Ruxley* [1996] 1 AC 344; *Farley* [2001] 3 WLR 899.

[68] D Harris, D Campbell and R Halson *Remedies in Contract and Tort* (2nd ed) (London: Butterworths 2002) at 600.

[69] 'Contract breaking is…an incident of commercial life which players in the game are expected to meet with mental fortitude', per Lord Cooke, *Johnson v Gore Wood & Co* [2002] AC 1 at 49.

[70] *Mackay v Dick* (1881) 6 App Cas 251 at 263; *Mona Oil Equipment & Supply Co Ltd v Rhodesia Railways Ltd* (1949) 83 Lloyds Law Rep 178; *Swallowfalls Ltd v Monaco Yachting & Technologies SAM* [2014] EWCA Civ 186.

[71] *Yam Seng* [2013] EWHC 111.

Transforming the commercial relationship into a fiduciary one

One vexed issue in relation to behavioural standards is whether these provisions can require a party to subordinate their own commercial interests to those of a contracting partner. This is doubtful, but behavioural standards, particularly ones couched in general terms of trust and co-operation, might be regarded as a suspicious attempt to impose fiduciary-type duties of loyalty on the parties to an arm's length commercial agreement. Precise wording of the standard is important here, and some terms may be interpreted as meaning a party is not entirely free to act solely in accordance with their own commercial interests without considering the effect on the other party.[72] Nevertheless, the legal default is that 'independently contracting parties do not undertake normally to subordinate their own commercial interests to another.'[73] To the extent that behavioural standards are perceived as disrupting this legal expectation, courts may react to them with circumspection.

This wariness of allowing fiduciary values to intrude into arm's length commercial dealing mirrors a similar reluctance to allow principles of equity to circumvent contractual rights.[74] Concern is often expressed that equitable interventions will 'distort the parties' contractual bargain'[75] or render the law and the exercise of contractual rights uncertain.[76] Equity's emphasis on good conscience as a standard appears opposed to the self-interested economic rationality that is often thought to suffuse the model of the commercial contractor underlying classical contract law.[77] Whereas equity is concerned with standards of behaviour and unconscionability, the basis of the contractual obligation lies not in the observance of general standards, but in bargain.[78] Contractual and fiduciary duties can exist in tandem, as with agents for example, but the duties under the contract are of a different character to those arising from a fiduciary relationship,[79] and contract law values predominate. If the parties act under a contract that also has fiduciary duties, the fiduciary duties may be moulded to fit the contract terms,[80] and crucially, any element of competition in the arrangements will prevent any fiduciary duties from arising.[81]

This particular objection to enforcing behavioural standards has little currency when the parties write such obligations into their agreement. It also overlooks that the role of the standard is to

[72] *Jet2.com* [2012] EWCA Civ 417; *Bhasin v Hrynew* [2014] SCC 71 at [65] (Supreme Court of Canada).
[73] *Fujitsu* [2014] EWHC 752 at [126].
[74] Concerns along these lines were expressed in *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514 and *Yeoman's Row* [2008] 4 All ER 713.
[75] *Fujitsu* [2014] EWHC 752 at [126].
[76] *Yeoman's Row* [2008] 4 All ER 713 at [81].
[77] TT Arvind, 'Contract Transactions and Equity' in L A DiMatteo, Q Zhou, S Saintier and K Rowley (eds), *Commercial Contract Law: Transatlantic Perspectives* (Cambridge, CUP, 2013) 146 at 166. Lord Justice Millett, 'Equity's Place in the Law of Commerce' (1998) 114 *LQR* 214 at 216.
[78] Sir John Mummery, 'Commercial Notions and Equitable Potions' in Sarah Worthington (ed) *Commercial Law and Commercial Practice* (Oxford, Hart Publishing, 2003) 29 at 42-43.
[79] *In re Goldcorp Exchange Ltd (in receivership)* [1995] 1 AC 74, per Lord Mustill at [98].
[80] *Henderson and others v Merrett Syndicates Ltd and others* [1994] 3 WLR 761 per Lord Browne-Wilkinson at 799-800.
[81] Per Rix J in *Global Container Lines Ltd v Bonyad Shipping Co* [1998] 1 Lloyds Rep 528 at 545.

indicate clearly that, while the parties may be using contractual mechanisms to pursue their project objectives, the untrammelled pursuit of self interest is circumscribed.[82] The appearance of behavioural standards in contracts illustrates that a simple binary distinction cannot be maintained between commercial relationships characterised by self-regarding attitudes and those relationships characterised by other-regarding attitudes. This is particularly the case in long-term contracts such as joint ventures or distributorship agreements which, in their reliance on norms of both adversarial contracting and partnership, display mixed commitments in their choice of relationship governance. Unfortunately, there is a general reluctance on the part of contract law to engage with the distinct features of commercial relationships that occupy this extensive middle ground. The legal response to relational contracts exemplifies this.

