

## GOOD FAITH OBLIGATIONS: WHEN WILL THEY BE IMPLIED? WHAT IS THE STANDARD?

English contract law has long stood firm against any suggestion that contracting parties might owe each other a duty of good faith. As Bingham LJ said in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] Q.B. 433:

" In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as "playing fair", "coming clean" or 'putting one's cards face upwards on the table'. It is in essence a principle of fair and open dealing...English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness. "

This position has undoubtedly come under increasing pressure in more recent times, both in terms of other common law jurisdictions, and from the UK's soon-to-be-terminated membership of the European Union.

In the United States, "every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement"<sup>1</sup>; Australia recognises that an agreement to negotiate in good faith may be contractually enforceable<sup>2</sup>. Most recently, in 2014, the Supreme Court in Canada has held that "there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations", albeit hedging its bets by noting that the duty had to be applied consistently with the weight which the common law places on "the freedom of contracting parties to pursue their individual self-interest"<sup>3</sup>.

Within (Roman) civil jurisdictions in Europe, a duty of good faith is common, albeit not universally well understood, and English lawyers learnt the language of fairness, first in the Unfair Contract Terms Act 1977, and, more recently, in the Unfair Terms in Consumer Contract Regulations 1999.

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<sup>1</sup> Restatement (Second) of Contracts para.205. cf. Uniform Commercial Code s.1-203.

<sup>2</sup> *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) N.S.W.L.R. 1 at 21-27.

<sup>3</sup> *Bhasin v Hrynew* 2014 SCC 71.

English common law's piecemeal approach has long recognised that certain contracts – employment and insurance contracts for example – do require the parties to act in good faith, but, as Bingham LJ's comments in *Interfoto* demonstrate, the traditional position remained fairly clear-cut.

However, in 2013 Leggat J caused something of a stir in the case of *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), when he suggested, obiter, that a duty of good faith might be implied more widely:

"Under English law a duty of good faith is implied by law as an incident of certain categories of contract, for example contracts of employment and contracts between partners or others whose relationship is characterised as a fiduciary one. I doubt that English law has reached the stage, however, where it is ready to recognise a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts. Nevertheless, there seems to me to be no difficulty, following the established methodology of English law for the implication of terms in fact, in implying such a duty in any ordinary commercial contract based on the presumed intention of the parties...More recently, in *Attorney General for Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 at 1993-5, the process of implication has been analysed as an exercise in the construction of the contract as a whole...Importantly for present purposes, the relevant background against which contracts are made includes not only matters of fact known to the parties but also shared values and norms of behaviour. Some of these are norms that command general social acceptance; others may be specific to a particular trade or commercial activity; others may be more specific still, arising from features of the particular contractual relationship."

Leggat J concluded that there were two relevant shared values and norms of behaviour in such commercial contracts: (1) honesty in performance and (2) fidelity to the parties' bargain. In some cases this not only precluded a party from making a false statement to the other party, but could preclude a party from giving evasive answers and, in "relational contracts" (joint venture agreements, franchise agreements, long-term distributorship agreements) could positively require a party to share information with the other.

Leggat J's approach has since received the explicit approval of the Court of Appeal in *Globe Motors Inc v TRW Lucasvarity Electric Steering Ltd* [2016] EWCA Civ 396.

What then, are the key points to take away in relation to good faith obligations?

- There is no *general* duty of good faith – that duty must be expressed or implied in any given contract

- The court will, so far as possible, give effect to express terms to *act* in good faith, although express terms requiring parties to *negotiate* in good faith are less likely to be enforced – it is fairly common to see conditional contracts for sale of land (i.e. conditional upon planning permission being obtained) including an express term requiring the parties to act in good faith. This was, for example, an issue in the case of *Bristol Rovers (1883) Limited v Sainsbury's supermarkets Ltd* [2016] EWCA Civ 160, where the Court of Appeal plainly considered the express term of good faith enforceable, albeit rejecting *Bristol Rovers* attempted reliance on it, on the facts of the case.
- Where commercial norms or ongoing/long-term commercial relationships demand or make it appropriate, the court may now be prepared to *imply* a duty of good faith. The most obvious context for such an implication to be pursued in a property context are in relation to (1) joint venture development agreements, and (2) conditional sale contracts. “Relational” features which tend to indicate that a duty of good faith may be implied include: high degrees of communication, co-operation and predictable performance, mutual trust, confidence and expectations of loyalty.
- In terms of what duties of good faith might be said to extend to, these can be summarised as: (1) A compliance with honest standards of conduct; (2) Compliance with standards of commercial dealing, (3) Fidelity to the parties’ bargain, and (4) No arbitrary exercise of contractual discretion.