
| RESEARCH ARTICLE**Critically Analyze Case Laws to Identify the Changes in Duty of Good Faith in English Contract Law****Ahmed Al-Raji***Barrister-at-Law (Lincoln's Inn); Lecturer, Notre Dame University Bangladesh***Corresponding Author:** Ahmed Al-Raji, **E-mail:** barristeralraji@gmail.com

| ABSTRACT

Generally, English contract law is not keen to recognize the duty of good faith, and the reason is ingrained in the fact that the English Legal System greatly values the significance of freedom of contract; hence, the ruling from various UK courts shows its reluctance to recognize the duty of good faith. However, recent case laws have given some indication that the position of the English Legal System is moving towards acknowledging the duty of good faith in some particular situations. The decision in *Yam Seng* played a legendary role in respect of this matter. Even though the decision of *Yam Seng* was not welcomed wholeheartedly by everyone, this case will always be regarded as a landmark case for introducing the notion of good faith in English contract law. Post-*Yam Seng*'s situation demonstrates that the obligation of good faith is finding its way to English law both by its inclusion as an express term and by implication. The objective of the research is to review and categorize significant case laws to determine how courts have interpreted and applied the duty of good faith in contractual relationships. This paper will examine the viewpoints of judges regarding the necessity and implications of good faith in contracts. This paper will also assess whether these cases reflect an acceptance of the duty of good faith as a legal principle.

| KEYWORDS

English Contract law, Good faith, Relational Contract

| ARTICLE INFORMATION**ACCEPTED:** 07 September 2024**PUBLISHED:** 02 November 2024**DOI:** 10.61424/ijlss.v1.i1.126

1. Introduction

English Contract Law has always opted for a hesitant approach when it comes to the principle of duty of good faith. However, in several civil law countries, such obligation has already taken up an established position to ensure that the contractual parties perform in good faith. Nonetheless, it cannot be denied that a long, heated debate over the topic of good faith has been going on for a very long time in English law, and its position has been ever-changing. It is an established rule that English law does not recognize good faith in the pre-contractual discussion, and due to that, it is not obligatory for the party to act in good faith prior to signing a contract.¹ A closer look at recent status shows that few common law countries have also started to recognize the doctrine of good faith, which in turn also encourages the UK courts to incorporate implied good faith obligation in the contract.² Many jurists even opined that the UK courts are willing to recognize the duty of good faith.³ Therefore, it has become imperative to examine

¹ Haemala Thanasegaran, *Good Faith in Insurance and Takaful Contracts in Malaysia* (1st edition, Springer 2016) 112

² Abdullah, N., Hanafi, H. and Murshamshul, M. K 'The Duty of Good Faith in Common Law: A New View on Contemporary Contract Law' (2017) 25 (S) *Pertanika J. Soc. Sci. & Hum.* 119 - 128

³ McKendrick, Ewan, *Contract Law: Text, Cases, and Materials* (5th ed, Oxford University Press 2012) 112

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to what extent the UK courts may recognize the duty of good faith in English contract law. In this paper, case laws relating to the duty of good faith will be explored, and the judiciary's view of this doctrine will be assessed.

1.1 The Objective of the Research

This research area has been explored well by respected researchers in different legal journals. The primary objective of this research is to assemble and scrutinize these academic insights, commentaries, and cases on the evolution of the doctrine of good faith and its present status in English contract law. This research will not speculate and predict the future of the doctrine of good faith in English Contract law but rather will be able to explain the development and changing situations of the doctrine of good faith by examining the case laws of the UK courts.

1.2 Relevance of the Research

This research will attempt to analyze the academic commentary, judges, and scholars' perspectives on the application of the duty of good faith in contract law. This paper will evaluate the case laws in relation to the duty of good faith and its development in the English law of contract.

Professor Roger Halson commented that Mr. Justice Leggatt, in the *Yam Seng case v International Trade Corporation Ltd*⁴, introduced an implied duty of good faith in the contract. The decision in *Yam Seng* suggested that a duty of good faith may be implied by law in the case of a relational contract. Moreover, in *Bates v Post Office Ltd* (No.3),⁵ the court pointed out that several factors, such as whether it is a long-term contract or involves significant investment by either party, need to be considered to determine whether the contract is a relational one. Leggatt J indicated his continued enthusiasm for a general doctrine of good faith.⁶

The duty of good faith is necessary because this obligation of good faith permits the party to avoid unreasonable commercial conduct. *Cathay Pacific Airways Ltd v Lufthansa*⁷ suggested that the most controversial area is the implied duty of good faith since the law did not reach any settled principle for such an obligation. The debate regarding the implied duty of good faith was to provide justice and assurance in the contract. It was assumed that this duty could balance between the certainty of the contract and commercially unacceptable behavior. However, the concern here is that imposing the implied obligation of good faith may produce too much uncertainty, and these duties may be ambiguous.

In *Russell v Cartwright & Ors*⁸, the claimant's argument was that the defendant acted in bad faith and there was an express obligation for good faith. However, the court did not find this argument valid and refused to acknowledge the existence of a broader obligation of good faith since it would contradict the express duty of good faith if the court had imposed an implied duty of good faith.

In *UTB LLC v Sheffield United Ltd & others*,⁹ the agreement was clearly written and formulated. The court did not find any express provision for duty of good faith in the agreement. The court observed that details of the pre-contractual negotiations were incorporated into the agreement. Sheffield United Ltd argued that UTB acted unfairly and submitted to the court to impose an implied duty of good faith. However, the court concluded that before imposing a broader duty of good faith, it would look into the entire factual scenario of the case to ascertain whether an implied duty of good faith can be applied.

The recent decisions of UK courts demonstrate that the court may imply the duty of good faith on the basis of fact rather than the law. Even though the court has established the "concept of relational contract" in order to imply a

⁴ [2013] EWHC 111

⁵ [2019] EWHC 606(QB)

⁶ Professor Roger Halson, (Contract Law, Undergraduate Laws, April 15, 2019) <<https://lawsblog.london.ac.uk/2019/04/15/good-faith-in-contract-law/>> Accessed on 15 November 2022

⁷ [2020] EWHC 1789

⁸ [2020] EWHC 41 (CH)

⁹ [2019] EWHC 2322 (Ch)

duty of good faith in the contract, the above cases suggested that the court will take a more critical approach to the implication of an implied duty of good faith on a case-by-case basis.

In *Yam Seng*¹⁰, the High Court held that there was an implied duty to act in good faith into a contract on the basis of it being a relational contract. Leggatt J opined that a general term of good faith could be implied either as a matter of construction or as a factual implication.¹¹ Hugh Collins, an academic, concurs with Leggatt J's general observation that the English common law treats obligations of good faith, loyalty, and cooperation originating from contractual arrangements in accordance with an unsatisfactory binary divide.¹² Mr. Justice Leggatt emphasized that there is likely to be an implied term of good faith in the particular cases.

Mr. Justice Leggatt expressed a contrasting opinion, expressing regret over the fact that English law 'would appear to be swimming against the tide' by not acknowledging a general obligation of good faith.¹³ A shift toward acceptance of express and implied obligations of good faith in connection to contractual performance has been seen in England and Wales case law in recent years.¹⁴

After reading the above cases, it seems to be a trend toward duty of good faith that may be implied in certain kinds of contracts. However, the court is still reluctant to accept the implied duty of good faith to all commercial contracts.

