

## Summer Project Report – Isadora Janssen

As a Dutch national studying English law, I have always been curious about the difference between the Common law system I was studying and the Civil law system back home. I find it intriguing that two systems so geographically close together can be so conceptually distinct, and often wondered how different they actually were in practice. Yet, despite being well-versed in English law, I knew very little about the law in the Netherlands prior to this summer. I am very grateful for the Summer Project scheme, as it gave me the opportunity to change this and pursue an in-depth comparison between Dutch and English Law.

The area I chose to look at was the principle of Good Faith in contract. While Good Faith is a cornerstone of Dutch contract law, the English law has repeatedly rejected adopting Good faith as a principle at all. Instead, English law has introduced a range of doctrines to deal with specific cases of bad faith, but these are in no way grouped together under a concept of fairness or fair dealing. The aim of my project was to see whether, despite their theoretical difference, these different approaches actually led to different outcomes, in terms of the practical protection the law afforded parties to a contract.

My plan was to focus on four elements of contract (formation, content, vitiating and remedies) and then compare what protections Good Faith offered parties under Dutch law, and how this compared to specific doctrines developed in England. As most of these English doctrines developed through case law, I originally aimed to compare cases. After all, it is the cases which show how the law is applied and in which circumstances parties are protected. However, while this approach was an easy study for English law, I quickly realised it was not going to work for a comparative essay. Case law does not have the same weight in the Dutch law as it does in English law, instead the law is entirely written out in statute books. Therefore, while there are occasional landmark cases that inform how the court should interpret or approach certain statutes, it was incredibly difficult to *find* cases to see how Good Faith operated in practice. Furthermore, even when I found those cases, they carried nearly no weight in law.

This realisation was the first big adjustment I had to make. While I already knew Civil Law systems did not attach the same weight to precedent, I had not realised cases were considered so irrelevant they were barely even studied. Cases were barely Dutch Law textbooks and articles. There was a complete divide between the law and the practical outcome in the courts. It was a completely different way of studying law than I was used to. The common law forms such an integral part of the English law, it was difficult to wrap my head around how the process differed so drastically just across the Channel.

I decided to change tact and simply use the English cases I had studied and try to apply the Dutch law on good faith to those circumstances. However, again I struggled. While Good Faith is an independent cause of action in Dutch Law, this action only applied to a very specific area of contract. Instead, there were a multitude of laws which were *inspired* by the principle of good faith. In order to know how this influenced the law and the court at every stage of contract, I would need to learn the entirety of the Dutch law of obligations. Good Faith was not merely one statute but woven into every other law governing contracts. It formed a grounding principle for the entire law on contract. This highlighted a fascinating difference between English and Dutch law which I had completely overlooked. English Law operates on the basis of cases, judges might be inspired by specific principles, but they are primarily concerned with the specific facts in front of them. The law is created by decisions in specific cases, and it is from these decisions that general principles emerge. However, principles are never the primary source for a decision, nor are they considered legally binding. In Dutch Law, this approach is the other way around. General principles form the law, which is then applied in specific cases. Dutch law needs a principle of Good Faith to create their laws, while it makes sense English Law only has specific doctrines arising out of specific cases. The

simplistic approach of simply comparing 'the law' of good faith was impossible when the two systems understanding of 'law' was so different.

This realisation offered a different dimension to my research. I changed the focus of my comparison to specifically the powers of the court to make decisions on the basis of the principle of Good Faith. This narrowed my scope from looking at every element of contract to simply studying one: content. This was the most interesting, and the most accessible, as this was where Good Faith provides an explicit cause of action in Dutch Law (section 6:2 of the Dutch Civil Code). In one of the rare cited cases, the Dutch court had outlined a specific approach as to how a contract should be interpreted, changed or voided by a court on the basis of the Good Faith statute. This could then be compared with the power English Courts had to re-interpret, change or terminate contract, which could easily be extracted from the case law I had already studied.

The results of my study were fascinating. From a practical viewpoint, the outcome of the approaches was relatively similar. Yet, theoretically, the powers that Dutch judges were afforded would be unthinkable for the English lawyer, specifically in cases where judges could rewrite contractual obligations without consent from the parties. This allowed me to engage in an exploration of the primary principles of either legal system. While Good Faith was crucial in Dutch Law, English prioritised certainty and freedom of contract. This led me to a much deeper theoretical comparison between what these priorities tell us about the philosophical nature of 'a contract'. Dutch law views contracts as *promises*, and thus as something which holds has moral value. It is only natural that the law thus injects a moral element, such as 'good faith', into their law of contract. In contrast, English law views the purpose of contract law as the facilitation of arms-length exchanges. It is viewed as a practical requirement to add an enforcement element to agreements between strangers, and thus allow for business to flourish. I noticed that it was this difference in philosophy that explained a lot of the legal differences between the two systems.

The Summer Project has been an incredibly valuable experience. I realised how different other legal systems are, not only in their blackletter law or constitutional arrangements, but also in how the law is applied and how its elements are viewed philosophically. This not only made comparative study between systems a lot more difficult than I anticipated, but it has also offered me a completely different way of looking at English Law. I found myself inspired by these more theoretical discussion and started looking for similar philosophical underpinnings in my other subjects as I was revising for collections. On a more practical level, undertaking my own independent study taught me how to structure my research and the importance of ensuring I was staying on topic. Initially, I spent a lot of time allowing my investigation to meander in loosely related fields simply because it was interesting. For example, I spent a full day studying conceptions of Good Faith in Roman Law and the difference between good faith and fair dealing, when this only compromised one paragraph in my final article. Quickly I became a lot better at staying focused and researching within a framework and for a purpose. These skills became incredibly useful later in the summer, when I was doing independent research for my final Jurisprudence essay as part of my course.

In short, the summer project has been a wonderful experience, and I am incredibly grateful for Merton College's support which allowed me to undertake this study