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“The Concept of Good Faith Become Part of English Contract Law”

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ABSTRACT

Contracts play vital role in our day-to-day lives. Most of the times, when individuals enter into contracts, they are guided and recognized through such contracts for fulfilling their needs and obligations. In every contract, the concept of good faith stands as an essential ingredient for the parties in order to bind by the rules and conditions of such contract. Parties can create obligation of good faith either expressed or impliedly. Parties have to try to hold on to moral aspect of maintaining the contractual relations and also try to deteriorate the inequalities for better execution of their roles and responsibilities. All the facts and circumstances have to be given importance while entering into a contract. They also have an obligation to reveal all the facts and circumstances without having any mal intention to deceive or injure the other party by not abiding by the contractual conditions. The court also has to consider the pre-contractual intentions of the parties in order to determine cases.

The paper focuses on coherent understanding of how the concept of good faith emerged. The paper throws light on the eminence of Roman law in originating and establishing the concept of good faith. The researcher along with explaining express and implied obligations of acting in 'good faith' also encapsulates the remedies arising out of breach of good faith. Finally, The paper also throws light on the topic of the position of good faith in English contract law.

CHAPTER I

INTRODUCTION

1.1 INTRODUCTION

The notion of ‘good faith’ emerged from Roman law and it has no broadly accepted definition. It is a rule, principle, obligation and code of conduct that has to be recognised by the parties while entering in a contract. Good faith constitutes a crucial part in civil law system where parties entering in a contract have to recognize and observe standards that are reasonable and must commit to the principle of faithfulness concerning acknowledging and executing such contract. In ‘TSG Building Services plc. vs. South Anglia Housing ltd.’, the court opined that parties have to mutually co-operate and work with fervour with trust, fairness and reasonable manner.¹

Good faith is used in both ways i.e., subjective and objective. In the former case, it can be said to the impotency of the parties to recognise an event or having no knowledge of the facts being unlawful. Here, parties have an erroneous conception of illegal reality being legitimate in its way. In the latter case, it can be said to be a standard of conduct of parties which are expected to fulfil while entering in contractual relationship.² They have to try to hold on to moral aspect of maintaining the contractual relations and also try to deteriorate the inequalities for better execution of their roles and responsibilities.

While entering in a contract where the agreement consists of provisions, and parties have coherently expressed their willingness towards their obligations are said to have consented to act duly in good faith and then, such contract can be legally enforceable. When parties expressly negotiate and agree to terms and conditions in good faith for enforcing the contract by fulfilling their own roles and specific obligations, then such contract can be said to be express contracts. Sometimes, parties to a ‘relational contracts’ may impliedly have to fulfil duties in good faith. In such case, the parties are refrained from performing few conducts which are prohibitory and unreasonable.³ Any individual, who can enter into contract and is not disqualified by law, can make agreements based on good faith.

¹ TSG Building Services plc v. South Anglia Housing ltd, [2013] EWHC 1151 (TCC).

² Melvin A Esienberg , *The Duty of Good Faith in Corporate Law* 31 Del. J. Corp. L. 1 (2006)

³ Saul Litninoff, Good Faith, 71 Tul. L. Rev. 1645 (1996-1997).

Until recent times, the application of ‘good faith’ in English law has been limited and exclusive partnership agreements and insurance contracts. Recently, even the English courts have acknowledged that good faith has been evolving in contracts where parties agree to the provisions and had been held that they can be enforceable in future contracts also. There has been a dilemma of good faith being a universal application or is restricted to nations which have recognised it through negotiations concerning the roles and obligations of parties and their responsibilities. It is observed that many nations recognise this concept in civil law. But the same is also gaining prominence in English contract law.

1.2 LITERATURE REVIEW

‘Good faith and insurance contracts’ is a book where the author detailly analysed the essential role good faith plays in insurance contracts.⁴ Parties of the contract have to be reasonable and try disclosing all the material facts and circumstances of the contract to be genuine with their roles and obligations. This may prevent parties from defrauding others for their benefit. The author throws light on legislations of good faith. Frauds, misrepresentation, Insurer and insured rights, acts which affect good faith are also discussed. The author did not discuss the remedies due to breach of good faith by any party.

The article ‘The Evolution of Good Faith in Western Contract Law’ focuses on the evolution of good faith since its inception in Roman law and how it has traversed to present countries adopting the law.⁵ It is observed that civil countries codified and explicitly agreed that parties shall act in good faith while executing a contract. UK law has not formally codified ‘good faith’ but the same has been recognised in various judicial precedents. This article didn’t discuss good faith in different types of contracts in English law.

In the journal article ‘The Commercial Doctrine of Good Faith Purchase’ the writer explained how ‘good faith’ has a vital position in the law of sales.⁶ The writer sheds light on the effects of faithlessness by explaining the effects of misappropriation of goods by an agent who acted fraudulently. The writer said that every person has his property rights and no one has right to abridge such rights from them without his/her consent. Purchasers need to be protected from

⁴ PETER MACDONALD EGGERS, SIMON PICKEN, GOOD FAITH AND INSURANCE CONTRACTS. (United Kingdom: Taylor & Francis, 2017).

