



## Good faith in English law – as elusive as ever?

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It is nearly 10 years since the celebrated case of *Yam Seng*<sup>1</sup>, in which Leggatt J said English law appeared to be “swimming against the tide” of international jurisprudence in refusing to recognise a general contractual obligation of good faith. Two recent Court of Appeal cases suggest English law still has no wish to go with the flow.

### Implied duties of good faith

It is well known that duties of good faith are generally only implied into “relational” contracts, identifiable by reference to the nine non-exhaustive indicators of Fraser J in *Bates v Post Office Ltd*<sup>2</sup>.

In *Candey Ltd v Bosheh*<sup>3</sup>, the Court of Appeal made clear that a good faith obligation will only be implied in “relational” contracts in fairly restricted circumstances. The case concerned Candey’s fees under a conditional fee arrangement (CFA) acting for the defendants to a fraud action. Following a settlement, Candey Ltd was not

entitled to any fee under the express terms of the CFA.

Candey argued that there was an implied term that the Boshehs would act in good faith in their dealings with Candey. This argument was rejected. Coulson LJ emphasised that the indicators in *Bates*<sup>4</sup> do not displace the ordinary test for implying terms set out in *M&S v BNP Paribas*<sup>5</sup>; both must be analysed in order to imply a term of good faith. He stated that “the elusive concept of good faith should not be used to avoid orthodox and clear principles of English contract law”<sup>6</sup>. He noted “there has been something of an avalanche of claimants in recent years trying to show that the contract into which they seek to imply the term is a relational contract, thereby bringing with it the implied obligation of good faith. Only a relatively few have succeeded”<sup>7</sup>. That being said, he added that it is “more common” to imply a duty of good faith in a “long-term joint venture between two

separate commercial entities concerned with mining, say, or infrastructure”<sup>8</sup>. He might equally have referred to the energy sector.

Candey is a salutary reminder that the courts will be slow to imply a duty of good faith. Coulson’s LJ’s comments about the “elusive concept of good faith”, nearly 10 years on from *Yam Seng*, also resonate with a further case in which the Court of Appeal recently had to construe the width of an express good faith obligation...

### Express duties of good faith

*Faulkner v Vollin Holdings Ltd*<sup>9</sup> concerned an unfair prejudice petition under s. 994 Companies Act 2006 against certain ‘Investors’, including a vehicle beneficially owned by Roman Abramovich, in a company seeking to develop a very small projector. The shareholder agreement provided:

“Each Shareholder undertakes to the other Shareholders and the Company that it will at all times act in good faith in

1 *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB) at [124].

2 [2019] EWHC 606 (QB) at [725].

3 [2022] EWCA Civ 1103.

4 The indicators were described by Coulson LJ as a “sense check rather than a series of statutory requirements”: [41].

5 [2015] UKSC 72.

6 [32].

7 [31].

8 [41](b).

9 [2022] EWCA Civ 1371. Also reported as *Compound Photonics Group, Re*.

all dealings with the other Shareholders and with the Company in relation to the matters contained in this Agreement”.

The High Court had held that the expression “good faith” imported certain “minimum standards”, namely: (a) a requirement to act honestly; (b) a requirement of fidelity to the bargain; (c) a requirement of fair and open dealing; and, (d) A requirement to have regard to the interests of minority shareholders<sup>10</sup>.

The Court of Appeal adopted a narrower approach. After an extensive review of the authorities, while emphasising that each case turns on its own facts, Snowden LJ rejected the notion that “minimum standards” could be copied and pasted. Rather, he considered that good faith requires the parties to act with honesty and, depending on the context, it may also require the parties not to act in a manner that is commercially unacceptable to reasonable and honest people. In some cases, the duty of good faith could have a broader meaning, but only if the broader meaning can be “derived... from the other terms of the contract in issue”. That broader meaning is not automatically imported by the use of the words “good faith”.<sup>11</sup>

*Faulkner* shows that the courts will be slow to interpret an express duty of good faith broadly, unless the context indicates that was intended. If parties wish to include obligations to deal fairly and openly, act with fidelity to the bargain and have regard to the interests of minority stakeholders, these should be stated expressly.

<sup>10</sup> As summarised by Snowden LJ at [143] in the Court of Appeal’s judgment in *Faulkner v Völlin*. The High Court had taken these “minimum standards” from an earlier case concerning an express good faith obligation, *Unwin v Bond* [2020] EWHC 1768 (Comm). Snowden LJ set out the “statements of principle” from *Unwin* at [102].  
<sup>11</sup> [147]-[151], [241]-[243], [275]-[276].

### Concluding thoughts

The reluctance of the courts to imply a duty of good faith, or to construe widely an express duty of good faith, are unpromising for any party that has to attempt reliance upon such a duty, in particular where (other) express duties cannot ground a claim or defence.

These difficulties also reinforce the need for caution when negotiating long-term contracts. Parties must bear carefully in mind the first (and only decisive) *Bates* indicator, namely that there be no express terms in the contract that prevent a duty of good faith from being implied. In particular, an apparent ‘win’ in negotiating a specific express good faith obligation relating to one aspect of performance, may later serve to negate a wider implied duty of good faith<sup>12</sup>.

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<sup>12</sup> “The existence of express good faith obligations indicates that when the parties intended to impose an obligation of good faith they did so, strongly suggesting that implying a more general good faith obligation would be inconsistent with the express terms”: *Russell v Cartwright* [2020] EWHC 41 (Ch.) at [89] per Falk J.



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