In this research, the case laws related to the obligation of good faith will be analyzed, and whether these case laws indicate the acceptance of good faith in English contract law will also be examined. In addition, this research will examine and arrange case laws to understand the approach of courts to identify the duty of good faith and how it will be imposed as an obligation to the contracting parties. The recent case laws and the viewpoints of judges and critics in this regard will be analyzed along with the present position of the implied duty of good faith in contract law.

1.3 Research Question

1. To what extent may a duty of good faith be imposed in the commercial contract?
2. What are the challenges for the implication of an implied duty of good faith in the commercial contract?

1.4 Methodology

Qualitative research methodology will be used in this paper.¹⁵ To find certain issues, qualitative research requires assessing and interpreting written content. I will explore primary sources like statutes and cases, as well as secondary sources like journal articles. After exploring these sources, outcomes will be evaluated from the socio-legal perspective while taking into account the broader effects of the legal issues of the implied duty of good faith, which is still under investigation. The analysis and interpretation of legal theories and case laws are going to be discussed with pertinent legal literature. By using this method, I will analyze legal rules found in cases, statutes, and regulations.¹⁶ The purpose of this research methodology will, therefore, be concerned with the evolving nature of the duty of good faith in English contract law as expressed in textbooks or journal articles. In this paper, I will be discussing the evolution of good faith in the English contract and the scope of acceptance of the implied duty of good faith in English contract law by analyzing primary and secondary sources of law. This method enables us to

¹⁰ *ibid* 4

¹¹ Carter JW and Courtney W, 'GOOD FAITH IN CONTRACTS: IS THERE AN IMPLIED PROMISE TO ACT HONESTLY?' (2016) 75 *The Cambridge Law Journal* 608

¹² Hugh Collins, 'Implied Terms: The Foundation in Good Faith and Fair Dealing, *Current Legal Problems*' (2014) 67 (1) *CLP* 297–331

¹³ Paul S. Davies, 'The Basis of Contractual Duties of Good Faith' (2019) 1 *Journal of Commonwealth Law* < <https://www.journalofcommonwealthlaw.org/article/8784-the-basis-of-contractual-duties-of-good-faith> > Accessed 16 November 2022

¹⁴ Paula Giliker, 'Contract Negotiations and the Common Law: A Move to Good Faith in Commercial Contracting?' (2022) 43 *Liverpool Law Rev* 175–202

¹⁵ Rattan Sing, *Legal Research Methodology* (2nd ed Lexis Nexis 2013) 140

¹⁶ *ibid*

collect in-depth insights and provide a comprehensive picture of changes in the duty of good faith in English contract law.

1.5 Literature Review

Paul S Davies, in the *Journal of Common Law*, was concerned about the basis of the implied duty of good faith. He compared several civil countries where the duty of good faith is already an established doctrine. His view was whether the obligation of good faith is the 'irreducible core' of the contract law or whether the court can imply this duty in the commercial contract. He preferred the implied duty of good faith. However, he opined that the best recommendation for the parties would be to make the obligation of good faith an express term of the contract.¹⁷

Hugh Collis was mainly criticized for only looking into the law of implied duty of good faith; rather, he suggested focusing on the facts. His opinion is that implied duty of good faith can only be implied by terms of the contract on a case-by-case basis.¹⁸

Jim Mason contrasted the presence of good faith provisions in other jurisdictions with the apparent hostile attitude of English law towards the principle of good faith. He also discussed the advantages of concretizing good faith obligation in English contracts and encouraged the development of this area of law.¹⁹

Ugo Draetta and Ralph Lake compared and contrasted the extent and foundation of pre-contractual liability under English, US, French, and German case laws. Along with that, they also discussed the scope of good faith obligation.²⁰

Kelda Groves discussed the explicit recognition of good faith obligation in French, German, and US legal systems in contrast to the position of the English legal system. The applicability of good faith obligation in the construction context has also been discussed.²¹

Sir Rupert Jackson drew a distinction between civil and common law legal systems regarding the recognition of the principle of good faith. While assessing what 'good faith' implies in construction contexts, the author also discussed the types of contracts in which good faith obligation is applicable by English courts.²²

Wayne Courtney meticulously analyzed the UK Supreme Court decision in *Braganza v BP Shipping Ltd*²³ along with the operation of 'Braganza Duty' and 'Wednesbury Reasonableness Test'.²⁴

C. Howard Cooper assessed and reviewed several case laws regarding relational contracts and implied terms of good faith and concluded that the implication of good faith obligation is unnecessary and only adds complexity.²⁵

Zhong Xing Tan compared the ruling in *Yam Seng*²⁶ with the decision in the Canadian case of *Bhasin*²⁷ and also reviewed the key features of both cases and their role in the debate between contextualism and formalism. The subsequent development of the principle of good faith has also been discussed.²⁸

Severine Saintier highlighted the application of good faith in civil and common law legal systems while also discussing the way English and French courts implemented the good faith obligation. The findings of *Yam Seng* were analyzed with a particular focus on how good faith should be identified and the scope of its obligation.²⁹

¹⁷ Paul S. Davies, 'The Basis of Contractual Duties of Good Faith' (2019) 1 *Journal of Commonwealth Law* < <https://www.journalofcommonwealthlaw.org/article/8784-the-basis-of-contractual-duties-of-good-faith> > Accessed 16 November 2022

¹⁸ Hugh Collins, 'Implied Terms: The Foundation in Good Faith and Fair Dealing' (2014) 67 *CLP* 297, 314

¹⁹ Jim Mason, 'Contracting in good faith- giving the parties what they want' (2007) 23(6) *Const. L. J* 436

²⁰ Ugo Draetta and Ralph Lake, 'Letters of intent and pre-contractual liability' (1993) 7 *I. B. L. J* 835

²¹ Kelda Groves, 'The duty of Good Faith in four legal systems' (1999) 15(4) *Const. L. J* 265

²² Sir Rupert Jackson, 'Does good faith has any role in construction contract' (2018) 34(5) *Const. LJ* 313

²³ [2015] *UKSC* 17

²⁴ Wayne Courtney, Reasonableness in contractual decision making (case comment) (2015) 131 *L.Q.R.* 552

²⁵ C. Howard Cooper, Occam's razor or Leggatt's multiblade- good faith or a clean shave? (2021) 7 *J.B.L.* 580

²⁶ *ibid* 4

²⁷ *Bhasin v Hrynew* [2014] *SCC* 71

²⁸ Zhong Xing Tan, 'Keeping faith with good faith? The evolving trajectory post-Yam Seng and Bhasin' (2016) 5 *J.B.L.* 420

Jan van Dunne, while reviewing how English courts have defined 'good faith' and approached its application in the English legal system, the author also considers whether English law should adopt a general good faith obligation. Furthermore, the author examined and analyzed the recognized position of good faith obligation in France.³⁰

J. W. Carter and Wayne Courtney meticulously evaluated the findings of Yam Seng by Leggatt J. in their article in order to assess whether the implication of good faith term can be possible and also suggested inadvertent outcomes that can arise from it.³¹

Joseph T Robertson, in his article titled 'Good Faith as An Organizing Principle in Contract Law: Bhasin v Hrynew – Two Steps Forward & One Look' mentioned Canada's position on duty of good faith. The writer addressed the Canadian judiciary was not sure whether the pre-contractual duty of good faith may be implied or not. However, Bhasin has brought significant changes in the earlier rulings of duty of good faith in the contract.³²