Legal reluctance to recognise the 'relational contract'

While there is some halting recognition of relational contracts in judgments, there has been no sustained legal attempt to develop and apply to them an alternative style of contract law that responds to their distinct characteristics.[83] Given that behavioural standards often appear in transacting contexts that one might associate with relational contracting - complex projects requiring a high level of day-to-day interaction, reliable information-exchange and close co-operation between the parties – the unwillingness to accord much significance to behavioural standards reflects the more deep-seated legal reluctance to acknowledge that commercial contracts are not all the same. Despite recognising the significance of individual contract context, there seems to be little judicial appetite for developing a set of coherent principles to deal with relational contracts nor the requisite criteria to determine when those principles will be applicable. This reluctance is driven primarily by the fear that it will result in legal uncertainty.

The phenomenon of parties writing relational-style duties of trust, loyalty and co-operation into their agreements confronts this legal reluctance directly, and makes it imperative for courts to engage with the idea of relational contracts. That said, judicial scepticism that a party can create a relational contract out of thin air by the addition of behavioural duties of loyalty and co-operation is entirely justified. One might speculate that formalisation of behavioural standards within contract documents signifies a business relationship at the discrete end of the contract spectrum, rather than the relational end. This is borne out when one considers that new 'partnering' models of agreement often appear in traditionally contract-reliant, adversarial and dispute-ridden industries, such as

[82] L Smith, 'Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another' (2014) 130 *LQR* 608 at 615.
[83] *Yam Seng* [2013] EWHC 111; *D & G Cars* [2015] EWHC 226; *Bristol Ground School* [2014] EWHC 2145. For House of Lords recognition, but no change in approach, see *Total Gas Marketing v Arco British* [1998] 2 Lloyd's Rep 209.

construction.[84] Of the many different transacting models that parties commit to, some eschew traditional contracting and sub-contracting in favour of various forms of alliancing and collaborative models.[85] Naturally this development may be criticised as highly artificial, reposing excessive faith in contractual documents to mould expectations of the contractors along more co-operative lines. Nevertheless, while such models may rely on the formalisation of behavioural expectations to achieve their aims, to the extent that these collaborative models are a genuine attempt to introduce a paradigm-shift away from discrete contracting to more co-operative forms of governance, then courts should develop doctrines and legal reasoning techniques that support this movement. There may be lessons here too for socio-legal and relational scholars. The phenomenon of the behavioural standard demonstrates that the simple divide into 'relational' and 'discrete' is too simplistic to capture the variety of governance techniques that commercial parties utilise in their contracts. It also complicates the debate about the relationship between legal and non-legal norms by denying that these stark alternatives exhaust the parties' options for contract governance.

A further consideration is that behavioural standards are an attempt to contract around an English law default. Commercial contract law reflects a number of assumptions about the contracting process, chiefly that it involves discrete transactions conducted at arm's length between antagonistic strangers.[86] The written text (where one exists) is assumed to be the repository of all the parties' obligations. Recent decisions from the UK Supreme Court have resiled from a broad contextualist approach to agreements, returning to a textualist, or at least minimal–contextualist, interpretative style which places primary focus on the words of the contract text.[87] Those scholars and judges who support a more formal contract law often argue that parties requiring a different legal approach to their agreement can contract around this default and into contextualist and standards-based legal reasoning methods.[88] Similarly, the legal response to the idea of relational contracts is to counsel parties to write agreements that reflect the relational aspects of their deal.[89] Behavioural standards expressed in partnership charters and the like, could be regarded as an attempt to do exactly this - mould contract context and in the process render obsolete the debate about whether judges *should* use contextual or textual interpretation methods.

Conclusions about contracting around a formal default may also follow implicitly from some contracting contexts. While many transactions fit the discrete and adversarial model (or appear to fit

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[84] Long-criticised for excessive reliance on formal contracts in project delivery: Sir J Egan, *Rethinking Construction: The Report of the Construction Task Force* (London, HMSO 1998) at 30.

[85] For example, standard construction contract NEC3 clause 10.1 states, 'the [parties] shall act as stated in this contract and in a spirit of mutual trust and co-operation'.

[86] Lord Ackner in *Walford v Miles* [1992] AC 128 at 138.

[87] See *Arnold v Britton* [2015] AC 1619; *Marks and Spencer plc* [2015] 3 WLR 1843; *Cavendish Square Holding BV v Talal El Makdessi* [2015] 3 WLR 1373.

[88] J Morgan, *Contract Law Minimalism* (Cambridge, Cambridge UP, 2013), 93.

