



Good Faith in the context of Relationships between Shareholders

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Freedom of Contract

Subject to overriding statutory provisions and policy considerations, the members of a company are free to adopt whatever rules and regulations they wish to govern their relationship. ...

The Bargain between Shareholders

The relationship between shareholders is an essentially contractual one, contained in the company's articles of association and any other shareholders' agreement, as it may in appropriate circumstances be constrained in equity, which together constitute the "bargain" between shareholders amongst themselves and the company.



‘There is a deep-rooted judicial caution in allowing **fiduciary and analogous principles** to intrude upon commercial transactions and relations in general and the “bargain” between shareholders ...’.



Duties of Good Faith in Contract Law

Lord Steyn – *Contract Law: Fulfilling the Reasonable Expectations of Honest Men* (1997)
113 LQR 433

Good Faith - the core meaning

Undoubtedly, good faith has a subjective requirement: the threshold requirement is that the party must act honestly. That is an unsurprising requirement and poses no difficulty for the English legal system.

But good faith additionally sets an objective standard, viz., the observance of reasonable commercial standards of fair dealing in the conclusion and performance of the transaction concerned.



Yam Seng

“Yam Seng” is a Cantonese phrase that means “Drink to victory”.

Yam Seng v ITC





Long-term and 'Relational' Contracts

Yam Seng Pte Ltd v International Trade Corporation Ltd [2013] 1 Lloyd's Rep 526 (QB, Comm)

'The modern case law on the construction of contracts has emphasised that contracts ... are made against a background of **unstated shared understandings** which informed their meaning [para 133]

A paradigm example of a general **norm** which underlies almost all contractual relationships is an expectation of **honesty**.... [para 135]

Another aspect of good faith ... is ... **fidelity to the parties' bargain**. ... [para 139]

Although [the requirements of good faith] are sensitive to context, the test of good faith is **objective** in the sense that it depends not on either party's perception of whether particular conduct is improper but on **whether in the particular context the conduct would be regarded as commercially unacceptable by reasonable and honest people.**' [para 144]



A cautious reception from the Court of Appeal:

Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd [2013] BLR 265 (CA)

The approach to the construction of express obligations of good faith is highly fact-specific.



Where such an obligation does exist, what is the content of a duty of good faith?

Subordinating one's own interests, or having regard to the interests of others?

Contrast acting in 'good faith' with an obligation to use 'all reasonable endeavours'

Astor Management AG v Atalaya Mining plc [2017] 1 Lloyd's Rep 476, Leggatt J:

'A duty to act in good faith, where it exists, is a modest requirement. It does no more than reflect the expectation that a contracting party will act honestly towards the other party and will not conduct itself in a way which is calculated to frustrate the purpose of the contract or which would be regarded as commercially unacceptable by reasonable and honest people. This is a lesser duty than the positive obligation to use all reasonable endeavours to achieve a specified result which the contract in this case imposed.'



Have 'relational contracts' evolved into a separate category?

Al Nehayan v Ionnis Kent [2018] EWHC 888 (Comm) Leggatt LJ

[176]. For present purposes it is sufficient to identify two forms of **furtive or opportunistic conduct** which seem to me incompatible with good faith in the circumstances of this case.

First, it would be inconsistent with that standard for one party to agree or enter into negotiations to sell his interest or part of his interest in the companies which they jointly owned to a third party covertly and without informing the other beneficial owner.

Second, while the parties to the joint venture were **generally** free to pursue their own interests and did not owe an obligation of loyalty to the other, it would be contrary to the obligation to act in good faith for either party to use his position as a shareholder of the companies to **obtain a financial benefit for himself at the expense of the other.**'



Some recent cases

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

Alan Bates v Post Office (No. 3) [2019] EWHC 606 (QB)

TAQA Bratani v Rockrose UKCS8 LLC [2020] EWHC 58 (Comm)

Cathay Pacific Airways Ltd v Lufthansa Technik AG [2020] EWHC 1789 (Ch) John Kimbell QC



Good Faith as between Shareholders

A purely commercial relationship, or a Quasi-Partnership?

Express contractual duties; exercising provisions in shareholders' agreements that benefit one party at the expense of another shareholder in good faith.

Re LCM Wealth Management Limited [2013] EWHC 3957 (Ch) at [55]:

Put shortly, in my judgment, there is no overriding reason not to give effect to the arrangements, including those for dismissal and removal of a director and the sale of his shares, comprised in the agreements (to the extent valid in law), albeit they should be strictly interpreted, exercised in good faith and not permitted to be used “for unworthy purposes” “on account of the abuse which may be made of them, and of the hardship of expulsion”: see by analogy **Lindley & Banks on Partnership** (19th ed. para 10-124), and also (emphasising the concern of the court to see that powers of expulsion are not used for improper purposes) *Blisset v Daniel* (1853) 10 Hare, 493.



Is incorporating express contractual obligations of good faith necessarily a good thing?

Joint venture agreements – *Russell v Cartwright* [2020] EWHC 41 (Ch)

The JV Agreement is a relatively detailed document. It contained limited express obligations of good faith... the existence of express good faith obligations indicate that when the parties intended to impose an obligation of good faith they did so, strongly suggesting that implying more general good faith obligation would be inconsistent with the express term.