Professor Roger Halson has addressed the duty of good faith regarding one of the requirements for the formation of a contract in his subject guide of the University of London. However, he also raised the concern of the necessity of duty of good faith in the contractual performance.³³

Paula Giliker, in his article titled 'Contract Negotiations and the Common Law: A Move to Good Faith in Commercial Contracting?' addressed the duty of good faith in negotiation as a well-established law in civil law jurisdiction; however, in common law jurisdiction, it is still a debatable issue.³⁴

J Enman-Beech, in her article titled 'The Good Faith Challenge,' discussed the challenges of implementing the duty of good faith, found three strategies for overcoming challenges, and evaluated the success of these strategies in Canada.³⁵

Samuel Martin discussed in 'The Evolution of Good Faith in Western Contract Law' that there are several Western countries where the duty of good faith was codified in the civil code. On the other hand, the UK did not formally recognize the duty of good faith apart from their attempt from the judicial rulings. Samuel Martin investigated how the duty of good faith has evolved from Roman Law to Civil law and Civil Law to common law.³⁶

1.6 Limitations of the study

The study is limited to a specific jurisdiction, making it challenging to generalize findings to other legal systems or regions. There is also restriction to access to some legal databases and documents may be restricted, limiting the comprehensiveness of the research. Moreover, the selection of cases may introduce bias and not fully represent the broader legal understanding of the duty of good faith.

2. What Is Good Faith

The law related to an implied duty of good faith is growing fast.³⁷ In modern times, we have seen a rebirth of the idea of good faith after the decisions of *Yam Seng Pte Ltd v International Trade Corp Ltd*³⁸ and *Bhasin v Hrynew*.³⁹

²⁹ Severine Saintier, 'The elusive notion of good faith in the performance of a contract, why still a bête noire for the civil and common law' (2017) 6 J.B.L. 441

³⁰ Jan van Dunne, 'On a clear day, you can see the continent-the shrouded acceptance of good faith as a general rule of contract law on the British isles' (2015) 31(1) Const. L.J. 3

³¹ J. W. Carter and Wayne Courtney, 'Good faith in contracts-is there an implied promise to act honesty?' (2016) 75(3) C.L.J. 608S

³² Joseph T Robertson, 'Good Faith as An Organizing Principle in Contract Law: Bhasin v Hrynew – Two Steps Forward & One Look' (2016) 93-3 Canadian Bar Review 809

³³ Professor Roger Halson, (Contract Law, Undergraduate Laws, April 15, 2019) <https://lawsblog.london.ac.uk/2019/04/15/good-faith-in-contract-law/> > Accessed on 15 November 2022

³⁴ Paula Giliker, 'Contract Negotiations and the Common Law: A Move to Good Faith in Commercial Contracting?'(2022) 43 Liverpool Law Rev 175–202

³⁵ Enman-Beech, John, 'The Good Faith Challenge' (2019) 1 Journal of Commonwealth Law 35

³⁶ Samuel Martin, 'The Evolution of Good Faith in Western Contract Law' (SSRN, 25 May, 2018) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3177520 > accessed 20 July, 2023

³⁷ Philippa Hopkins QC, Commercial contracts, individual terms, and good faith: where do we go from here? (2021) J.B.L 219

³⁸ ibid 4

The first thing that needs to be asked is what constitutes "good faith"? There is no universally accepted definition dedicated to the principle of good faith, as the topic might arise in a variety of commercial contexts, and the viewpoint on the matter varies depending on the context in which it appears. In *Berkeley Community Villages Ltd and another v Pullen and others*⁴⁰, Morgan J stated that parties to the contract would act honestly and fairly, and prudently. However, it can be said that good faith sets honest standards of conduct for parties to the agreement. Contrary to the English legal system, the duty of good faith is a recognized duty in most legal systems.⁴¹ In civil law systems, the concept of good faith is a technique employed to ensure fair dealing between contracting parties. In general, acting honestly means acting in good faith without any ill intention. In a recent decision, Leggatt J in *Yam Seng* noted that the content of the duty of good faith is context sensitive and has two aspects: honesty and fidelity to the parties' bargain. He also put forward a test for good faith that objectively assesses whether reasonable and honest people would contemplate the conduct as commercially acceptable in that context. A few more recent authorities, including *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd*⁴² and *Greenclough Ltd v National Westminster Bank Plc*,⁴³ have also emphasized the significance of context while discussing the duty of good faith.

English law's relationship with the notion of good faith is contentious and appears to be evolving throughout time. Although English contract law does not recognize a general duty of good faith, this obligation is increasingly being included in commercial contracts, both explicitly and implicitly. In this research, recent case laws will be analyzed to get a picture of the consequences and limitations of good faith.⁴⁴

2.1 The History of the Doctrine of Good Faith

The idea of "good faith" first appeared in Roman law. The Latin word "bona fides" means good faith in business. For the very first time, the jurists of Rome identified the notion of good faith in business dealings.⁴⁵ Throughout Europe's medieval times, the notion of good faith persisted in legal jurisprudence. This notion of good faith is also identified by the Canon law as well.⁴⁶

While the idea of good faith can be traced back to a long time ago,⁴⁷ the implication of an obligation of good faith in performing the contract is a relatively modern development in contract law. It has been very emerging since the Nineteenth Century.⁴⁸ The notion of the implied duty of good faith has traditionally been very limited in the United Kingdom. The legal system of England has historically adhered to the notion of "freedom of contract." However, there are several civil law nations where a general duty of good faith is expressly established.

The English Legal System has started to acknowledge the few occasions when good faith may be assumed in contracts. It is frequently applied to particular kinds of contracts, such as contracts of employment and insurance policies.

2.2 The Traditional Approach to Good Faith

Except in certain areas of law, such as insurance and partnership law, English law does not have an overarching concept of good faith. Instead of acknowledging an implicit duty of good faith, the UK court's preferred approach is to base their decision on well-established legal principles as it has the advantage of being certain and unambiguous about how contractual obligation would be upheld.⁴⁹ In addition, the UK courts are more inclined to put emphasis on freedom of contract and are reluctant to interfere with the party's commercial bargain. Such less consideration

³⁹ [2014] SCC 71

⁴⁰ [2007] EWHC1330(Ch)

⁴¹ *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433

⁴² [2013] EWCA Civ 200

⁴³ [2014] EWHC 1156 (Comm)

⁴⁴ Philippa Hopkins QC, 'Commercial contracts, individual terms and good faith: where do we go from here?' (2021) J.B.L 219

⁴⁵ Samuel Martin, 'The Evolution of Good Faith in Western Contract Law' (2018) *Legal History Journal* 20

⁴⁶ *ibid*

⁴⁷ Stephen Waddams, 'Good Faith and Contract Law: A General Principle Reconsidered' (1997) 56(1) *The Cambridge Law Journal* 70

⁴⁸ Harold Dubroff, 'The implied covenant of good faith in contract interpretation and gap filling: Reviving A Revered Relic, (2006) 80 (2) *St. John's Law Review* 560

⁴⁹ Shy Jackson, 'Good Faith Revisited' (2014) 30 (8) *Construction Law Journal* 379

of the principle of good faith is primarily attributable to the positivist approach used by the English courts, which, while giving judgments and reasoning, mostly focused on the doctrine of stare decisis rather than relying on any overarching policy oriented ideas.⁵⁰