[89] See *Globe Motors* [2016] EWCA 396 at [64] citing E McKendrick, 'The Regulation of Long Term Contracts in English Law' in J Beatson and D Friedman (eds), *Good Faith and Fault in Contract Law* (Oxford, OUP, 1995) 305.

this model) it is also clear that many do not. Hybrid forms of arrangement that rely on norms of partnership, co-operation and alliancing may be used by relative strangers as part of an attempt to build an ongoing relationship of trust.[90] These agreements may be underpinned by different expectations concerning a 'moral contract' rather than legal entitlement.[91] In the wake of developments in outsourcing, vertical disintegration of firms and the advent of the network phenomenon, contracting forms are increasing in complexity.[92] In these contexts, and in other long-term commercial relationships involving repeated interactions between parties, there will often be multi-layered and multi-purpose documentation covering many different aspects of the arrangements, including both legal obligations, informal commitments and other essential information.[93] In complex projects, given the requirement for reliable information exchange and to engage in a degree of relationship management and co-ordination, complete faith in governance by informal norms and sanctions is not feasible. But neither is discrete and legalistic contracting. Legal measures are not abandoned entirely, but the contracting environment may be mired in the kind of uncertainty and complexity which militates against comprehensive advanced planning. At the very least, behavioural standards may have a placebo effect on the contractual relationship, drawing on the disciplining and symbolic power of the written document, quite irrespective of its enforceability, to channel contractor behaviour, as well as providing practical reassurance.[94] Having a record of expectations provides a platform for negotiating difficult matters which only reveal themselves once the parties have embarked on performance, and which were not decided in advance.[95] This kind of semi-contractual framework appears very different to the standard terms and conditions of a discrete sales agreement (or even a series of such agreements), familiar from the early empirical studies, which were exchanged (or not) and then filed away. That sort of agreement rarely requires ongoing co-operation. Thus the correct legal response to the use of the behavioural standard – whether they should be regarded as merely aspirational or as manifesting a more serious commitment - depends on each individual contract and its context. This is explored further below.

Giving Effect to the Behavioural Standard

[90] S Deakin, C Lane and F Wilkinson, 'Trust or Law? Towards an Integrated Theory of Contractual Relations Between Firms' (1994) 21 *Journal of Law and Society* 329 at 339.

[91] E H Lorenz, 'Neither Friends Nor Strangers: Informal Networks of Subcontracting in French Industry' in D Gambetta (ed), *Trust: Making and Breaking Cooperative Relations* (Oxford, Basil Blackwell, 1988) 194.

[92] For an overview of this phenomenon see M Jennejohn, 'The Private Order of Innovation Networks' (2016) 68 *Stanford Law Rev* 281. See also G S Geis, 'An Empirical Examination of Business Outsourcing Transactions' (2010) 96 *Virginia Law Review* 241.

[93] G S Geis, 'The Space Between Markets and Hierarchies' (2005) 95 *Virginia Law Review* 99 at 130ff.

[94] D Yates, *Exclusion Clauses in Contracts*, 2nd edn (London, Sweet & Maxwell, 1982) at 19, 30; T Wilkinson-Ryan, 'Do Liquidated Damages Encourage Breach? A Psychological Experiment' (2010) 108 *Michigan Law Review* 633.

[95] G K Hadfield and I Bozovic, 'Scaffolding: Using Formal Contracts to Build Informal Relations in Support of Innovation' (February 2012), University of Southern California. University of Southern California Law and Economics Working Paper Series, Working Paper 144 at 28-9.

It is unlikely that a uniform approach to the enforcement of behavioural standards can be mandated in advance. As such, contract law should develop an appropriate, context-led method that differentiates when direct enforcement of the standard may be appropriate and when it should be accorded a supporting role in the contract framework, notably as an interpretative criterion. A direct approach to enforcement can be seen in *Berkeley Community Villages v Pullen*.[96] Here the judge interpreted an abstract good faith duty as creating 'a contractual obligation to observe reasonable commercial standards of fair dealing in accordance with their actions which related to the Agreement and also requiring faithfulness to the agreed common purpose and consistency with the justified expectations of the...Claimant'.[97] This interpretation denied the defendant a right to pursue certain forms of behaviour which, while not in contravention of any express stipulation in the agreement, nevertheless undermined its purpose and spirit. Alternatively, behavioural standards can be regarded as 'organising principles' informing the interpretation of other terms and the application of doctrine.[98]

