



A CONTRACTUAL OBLIGATION OF GOOD FAITH:

WHAT IS ITS SCOPE?

WHAT DOES IT MEAN?

HOW DO YOU SHOW IT HAS BEEN SATISFIED?

A TALK BY DAVID SEARS QC

Introduction

No overriding principle in English law that in making and performing contracts the parties should act in good faith.

See:

- *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433 (CA)
- *ING Bank NV v Ros Roca SA* [2011] EWCA Civ 353; [2011] All ER (D) 39

An implied term

There have been a number of attempts recently to imply a term that the parties should act in good faith towards each other. See, for example:

- *Yam Seng PTE Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB)
- *Bristol Groundschool Ltd v Intelligent data Capture* [2014] EWHC 2145 (Ch)
- *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2015] 283 (Comm)

But it must be very doubtful whether any such attempt will succeed. See:

- *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a/ Medirest)* [2013] EWCA Civ 200
 - o *'If the parties wish to impose such a duty, they must do so expressly'*
- *TSG v South Anglia Housing* [2013] EWHC 1151 (TCC); [2013] BLR 484
- *Hamsard 3147 Ltd v Boots UK Ltd* [2013] EWHC 3251 (Pat)
- *Greenclose Ltd v National Westminster Bank PLC* [2014] EWHC 1156 (Ch)

An express term

Where there is an express term requiring the parties to act in good faith, the courts are likely to strive to give it effect. See:

- *Petromec Inc v Petroleo Brasileiro SA Petrobas* [2005] EWCA Civ 891

(a) What is its scope?

Does it pervade the entire contract or just limited provisions?

Recent authority suggests that any such clause is likely to be strictly construed and/or held to be limited in its scope unless very widely drafted.

For example, see:

- *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a/ Medirest)* [2013] EWCA Civ 200
- *TSG v South Anglia Housing* [2013] EWHC 1151 (TCC); [2013] BLR 484
- *Bristol Rovers (1883) Ltd v Sainsbury's Supermarkets Ltd* [2016] EWCA Civ 160

(b) What does 'good faith' mean?

Different courts have expressed its meaning differently, according to context.

See, for example, the following recent cases:

- *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433 (CA):
 - o 'playing fair, coming clean, putting one's cards face upwards on the table'

- 'In essence, a principle of fair and open dealing'
- *Emirates Trading Agency LLC v Prime Mineral Exports Ltd* [2014] EWHC 2104
 - 'fair, honest and genuine'
- *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200
 - 'honestly endeavouring to achieve the contractual purpose'
- *Berkeley Community Villages Ltd v Pullen* [2007] EWHC 1330 (Ch)
 - 'observe reasonable commercial standards of fair dealing'
 - 'faithfulness to the agreed common purpose and consistency with the justified expectations of the other party'
- *Gold Group Properties Ltd v BDW Trading Ltd* [2010] EWHC 1632 (TCC)
 - 'act in a way that will allow both parties to enjoy the anticipated benefits of the contract'
- *CPC group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch)
 - 'to adhere to the spirit of the contract'
 - 'to observe reasonable commercial standards of fair dealing'
 - 'to be faithful to the agreed common purpose'
 - 'to act consistently with the justified expectations of the parties'
- *Yam Seng PTE Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB)
 - 'an expectation of honesty'
- *Hamsard 3147 Ltd v Boots UK Ltd* [2013] EWHC 3251 (Pat)
 - 'to deal on an open and collaborative basis'
- *Bristol Groundschool Ltd v Intelligent Data Capture* [2014] EWHC 2145 (Ch)
 - 'the test was whether conduct would be regarded as commercially unacceptable by reasonable and honest people'
- *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2015] 283 (Comm)

- 'a contractual discretion must not be exercised arbitrarily, capriciously or irrationally'

(c) How do you show an obligation to act in good faith has been satisfied?

More likely, how do you establish a breach?

Breach will certainly be demonstrated by proving bad faith; i.e. by proving dishonesty or malice.

But proving honesty or lack of malice alone is unlikely to be enough to prove compliance because good faith requires more than the absence of bad faith.

Good faith requires a conscientious approach to the exercise of contractual powers.

Therefore, the presence or absence of good faith should be tested both subjectively and objectively so as to test:

- The honest belief of the alleged contract breaker; and (if necessary)
- The conscientiousness of his approach judged against the standards of reasonable and honest commercial people.

Whether that approach shines forth from the recent cases is perhaps debatable.

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