However, there were indications of a growing good faith principle in common law contracts as early as 1766. Lord Mansfield, in *Carter v Boehm*,⁵¹ outlined the good faith principle as a concept that is applicable to all contractual dealings and also pointed out that no contracting party should conceal any extraordinary facts from the other party of the transaction.⁵² A similar approach was also seen to be taken by Lord Cockburn C.J in *Stirling v Maitland*⁵³ and later by Lord Blackburn in *Mackay v Dick*.⁵⁴ Nonetheless, none of these decisions were ingrained in English law as incorporating such overriding principles in English law would result in cases being decided on the grounds of unfairness and morality, which would only generate uncertainty.⁵⁵

The conventional stance of English law with respect to the doctrine of good faith can be perceived in *Walford v Miles*⁵⁶, where Lord Ackner labeled the concept of a duty to negotiate in good faith as inherently repugnant and observed that the adversarial position of the parties contradicts with such terms of the contract. While giving his reasoning in *Walford*, he heavily relied on the decision of *Courtney & Fairbairn Ltd v Tolaini Bros (Hotel) Ltd*⁵⁷, where Lord Denning M.R observed that a contract that is negotiated in good faith has no binding effect due to impossibility of escalating damages by the court and the uncertainty surrounding whether or not the negotiation will be successful and ultimately concluded that an agreement to negotiate in good faith or 'lock in agreement' is unenforceable as it lacks uncertainty and is inherently inconsistent with the position of negotiating parties.

Later in *Interfoto*⁵⁸, Lord Bingham described good faith as "*playing fair*", "*coming clean*," or "*putting one's cards face upwards on the table*" and finally came to the conclusion that it "*is, in essence, a principle of fair and open dealing*".⁵⁹ Moreover, he rightly observed in his judgments that though many civil law systems recognized the concept of good faith, English law, instead of adopting such overriding principle developed a piecemeal approach and through such piecemeal solution such as – equity or establishing a range of situation specific principles, English law has recognized some sort of good faith obligation to deal with the matter of unfairness.⁶⁰ This also explains the reason behind the decline to impose an explicit standard of good faith in pre-contractual negotiation, as seen in the case of *Walford*.

The attitude of English law regarding the notion of good faith and fair dealing appeared to be unambiguous in the last years of the 20th century, and that denies the existence of the said principle.⁶¹ English law's approach towards promoting the idea of commercial certainty over good faith appears to be more circumspect, which is reflected in Corbin's warning that there may be an excessive price to be paid in the pursuit of legal certainty.⁶² However, any introduction of necessary reform by the Parliament has always been welcomed, as evidenced by the express reference to good faith in the Unfair Contract Terms Act 1977, the Unfair Terms in Consumer Contracts Regulation 1999, and the Commercial Agents (Council Directive) Regulations 1999.

⁵⁰ *ibid* 30

⁵¹ [1766] 3 BURR 1905

⁵² P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (New York: Oxford University Press, 1979)

⁵³ [1864] 122 E.R. 1043

⁵⁴ [1881] 6 App. Cas. 251

⁵⁵ William Tetley, 'Good Faith in Contract: Particularly in the Contracts of Arbitration and Chartering' (2004) 35(4) *Journal of Maritime Law & Commerce* 570

⁵⁶ [1992] 1 All E.R. 453

⁵⁷ [1975] 1 All ER 716

⁵⁸ *ibid* 23

⁵⁹ *ibid* 23 at [439]

⁶⁰ Peter Rosher, 'Good faith in construction contracts: comparing French and English contract law approaches' (2020) 2 *I.B.L.J.* 145

⁶¹ Jan Halberda, 'The Principle of Good Faith and Fair Dealing In English Contract Law' (2020) 64(3) *Pravovedenie* 312

⁶² Arthur Corbin and Joseph M Perillo, *Corbin on Contracts* (1960), Vol. 3, para. 609, p. 689

2.3 Yam Seng: The 'Good Faith' Movement

The traditional position of English law regarding acknowledging the essence of good faith in regulating the performance of the contract has always been rather unyielding. However, a ray of hope appeared when Yam Seng's decision⁶³ came to light.

The case concerned a dispute over a distribution contract; under the agreement, the ITC (defendant) gave rights to Yam Seng (claimant) to distribute a particular fragrance bearing the brand name 'Manchester United' across specific geographical areas. However, in due course, the relationship between the contractual parties started to deteriorate, leading the claimant to terminate the contract and claim damages on the grounds of breach of contract and misrepresentation. The allegation pointed to the defendant's repeated failure to ship the agreed product promptly, undercutting the agreed prices, providing false information, and, in general, failing to fulfill the contractual obligation in good faith.

In his judgment, Mr. Justice Leggatt acknowledged the English court's historic reluctance to recognize the duty of good faith in performing contractual obligation; however, he referred to such aversion as 'swimming against the tide'.⁶⁴ Furthermore, Leggatt J referred to the observation of Bingham LJ in *Interfoto*⁶⁵ that most civil law legal systems-including Italy, France, and Germany, recognized a general principle of good faith, and from that source, the principle has already entered the ambit of English law via EU legislation.⁶⁶ Moreover, Leggatt J noted the welcoming position of good faith in common law countries- the United States of America, Australia, and Canada- and showed that it is not 'antithetical to Anglo-Saxon individualism'.⁶⁷

While acknowledging that English law has yet to reach the stage of acknowledging the requirement of good faith as a duty implied by law in all commercial contracts, Leggatt J observed that the English Court's hostility towards the notion of good faith is rather misplaced⁶⁸. To demonstrate his willingness to consider a good faith obligation, he examined the test for the implication of a term based on what the contract, read as a whole against the relevant background, could reasonably be understood to mean as set out by Lord Hoffman in *Belize Telecom Ltd.*⁶⁹ In *Yam Seng*, the judge stressed that modern case law recognizes that contracts are constructed against the background of shared understating while embracing both matters of fact known to the parties as well as shared values and norms of behavior, which may cover norms that command general social acceptance or norms that are specific to a certain trade, commerce activity, or contractual relationship. Moreover, he analyzed several lines of authority, including *Rainy Sky SA*,⁷⁰ *HIH Casualty*,⁷¹ *Berkeley Community*,⁷² and *CPC Group*⁷³, and based on his analysis, came to the decision that there are two core aspects of good faith: a duty of honesty and fidelity to bargain. He observed that the requirement of honesty satisfies the traditional test for the implication of a term; the term is apparent and essential for business efficacy, and such obligation of honesty also extends to not engaging in conduct that is improper or commercially unacceptable. While considering whether the conduct falls within the ambit of commercially unacceptable, the court needs to explore the presumed intention of the parties and assess objectively whether a reasonable and honest man would consider the conduct as commercially unacceptable or not, and this was also used as the test of good faith.⁷⁴

Leggatt J further noted that English law has already drawn differences between certain relationships- such as partnership, trusteeship, and other fiduciary ties- while some of them hold arduous disclosure obligations, other holds no such duty of disclosure. The judge did not make any recommendations regarding the existence of a

⁶³ *ibid* 4

⁶⁴ *ibid* 4 at [124]

⁶⁵ *ibid* 23

⁶⁶ *ibid* 44

⁶⁷ *ibid* 4 at [125-127]

⁶⁸ *ibid* 4 at [153]

⁶⁹ *Attorney General for Belize v Belize Telecom Ltd* [2009] 1 WLR 1988

⁷⁰ *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900

⁷¹ *HIH Casualty v Chase Manhattan Bank* [2003] 2 Lloyd's Rep 61

⁷² *Berkeley Community Villages Ltd v Pullen* [2007] EWHC 1330 (Ch)

⁷³ *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch)

⁷⁴ *ibid* 4 at [144]

general duty of disclosure. There may not be any duty to divulge more information than is required by law in a straightforward exchange contract. However, Leggatt J. contends that long-term collaborative agreements or 'relational contracts' involve a distinct form of commitment from the parties⁷⁵. Here, the circumstances and "norms" might imply a responsibility of disclosure.

