Chapter 20

Should a general duty of good faith be recognised in English law?

English contract law traditionally does not incorporate a general requirement of good faith either in pre-contractual negotiations (*Walford v Miles*) or in the performance of primary contractual obligations (*Yam Seng*). Leaving considerations of The Consumer Rights Act 2015, imposing a duty of good faith, aside, this essay will ascertain to what extent commercial contract law sticks to the orthodox principle above and whether the reasons given to justify it are convincing. It will be evaluated to what extent various duties of good faith can be found in the case law, and how judges have circumvented the rejection of the general doctrine by developing the notion of good faith incrementally. It will be argued that the time has come for English contract law formally to accept the good faith requirement, both because it has already entered through the backdoor via the doctrine of implication of terms in fact and in law and for normative reasons, including avoidance of frustration of legitimate expectations of business people and the promotion of coherency in contract law.

There is consistent authority denying the existence of a general duty of good faith. Thus, Lord Ackner declared in *Walford v Miles* that a lock-out clause in pre-contractual negotiations was not valid for want of a time limit. He dismissed Bingham's suggestion of reading in a "reasonable" time limit, arguing that this would essentially require the parties to act in good faith, a concept irreconcilable with the adversarial position of the parties in contracts. Similarly, Blackburn J stated in *Smith v Hughes* that there was no duty of good faith short of deceit or fraud imposed on a vendor who knew of a buyer's mistaken belief as to the nature of the subject-matter of the sale. In *Yam Seng,* Leggatt J declined to accept the proposition that good faith was generally implied into contracts by law. Rather, he reached his conclusion of the existence of good faith in this particular contract by reference to the doctrine of implication of terms in fact, falling short of introducing a general good faith requirement into contract law.

Leggatt J in *Yam Seng* identified three reasons for the English position, which seems to be "swimming against the tide" in comparison to other European jurisdictions.

Firstly, a duty of good faith seems to be at odds with the parties' own self-interest, as stressed by Lord Ackner in *Walford v Miles*. This reflects the traditional English conception of contracts as bargains, the content of which is ascertained by an objective standard, rather than mutual agreements. Each party seeks to maximise its own profits, regardless of the other's interests.] However, this traditional conception is not irreconcilable with good faith. There is an intrinsic morality within the objectivity principle. The question is not whether either party would regard certain conduct as improper, but whether in the particular context the conduct would be regarded as improper by reasonable business people, suggesting that the duty standard would be lower in pre-contractual negotiations than in the performance of a fully fleshed-out contract. Adopting Leggatt J's perception of good faith as including duties such as honesty, not to act capriciously or absurdly, to reasonably bring a change of circumstances to the attention of the other party and to not frustrate legitimate expectations unreasonably, there is no reason why the parties would be prevented from acting in their own best interest if they were subject to a duty of good faith at the same time. Moreover, such a duty would not introduce novel concepts into contract law. A party's own self-interest in both pre-contractual negotiations and contractual performance is already limited by the doctrines of duress and unconscionability.

Comment [A1]: And this is not a general duty anyway – what is the scope of good faith in this context?

Comment [A2]: Why limit to commercial law? And what does this mean anyway? Perhaps good faith is less necessary when two major corporate entities advised by expensive lawyers enter into a contract, but what about two small businesses?

Comment [A3]: Which perhaps underpin implication too?

Comment [A4]: Use judges' titles!

Comment [A5]: See also *Collins* (2014)

Comment [A6]: Compare an approach which demands that the parties co-operate with each other.

Comment [A7]: Is it clear what the content and scope of these duties should be?

Comment [A8]: But these doctrines are much better defined.

The second reason for the English dislike of a general requirement of good faith is its general preference for piecemeal solutions rather than overarching principles. This is the real crux explaining the English aversion against good faith. In light of lessons learned from German law for example this reason does not hold up. Although good faith is imposed by the Civil Code in this jurisdiction, this rather meaningless label has been filled with content through the jurisprudence of the courts on a case-by-case basis. It is somewhat ironic that English orthodoxy seems to find it impossible to reconcile generality with an incremental approach in light of the way in which the tort of negligence has developed. Despite the general nature of the neighbour principle (*Donoghue v Stevenson*) this has in no way impeded the incremental development of the various duties of care in negligence. Seeing as good faith is a heavily context-dependent concept, accepting it as a general requirement would in no way inhibit the courts from judging a case on its individual facts and merits.

Thirdly, English orthodoxy rejects good faith on the basis that it would lead to uncertainty: a party would not know whether it acted in good faith before a court adjudicated on the matter. However, determining whether a certain type of conduct was in good faith or not amounts to nothing but ordinary interpretation of the contract based on the objectivity principle (*Yam Seng*). The type of contract should be determinative of what standard a duty of good faith imposes. Factors that might play a role include business practice and other commercial codes of conduct. In this way good faith is ascertainable from the beginning and does not give rise to much uncertainty.

There are also a number of positive reasons why English contract law should adopt a general principle of good faith. These have been recognised by the courts by imposing various duties of good faith through the implication of terms in both law and fact.

Firstly, many contracts are co-operative in nature and rely on good faith. Imposing such a duty gives effect to the reasonable expectation of the business people involved and thus facilitates commerce. In *Yam Seng* for example the parties contracted for the supply of merchandise products, the amount of which was impossible to fix conclusively in advance. A duty to act in good faith was implied in fact by Leggatt J. The threshold for such an implication on the facts however is high. Lord Hoffmann's reasonableness test in *Belize Telecom* has finally been rejected by Lord Neuberger in *Marks and Spencers*, holding that it must be necessary to give effect to the parties' intentions, not merely reasonable, to imply a duty of good faith on the facts. It must be "obvious" that the parties had intended such an implication.

Secondly, a duty of good faith has consistently been implied in law in contracts that give one contracting party a discretionary unilateral power (*Mid Essex Hospital Services*). This approach was adopted by the House of Lords in *Braganza v BP* where the House was unanimous in their conclusion that BP's discretion regarding the inquiry into the death of an employee had to be exercised reasonably and thus in good faith.

In conclusion, as Bingham LJ stated in *Interfoto* there are currently only traces of good faith in contract law, falling short of a general principle. In light of the unconvincing reasons against such a general principle and the practice of the courts to occasionally imply good faith, it would promote coherency in English contract law to elevate this practice to a general principle. There is no reason why contracts that do not confer a discretionary power onto one of the parties should not be subject to a good faith requirement, especially where the contract is fundamentally based on the continued cooperation of the parties which is frequently the case in commercial contexts. Moreover, recognising a general duty of good faith would string contract principles governing commercial and consumer relations respectively back together, ensuring a principled coherent and de-compartmentalised body of contract law.

Comment [A9]: See eg *Interfoto.*

Comment [A10]: Would this be useful? What gaps are there currently in the law that need rectifying?

Comment [A11]: This might be considered by some to be optimistic. The content of 'good faith' can be difficult to know.

Comment [A12]: After formation only?

Comment [A13]: And that it be clear what good faith means?

Comment [A14]: So only in certain types of contract – such as 'relational' contracts?

Overall essay feedback: This is very good – a clear argument and good evidence of wider-reading and thinking. But at times I thought you drifted away a little from the primary material (which is both understandable and easy to do with this sort of question). I think your argument would be stronger if you could tell me *why* English law should recognise a general duty of good faith – in what respects is the law currently unsatisfactory? It may be that if you were starting from a blank sheet of paper you wouldn't choose to adopt a piecemeal approach, but given that is what we currently have, in what respects is it unsatisfactory and what cases should have been decided differently?

High 2.i