Ultimately, whether behavioural standards can be taken seriously as creating obligations to behave in the prescribed manner depends upon the level of fit between the values expressed in the standards, the features of the project and the relationship of the parties. Of course formal references to legal rights such as termination, which appear unequivocal in tone and effect, may sit uneasily with references elsewhere to the parties displaying virtues of loyalty, flexibility and co-operation. There have been instances where courts have attempted to construct a coherent and consistent contract framework out of both the express behavioural standards and other rights and obligations by treating the standard as the interpretative criterion against which the harder terms are given meaning and effect. A systematic and principled approach to this has yet to be developed however, and any decision on the effectiveness of the good faith or co-operation clause in curtailing self-interested contractor behaviour mainly serves to add weight to an outcome justified on other legal grounds. Nevertheless, there are instances of courts adopting a suitably holistic approach to the agreement, seeking to bestow some significance on the behavioural standards. In *Birse Construction Ltd v St Davids Ltd*[99] the court interpreted the existence of a 'partnership charter', in which the parties outlined in broad terms their expectation that they would proceed on the basis of 'mutual co-operation and trust', as preventing one party adopting a formal and legalistic attitude towards the creation of a contract. *Berkeley Community Villages* and *Birse* demonstrate the potential of the behavioural standard to allow courts to police commercial behaviour which may be characterised as opportunistic rather than dishonest, and over which the law may often be equivocal. Since these controlling

[96] [2007] EWHC 1330.
[97] [2007] EWHC 1330 at [97].
[98] *Bhasin* [2014] SCC 71 at [33].
[99] 13 February 1999*;* see also *Willmott Dixon Housing Ltd v Newlon Housing Trust* [2013] EWHC 798; *Northern Ireland Housing Executive v Healthy Buildings(Ireland) Ltd* [2014] NICA 27.

standards are found within the agreement itself, it is difficult to criticise this judicial scrutiny as an unacceptable interference with freedom of contract.

Outright inconsistency in terms remains a problem, particularly in multifaceted contract documents serving a variety of complex purposes. As with most things in contract, dealing with inconsistency requires the contract to be interpreted. The court must take an overview of the overall purpose and object of the contract, and to reject any contract provision which is inconsistent with this purpose.[100] The relative weight of the contract terms in relation to the contract purpose, and in light of considerations of 'reasonableness' and 'business common sense', may also be material.[101] Where parties commit to a general behavioural standard this may qualify the exercise of their 'absolute' contractual rights, rendering them non-absolute. Alternatively, applying a contextual interpretative approach one might infer that hard terms will take precedence over behavioural standards in particular contexts. A single good faith provision in a comprehensive document within an industry noted for a self-interested and adversarial attitude between participants of broadly equal bargaining power probably shouldn't be taken that seriously as expressing a serious obligation. In *Compass Medical Group* for example the Court of Appeal was not prepared to admit that an express good faith clause could signal a change to the paradigm of self-interested dealing, it could only qualify the isolated and precise contractual commitment to which it was formally attached. One might speculate that despite the appearance of express references to good faith, little day-to-day co-operation between the parties was actually required, and that the Trust only exercised control over the outsourced operations through the ex post identification of failures, rather than ex ante daily management of the counter-party's activities. Indeed outsourcing is supposed to minimise the necessity for this close supervision.[102] Similarly a relationship which can be categorised as 'just selling' may be assumed to be underpinned by a self-interested ethic.[103] In these circumstances any good faith duty may well be discharged by performing the agreement according to its terms. Other contracting contexts involving complexity, the need for on-going co-operation and co-ordination of parties, uncertainty, and long-term relationships, may well require an alternative approach where the behavioural standard has a more significance as a functional and meaningful undertaking.

Conclusion

This article has examined the contract law response to the inclusion of behavioural standards in business contract documentation. There are many different forms of such standard and myriad reasons

[100] *Glynn v Margetson & Co* [1893] AC 351; *Alexander v West Bromwich Mortgage Co Ltd* [2016] EWCA Civ 496.
[101] *Alexander v West Bromwich* [2016] EWCA Civ 496 at [41].
[102] See Geis, above n 93, at 129.
[103] *Bristol Rovers* [2016] EWCA Civ 160*; Acer Investment Management v The Mansion Group* [2014] EWHC 3011 at [94] and [100].

why they may be included in contracts. Use of express behavioural standards does not entail that these are always legally enforceable, and the parties may be equivocal about their meaning and effect. It could be that behavioural standards do not reflect any genuine preference on the part of contractors for a different model of contracting. This seems unlikely however. Given the wide array of contracting forms available to parties, it is hard to conclude that the choice of a co-operative contracting model is the result of indifference or inattention, rather than deliberation and design. Given this, there are plausible reasons to suggest that these provisions should be taken more seriously by contract law. The current legal response of restrictive interpretation is in danger of undermining their role in the management of the contractual relationship and performance. Some reasons for legal reticence in enforcing these sorts of standard have been advanced. In addition, some strategies have been suggested for overcoming this reticence and attempting to give such provisions greater effect, at least in some contracting circumstances where these kinds of provision can be regarded as a rational response to uncertainty or other features of the contracting environment.