The Judge reviewed the English court's reluctant approach to recognize an implied duty of good faith at some length and sought to deal with the three reasons for 'traditional English hostility' as put forward by Professor McKendrick.⁷⁶ Leggatt J reasoned that English law does not need to discard its distinctive 'case by case approach' in order to incorporate the notion of good faith into account in view of the fact that the content of the duty is significantly reliant on context and is established through the construction of contract⁷⁷. Moreover, the parties' right to pursue their own interest never falls prey to unlawful constraint since the duty of good faith finds its foundation in the presumed intention of the party.⁷⁸ In addition to that, due to the existence of such a basis, the contracting parties also procure an authority to alter the nature of their obligation, including excluding any contractual obligation or liability altogether. However, it is improbable that any contracting party would seek to expressly eliminate the fundamental obligation to act honestly from their contract.⁷⁹ Overall, Leggatt J held the view that the principle of good faith is not contradictory to English law and can be implied, as a matter of fact, mostly in relational contracts. He also eliminated the possibility that acknowledging a duty of good faith would create uncertainty, as nothing about the notion is overly ambiguous or impracticable, and the application of it entails no more ambiguity than the process of interpreting a contract.⁸⁰

2.4 Position After *Yam Seng*:

Few decisions emerged in 2014 supporting the findings of *Yam Seng*; the most notable was *Bristol Groundschool Ltd*⁸¹, where the Court of Appeal assessed the possibility of implying a duty of good faith in business dealings and opined that there could be a general obligation of good faith in the English legal System in particular cases like long-term relationship business dealings. However, the above case did not establish a judicial precedent for implied duty of good faith.

Though Leggatt J.'s findings had a significant impression on the discussion over the existence of implied good faith obligation and were welcomed by few commentators, there were a few articles that disagreed with Leggatt J.'s ruling in *Yam Seng*, most notably those by Professors Carter and Courtney who claimed that it was improper and unlawful to assume a duty to perform in good faith prior to deriving particular duties out of that overarching or general duty⁸².

Moreover, further rulings have demonstrated that the notion of duty of good faith is not yet established in English law. For instance, in *Mid Essex*⁸³, the Court of Appeal drifted away from the reasoning of Leggatt J. and demonstrated that even when a contract contains an express clause requiring the parties to perform good faith obligation, the scope of that obligation may be constrained to extremely narrow obligations and that there is no such thing as a universally applicable good faith requirement.⁸⁴ Lord Beatson LJ observed that when dealing with detailed contracts containing specific provisions for particular occurrences, the court must take special care not to construe a general obligation to perform a contractual obligation in good faith.⁸⁵ In *Mid Essex*, the judge opted for the doctrine of freedom of contract as giving effect to explicitly agreed terms by the contractual parties over the inclusion of other terms in the contract through a general principle of good faith would ensure certainty. The same

⁷⁵ *ibid* 4 at [142]

⁷⁶ Ewan McKendrick, *Contract Law* (9th edn Palgrave Promotional 2011), at pp.221–222

⁷⁷ *ibid* 4 at [147]

⁷⁸ *ibid* 4 at [148]

⁷⁹ *ibid* 4 at [149]

⁸⁰ *ibid* 4 at [152]

⁸¹ *Bristol Groundschool Ltd. v. Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch)

⁸² Peter Rosher, 'Good faith in construction contracts: comparing French and English contract law approaches' (2020) 2 I.B.L.J. 19

⁸³ *Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust* [2012] EWHC 781

⁸⁴ Jan van Dunné, 'On a clear day, you can see the continent - the shrouded acceptance of good faith as a general rule of contract law on the British Isles' (2015) 31(1) Const. L.J. 3–25

⁸⁵ *ibid* at [150]

approach was adopted in subsequent cases with similar issues, for instance, in *TSG, Portsmouth CC*, and *Monde Petroleum*⁸⁶.

Following *Yam Seng*, Leggatt J again attempted to invigorate his claim of English law being ready to recognize the duty of good faith in *MSC Mediterranean Shipping*⁸⁷. The judge pointed out several findings on the exercise of contractual rights and came to the conclusion that the necessity of good faith in contractual negotiation is becoming increasingly accepted in the common law legal system.⁸⁸ The Court of Appeal, however, disregarded Leggatt J's reasoning and observed that the contract law should evolve within its established principles instead of looking for an overarching principle of good faith derived from diverse sources.⁸⁹ Moore-Bick LJ rejected the High Court's conclusion that there had become a greater acceptance of the need for good faith in the contract and also suggested that a notable risk exists if a general principle of good faith were developed as it could be used both to contradict and to support the terms of the parties' agreement.⁹⁰ Such risk is analogous to adopting an unduly broad approach to contract interpretation as recognized in *Arnold v Britton*⁹¹. This case especially emphasized the implied duty of good faith that can be incorporated in certain circumstances, but not always, in the particular relational contract.

However, while the idea of a general duty of good faith has been disregarded, an increasing amount of rulings from the later part of 2015 have accepted the more constrained claim that in the specific contractual setting of "relational contracts," a party to the contract need to perform his act in good faith may be inferred in fact. For example, in *Property Alliance*⁹², Asplin J accepted that good faith obligation may be recognized in some 'recognized categories' of contracts.⁹³ Later, in *Monde Petroleum*⁹⁴, the court opined that an implied duty of good faith could be used in a joint venture. Moreover, in the case of *National Private Air Transport*⁹⁵, Blair J endorsed *Yam Seng* but concluded that a sublease was not appropriate to imply an obligation of good faith. In 2017, the Court of Appeal in *Wood*⁹⁶ recognized the duty of good faith but also mentioned that it is not a 'free-standing duty'. It requires an express clause for duty of good faith to enforce the duty between the parties.

Later in *Bates*⁹⁷, Fraser J endorsed the implication of good faith obligation in a 'relational contract' and also provided a non-exhaustive list of factors to determine whether the contract is relational, which includes high levels of cooperation, communication, and predictable performance under the contract, expectations of loyalty and mutual confidence, an exclusive relationship was maintained between the contracting and few others.⁹⁸ However, Fancourt J in *UTB LLC*⁹⁹ criticized the approach adopted by *Bates*. Instead, he suggested that the correct approach would be to consider whether a reasonable reader would contemplate that an obligation of good faith is essential for the proper execution of the contract.¹⁰⁰ Furthermore, in *Essex County Council*,¹⁰¹ though the reasoning of *Bates* was followed, Pepperall J was of the view that the non-exhaustive list, as mentioned in *Bates*, should not be followed rigidly.

In *Mears Group PLC*,¹⁰² the Court of Appeal recognized the implied duty of care in a construction contract. However, the above case did not establish a judicial precedent for implied duty of good faith. In other words, this case did not

⁸⁶ *Monde Petroleum SA v Westernzagros Ltd* [2016] EWHC 1472 (Comm) at [267]

⁸⁷ [2015] EWHC 283 (Comm)

⁸⁸ *ibid* at [97]

⁸⁹ [2016] EWCA Civ 788 at [45]

⁹⁰ *ibid* at [45]

⁹¹ [2015] UKSC 36

⁹² *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2016] EWHC 3342 (Ch) at [275]–[276] (Asplin J)

⁹³ *ibid* at [275]–[276]

⁹⁴ *ibid* 70

⁹⁵ *National Private Air Transport Services Co (National Air Services) Ltd v Creditrade LLP* [2016] EWHC 2144 (Comm) at [132]–[136] (Blair J)

⁹⁶ *Wood v Capita Insurance Services Ltd* [2015] EWCA 839

⁹⁷ *ibid* 5

⁹⁸ *ibid* 5 at [725]

⁹⁹ *ibid* 9

¹⁰⁰ *ibid* 9 at [203]

¹⁰¹ *Essex County Council v UBB Waste (Essex) Ltd* [2020] EWHC 1581 (TCC)

¹⁰² *Mears Group PLC v Costplan Services (South East) Ltd and Others* [2019] EWCA Civ 502

set out a universal duty of good faith in all commercial relationships. The duty of good faith was exclusively given to the construction contract in this case.

The English court has also long established the position that when a contractual dealing confers unilateral discretionary power on one contractual party, that party is obligated to exercise the duty of rationality. In essence, this duty entails exercising discretion reasonably, in good faith, and taking into account relevant factors while reaching a decision, whether arbitrarily or perversely.¹⁰³ This duty is referred to as 'Braganza Duty', named after a leading Supreme Court Case.¹⁰⁴

The implied duty of good faith was elaborately discussed in *Candey*¹⁰⁵, and the Court of Appeal addressed how challenging the position will be for a claimant to overcome the requirement that the contract in question is 'relational' in nature to prove that an implied obligation of good faith has been breached. Coulson LJ's pejorative tone in his decision in *Candey* does not give the impression that "relational contracts" would be broadly defined to imply a duty of good faith into a broad class of contracts; rather, it pointed out that only a relatively few cases have succeeded relying on this ground.¹⁰⁶ In addition, to determine whether the contract is relational or not, the learned judge used Fraser J.'s checklist in *Bates* merely as a "sense check rather than a series of statutory requirements".

In comparison to other countries where the general duty of good faith is well-established, the English legal system is still undetermined regarding the notion of good faith. This is still considered a debatable issue whether the English legal system is going to acknowledge an obligation of good faith in a contract or not. The underlined concern here is that this duty will generate unfairness in the contract or it might lead to the risk of uncertainty and increase the multiplicity of legal proceedings on the good faith cause of action. However, the recent development demonstrates the UK's attempt to recognize this duty, even if only in particular contexts such as long-term relationship contracts or relational contracts.

2.5 Recent Development in the Good Faith Contract Issue

It has already been established that English contract law does not recognize the principle of good faith.¹⁰⁷ However, the Court of Appeal gave crucial guidance on how to handle these contractual good-faith obligations in *Mark Faulkner*.¹⁰⁸ Since there was an express good faith clause between the parties in this case, the High Court judge set a number of requirements for enforcing the express contractual duty of good faith by following the case of *Unwin*.¹⁰⁹ However, the High Court's judgment was overturned and was mentioned as a very broad approach adopted by the High Court judge.¹¹⁰ After reviewing the leading case authorities from different jurisdictions, the Court of Appeal concluded that the "fundamental" condition of the good-faith obligation requires both parties to behave honestly; depending on the particular scenario, this obligation may be broken by actions performed in bad faith, which might include actions that could be considered "commercially unacceptable by reasonable and honest people"¹¹¹ and hence upholds the crucial principle of guiding English law's acceptance of contractual good-faith obligations. Furthermore, the ruling makes it clear that a party covered by a good-faith clause must act honestly, at the very least.

Some developments in English contract law indicate a potential trend toward establishing an obligation of good faith in certain cases. For instance, in *Balfour Beatty*,¹¹² the Court of Appeal noted that good faith obligation can be

¹⁰³ Wayne Courtney, 'Reasonableness in contractual decision making (case comment)' (2015) 131 L.Q.R 552

¹⁰⁴ *Braganza v BP Shipping Ltd.* [2015] UKSC 17

¹⁰⁵ *Candey Ltd v Bosheh* [2022] EWCA Civ 1103

¹⁰⁶ *ibid* at [31]

¹⁰⁷ Haemala Thanasegaran, *Good Faith in Insurance and Takaful Contracts in Malaysia* (1st edition, Springer 2016) 173

¹⁰⁸ *Mark Faulkner & Ors v. Vollin Holdings Limited* [2022] EWCA Civ 1371

¹⁰⁹ *Unwin v Bond* [2020] EWHC 1768 (Comm)

¹¹⁰ Oliver E. Browne and Alex Cox, Meaning of "Good Faith" Under English Law: Latest Clarification (2022), Latham & Watkins on November 10, 2022

¹¹¹ *ibid*

¹¹² *Balfour Beatty v. MW High Tech Projects* [2020] EWHC 1413 (TCC)

implied in the relational contract. In addition, *Yam Seng*¹¹³ raised the possibility that English law is heading towards the implied duty of good faith, similar to civil law countries.

In the context of English law, the current position regarding good faith is that it is not recognized as a standard imposed by the operation of law.¹¹⁴

Moreover, after departing from the EU, the government intended to keep some EU directives.¹¹⁵ As a result, the intention of the post-Brexit government is to maintain good faith in contract law.

3. Good Faith in Civil Law

The development of the concept of good faith in civil law is attributable to its deep-rooted history in Roman law, which is the notion itself derived from the Roman theory of 'Bonafide. Unlike the common law countries, the principle of good faith appears to be more settled in civil law while acknowledging its impact in both pre-contractual and contractual contexts. However, the scope and extent to which the principle of good faith has been adopted in different legal and legislative systems vary from country to country. The concept of "good faith" is commonly recognized in most civil law statutes, including the French Civil Code (1804), the German Civil Code (BGB) (1900), and the Italian Civil Code (1942). These statutes provide examples of what "Good Faith" entails in different contexts.¹¹⁶

3.1.1 France

The absence of strict judicial precedence in the French Legal System did not put a stop to the French Court's practice of creating various civil law rules relating to contracts and obligations. Some of these civil rules were, in fact, codified by the Ordinance 2016, which introduced significant substantive and structural changes to French contract law, including the focus on good faith obligation in contract law.¹¹⁷ The concept of good faith now stems from Article 1104 of the French Civil Code, pursuant to which the obligation to negotiate, perform, and conclude a contract in good faith is obligatory and applicable to the parties of the contract from the pre-contractual phase to the dispute phase and thus took a remarkable step forward from its previous position by filling up the legislative gap in respect of good faith obligation.¹¹⁸ Under the previous position, as addressed under former Article 1134 of the French Civil Code, the obligation of good faith was solely imposed on the contracting parties during the performance of the contract, ignoring and excluding any obligation to act in good faith during the pre-contractual negotiation stage or contract formation.¹¹⁹

The 2016 Reform also introduced Article 1112, which elucidates the contractual parties' authority to commence, continue, or break off any pre-contractual negotiations as long as the mandatory specific requirement of good faith is satisfied, thus giving rise to pre-contractual liability.¹²⁰

The sanction for violating a good faith obligation essentially depends on whether the contract has been formally negotiated or not. Where the contract is founded upon informal negotiation, a party may be found liable in tort and may be liable to pay compensation, including reimbursing fees and expenses for breaking off a negotiation without any proper justification.¹²¹ The consequence of breaking off a negotiation where the contractual parties have already entered a contract as part of their negotiation is different, as the damages granted by the court will be solely based on contractual liability, which might also include recovering a proportion of the anticipated benefit of

¹¹³ *ibid* 4

¹¹⁴ *ibid* at [249]

¹¹⁵ Paula Giliker 'Interpreting retained EU private law post-Brexit: Can commonwealth comparisons help us determine the future relevance of CJEU case law?' (2019) 48(1-2) Common Law World Review 15

¹¹⁶ Abdullah, N., & Ghadas, Z. A. A. 'The application of good faith in contracts during a force majeure event and beyond with special reference to the Covid-19 ACT 2020' (2023) 14(1) UUM Journal of Legal Studies 141

¹¹⁷ Peter Rosher, 'Good faith in construction contracts: comparing French and English contract law approaches' (2020) 2 I.B.L.J 19

¹¹⁸ *ibid*

¹¹⁹ Guy Robin, 'The Principle of Good Faith in International Contract' (2005) 6 I.B.L.J 695,696

¹²⁰ Jean-Luc-Soulier, 'Reform of French Contract law: is the Civil Code victim of the spirit of the times?' (Soulier Avocats, 30 January 2017 < www.law.ox.ac.uk/sites/default/files/migrated/oscola_4th_edn_hart_2012quickreferenceguide.pdf> accessed 14 July 2023

¹²¹ *ibid* 90

the contract.¹²² In addition, the French court may order a limited form of specific performance of a contract, but only if the parties to a contract have entered into an agreement containing essential elements or fundamental obligations. Moreover, the courts have the authority to opt for a rarely used remedy of ordering the contractual parties to recommence negotiation and may even appoint a "mandataire-négociateur" to follow the negotiation process.¹²³

3.1.2 Germany

In the German legal system, the doctrine of good faith is founded on two essential regulations: the German Civil Code (BGB) and the General Conditions for Affairs (AGBG), both of which elucidate a positive approach to the concept of good faith and has also attached to it positive extra-contractual obligation which in turn facilitate the performance of the contract.¹²⁴

Article 157 and Article 242 of the German Civil Code, the Burgerliches Gesetzbuch ("BGB") expressly impose an obligation on the contractual parties to perform their obligation in good faith while taking into consideration the customary practice.¹²⁵ In addition, Article 9 of AGBG, which was incorporated in Articles 305 to 310 of the BGB, highlights the significance of good faith in business relations by making use of the doctrine of good faith in order to control the contents of the contract.¹²⁶

However, in contrast to the French court's reluctant approach to accepting the doctrine of good faith as an appropriate explanation for the variation of a long-term contract, the German courts seem to adopt a more relaxing approach in this regard, especially if the debtor's obligation to perform has been affected because of a change in economic circumstances making it significantly different from the originally contemplated performance. In other words, the German courts have approved judicial re-allocation of contractually agreed risk on the basis of Article 157 of the BGB.¹²⁷

3.2 Good Faith In Common Legal System

The question of good faith often plays a strategic role in differentiating between civil law and the common law legal system. Even though the principle of good faith is embedded in civil law, the implied duty to perform a contractual obligation in good faith and fairness has been recognized and adopted in many common law legal systems.

3.2.1 The United States of America

The statutory basis for the doctrine of good faith is recognized in the Uniform Commercial Code (UCC), which has been adopted in one form or another in most states of the United States. The most relevant provisions with respect to performing contractual obligations in good faith are embraced by sections 1-203 of the UCC, stating that every contract or duty within this Act imposes an obligation of good faith for its performance or enforcement.¹²⁸ The same principle is also adopted in the second Restatement of Contracts; in particular, under section 205 of the Restatement, an obligation of good faith is implied into all contracts, including those contracts not covered by the UCC.¹²⁹ Although the Restatement has no statutory force, it acts as a persuasive authority and is pervasively used by the courts. Neither the Uniform Commercial Code nor the Restatement (Second) of Contract embraces the obligation of good faith in the pre-contractual phase rather than only giving effect to an existing agreement conditioned by the inherent requirement of good faith.¹³⁰ However, the comment to section 205 of the Restatement indicates that 'bad faith' during the negotiation phase is actionable.¹³¹

¹²² *ibid* 90

¹²³ *ibid* 90

¹²⁴ *ibid* 91, 697

¹²⁵ Kelda Groves, 'The doctrine of good faith in four legal systems' (1999) 15(4) *Const. L. J* 265

¹²⁶ *ibid*

¹²⁷ *ibid*

¹²⁸ *ibid* 98

¹²⁹ *ibid*

¹³⁰ Ugo Draetta and Ralph Lake, 'Letters of intent and pre-contractual liability' (1993) 7 *International Business Law Journal* 835

¹³¹ *ibid*

The United States' approach towards the concept of good faith and fair dealing is much influenced by the German than French system as it applies both to the performance of a contractual obligation and to its enforcement.¹³² In addition, the Uniform Commercial Code, similar to German law, is one of the few codes that have codified customs as an inherent element of good faith.¹³³

3.2.2 Canada

The perception of Canada regarding the principle of good faith took a significant step forward when the Supreme Court of Canada's (SCC) decision in *Bhasin*¹³⁴ came to light in 2014. Before 2014, Canada had shared the same restrictive approach towards good faith as English law, which can be evidenced by the observation of Leggatt J in *Yam Seng*, who noted the Canadian Court's cautionary procession towards good faith in performing a contractual obligation.¹³⁵

In *Bhasin*, the SCC acknowledged the existence of the 'organizing principle of good faith' and imposed a common law duty upon both parties to perform all contracts or contractual obligations honestly and reasonably and not arbitrarily or capriciously while carrying out a contractual obligation a contracting party must give proper attention to the 'legitimate contractual interest of another party'.¹³⁶ This principle has created a broader duty by authorizing the court's ability to extend the law incrementally.

However, the scope of the 'organizing principle of good faith' has been a topic of heated discussion since the *Bhasin* judgment came to light; the judges in *Bhasin* were of the view that the law should be advanced incrementally while maintaining consistency with the common law of contract and at the same time giving due importance to private ordering and certainty in commercial affairs.¹³⁷

Later in *Callow Inc.*¹³⁸ the SCC further defined the duty of honesty that parties 'must not lie or knowingly mislead each other about matters directly linked to the performance of the contract' and chose to expand the *Bhasin* duty of honesty by asserting half-truth, omission or even silence within the ambit of dishonesty.¹³⁹ The court was also of the opinion that a breach of duty entitles a contracting party to the usual remedy in contract law. However, in *Bhatnagar*,¹⁴⁰ the Court of Appeal for Ontario clarified that damages do not automatically flow from a breach of the duty of honesty as articulated in *Callow*; rather, a minimum evidentiary threshold has to be met to claim damages for breach of good faith.

3.3 Present Condition Civil Law and Common Law Traditions In Good Faith

Civil law systems place a strong emphasis on the duty of good faith. Parties of the contract are often required to operate in good faith and in a reasonable and equitable manner in commercial contracts, as stated above. A breach of this duty may have legal ramifications, such as the recession of the contract or the award of penalties for the breach of good faith.

The idea of good faith is less rooted in contract law in common-law countries as it gives preference to precise provisions and intentions of the parties as expressed in their agreement. However, the idea of an implied good faith obligation is slowly gaining popularity in common law countries as well.

¹³² *ibid*

¹³³ *ibid* 92

¹³⁴ *Bhasin v. Hrynew* [2014] SCC 71

¹³⁵ Paula Giliker, 'Contract Negotiations and the Common Law: A Move to Good Faith in Commercial Contracting?' (2022) 43 *Liverpool Law Review* 175

¹³⁶ Joseph T Robertson, 'Good Faith as An Organizing Principle in Contract Law: *Bhasin v Hrynew* – Two Steps Forward & One Look' (2016) 93-3 *Canadian Bar Review* 809

¹³⁷ *ibid*

¹³⁸ *Callow Inc. v Zollinger* [2020] SCC 45; 452 D.L.R. (4th) 44

¹³⁹ *ibid*

¹⁴⁰ *Bhatnagar v. Cresco Labs Inc* [2022] ONSC 1745

4. Findings

The UK traditionally did not recognize a general duty of good faith in contractual performance, unlike other civil law countries. However, over the recent centuries, significant changes have emerged. After analyzing various lines of authority, including both primary and secondary sources, the following findings are summarized as follows:

4.1 Lack of Clarity

The obligation to act in good faith might be a vague, abstract idea without well-defined rules. Depending on the case and jurisdiction, it is variable. Due to the ambiguity, there may be uncertainty and disagreements about the duty's scope and proper application.

4.2 Subjectivity

Since good faith is a relative norm, various parties could have various opinions about what exactly qualifies as good faith conduct. Due to this subjectivity, determining whether a person has violated the duty of good faith can be difficult because it needs to assess each of their intents and purposes.

4.3 Inadequate Explicit Criteria

Legal frameworks may lack explicit criteria for good faith, creating the possibility for uncertainty. These could give rise to disagreements about whether or not a party behaved in good faith.

4.4 Uncertain Situations

A contract's surroundings can change suddenly, affecting a party's capacity to fulfill their obligations. It can be difficult to determine whether a party acted in good faith due to unforeseeable events.

4.5 Challenges in Determining Good Faith

According to the Supreme Court of Canada in *Bhasin*, the duty of good faith is currently a guiding idea of contract law, just waiting to be recognized. Above all, good faith provides a chance for us to reflect on our opinions on common law; it is significant not just for what it may accomplish in court but also for what we say about it. It is a source of perpetual contention not because the ship of trade is always in danger of collapsing but because we have stuffed it with all the contradictory values that a contract should reflect.¹⁴¹

4.6 Challenges Incorporating Good Faith in the Contract

The inclusion of an implied good faith obligation in contracts can have both positive and negative consequences. The duty of good faith can improve fairness and honesty among contracting parties. However, this implied duty of good faith raises several challenges.¹⁴² The following challenges can arise while applying implied good faith obligation in a commercial contract.

4.6.1 Uncertainty

Different parties' perspectives on what constitutes good faith behavior in a given situation may differ, resulting in uncertainty. The concept of good faith can be a vague and uncertain concept depending on how parties to the contract may interpret it. Different parties' perspectives on what constitutes good faith behavior in a given situation may differ, resulting in uncertainty.

4.6.2 Extent of the Duty of Good Faith

It is necessary to establish the extent of the duty of good faith in the contract in order to deal with the challenges. Parties are required to clarify what constitutes good faith in the contract. It can also be recommended that alternative dispute mechanisms be established to deal with cases of good faith issues.

4.6.3 Ambiguity And Burden Of Proof:

It may be argued that the terms of the contract may be ambiguous. As a result, it will be strenuous to ascertain whether the party actually acted in good faith or bad faith. Furthermore, it will raise the complexity of which party will bear the burden of proof.

¹⁴¹ John Enman-Beech, 'The Good Faith Challenge' (2019) 1 Journal of Commonwealth Law 35 <

<https://www.journalofcommonwealthlaw.org/article/8812-the-good-faith-challenge>> accessed 29 July, 2023

¹⁴² *ibid*

4.6.4 Changing Circumstances of the Contract

After the contract is formed, the business environment can be changed at any time. These changes can be challenging when adopting good faith in the contract.

4.6.5 Remedies Are Not Straightforward

Implementing good faith commitments might be difficult because there aren't always clear or straightforward remedies for a breach of good faith. Litigation may be necessary for parties to resolve disagreements about good faith.

4.7 Historical Evaluation

The English legal system has traditionally taken a strong stance when interpreting and upholding contracts. In addition, the law of contract in the UK follows the notion of "let the buyer beware," which focuses on the freedom of parties to a contract. As a result, historically, UK courts are very reluctant to impose a duty of good faith.

4.8 Few Cases Of Implied Duty Of Good Faith

Though there was no predominant duty of good faith, there were certain limited exceptions where good faith obligations were acknowledged. For example, in insurance contracts, there was an established duty of utmost good faith on both parties. Additionally, an implied obligation of good faith may exist in some types of contracts, such as partnership agreements or employment contracts.

4.9 Views from Recent Case Laws

In the English legal system, the idea of good faith was evolving. In several decisions from the latter part of the twentieth and early twenty-first centuries, it was seen that the courts are willing to accept the duty of good faith, which may be presumed in specific situations. The rulings of *Yam Seng Pte Ltd v International Trade Corp Ltd* and *Bates v Post Office Ltd* suggested that the UK's perspective on good faith could be changing for specified contracts.

4.10 Express Duty of Good Faith

Since the law in this area is still developing. Therefore, it can be suggested that parties may expressly state the duty in good faith in the contract to avoid future disagreements and disputes.

4.11 Commercial Impact

Acknowledging the principle of duty of good faith may have a significant impact on the parties of commercial contracts. As a result of this duty, parties shall treat one another fairly and honestly; however, there might be questions about how a contract is interpreted and used.

5. Recommendation

The following recommendations can be given:

5.1 Express Term

By employing the duty of good faith in the contract, it is possible to promote fairness and honesty between the parties of the contract. In order to prevent disputes and disagreements, different legal frameworks are required in the contract.

5.2 Clause For Alternative Remedy

Before seeking the last resort of litigation regarding the duty of good faith, a clause for dispute resolution for the duty of good faith can be incorporated. This alternative remedy for dispute resolution

5.3 Set A Standard For The Performance Of The Contract

Clearly set a standard for the performance of a contract for both parties of the contract. This makes it possible for both parties to recognize their obligations and hold one another accountable for fulfilling them. If a certain standard is set regarding performance, then it will be easier for both parties to understand their duty. If this duty is breached, then the parties will be held accountable for not complying with the duty.

5.4 Termination Clause

Include a termination clause that permits any party to end the agreement if the other side repeatedly acts without acting in good faith. Make sure the grounds for termination are spelled out in detail.

5.5 Specified Law

To understand the duty of good faith, a specified law can be made like other various jurisdictions. As a result, parties will understand their duty according to the law contract.

5.6 Maintain Communication

A clause for communication with respect to any concerns in the contract can be introduced in order to maintain communication between the parties. So, the uncertain implied duty of good faith will not have arisen suddenly.

6. Conclusion

In conclusion, despite English law's rigid attitude towards introducing good faith obligations in contracts in the past, a welcoming change has been noticed lately, especially in employment contracts, insurance contracts, and relational contracts. Moreover, the effect of EU law has also contributed to encouraging the practice of good faith in some contexts. However, only further developments in law and rulings will determine how good faith obligation will be incorporated into English contract law. It is also pertinent to mention here how ideas of fairness, morality, and reliability influence legal interpretations and commercial practices considering the ethical aspects of good faith in contract law.

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