⁵ Martin, Samuel, *The Evolution of Good Faith in Western Contract Law*, SSRN PAPERS, (April 7, 4.53 PM), Available at SSRN: <https://ssrn.com/abstract=3177520>.

⁶ Grant Gilmore, *the Commercial Doctrine of Good Faith Purchase*, 3 Yale L.J. 1057 (1953-1954).

any commercial agents who tend to act unfaithfully. The author mainly focused on the concept of good faith in the law of sales. The article doesn't discuss about the position of good faith in English law.

'Tort Remedies for Breach of Contract: The Expansion of Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing into the Commercial Realm' is a journal article where the author focused on good faith in tortious actions. The author discussed about the expansion of tortious law in spheres like insurance, commercial contracts, etc., the remedies of loss arising out of tort is followed from the made contract itself. Developments in contract law to retribution of loss arising from bad faith and its consequences. This article didn't focus on the development of good faith and expressed and implied obligations of good faith.

1.3 RESEARCH QUESTIONS

1. How did the notion of good faith emerge?
2. What are expressed and implied obligations of acting in good faith?
3. What is the concept of the covenant of good faith and fair dealing?
4. What are the remedies arising out of breach of 'good faith'?
5. What is the position of 'good faith' in English contract law?

1.4 RESEARCH OBJECTIVES

- To have a cogent appreciation of how the concept of good faith emerged.
- To have a coherent understanding of express and implied obligations of acting in 'good faith' and delineate the concept of good faith by incorporating relevant case laws.
- To encapsulate the remedies arising out of breach of good faith.
- To acknowledge the position of good faith in English contract law.

1.5 RESEARCH METHODOLOGY

1.5.1 NATURE

Doctrinal research mainly focuses on researching by compiling information from resources like diverse rules, law, statutory principles, judicial precedents, etc., it evaluates legal doctrines and draws inferences from them. Non-doctrinal research gathers resources and information by using socio-legal method where the researcher gathers empirical evidence and draws possible outcomes and solutions from the data collected.

1.5.2 DOCTRINAL RESEARCH

The researcher adopts doctrinal methodology as the topic demands various rules, laws, statutes, judicial principles, committee reports and legal principles for better conceptual understanding and interpretation of collected information. Doctrinal method of research helps researcher to detailly appreciate the topic by analysing the information as a whole. The paper includes case laws that play a vital role in better understanding of good faith as the researcher is focusing on the notion of 'good faith' becoming part of UK contract law.

CHAPTER II

ORIGINS OF THE CONCEPT OF GOOD FAITH

The notion of good faith originated in Roman law. Roman law gave importance to ‘bona fide’ and recognised the essentiality of the parties being obliged to act in good faith while executing the contract. According to Roman law, bona fide means being loyal to a promise. Cicero, an eminent Roman academician termed “Ut inter bonos bene agere oportet et sine fraudatione” which means ‘one must act well, as among good men without fraudulence’. As per Roman law’s twelve tables, when parties enter in a contract by expressly agreeing to be bound by good faith shall have a legal binding force to the same. The Latin maxim “pacta sunt servanda” means agreements to be kept.⁷ After this, bonafide has been a tactical instrument in the Roman law where judges had discretion to pronounce decisions based on equity and fairness after enumerating the available facts and circumstances.

Roman law followed a formulae system where judges would take citizens’ disputes, hear arguments, assess the allegations and then decide cases based on formulae which is pre-determined. The judges discreetly hear both the parties and decide based on what one party owes to another. Later ‘jus gentium’ (law of nations) formulated the principle of consensualism in contract law where the same is different from a conventional contract law. It is a ‘jus civile’ (civil law) that draws its force from ‘good faith right of action’.⁸ The judge was allowed to decide on his understanding of one party’s behaviour and his honesty. The right of good faith led to judges play a vital role in dealing with contracts which were consensual in nature. It has also broadened judge’s power of interpretation and deciding disputes.

Cicero, a Roman scholar in his book ‘De Officiis’, elucidated about real estate that according to Roman twelve tables, a retailer of real estate was accountable for the defects that he expressly retracted. Retailers became accountable only for the flaws if known about the flaw of the real estate but not expressly communicated. After years of deliberations, it was accepted that bona fide can be put into existence by enforcing customary obligations but not according to statutory law. As the notion of good faith progressed, the judges’ role also

⁷ Samuel Martin, *The Evolution of Good Faith in Western Contract Law*, SSRN PAPERS, (May 30, 2021, 5.32 PM), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3177520.

⁸ Watson, A., *The Evolution of Law: The Roman System of Contracts*, 2(1) LAW & HIST. REV., 1-20, (1984).

changed to evaluator than just deciding based on facts. The progression in Roman law of incorporating the essence of good faith also led to improvement of judicial volition. Many contemporary theories of good faith can be rooted back to the roman evolution of law.

CHAPTER III

CONCEPT OF COVENANT OF GOOD FAITH AND FAIR DEALING

The covenant of good faith and fair dealing acknowledges the obligations of parties of the contract to disclose all the known material facts while entering into such contract. Unlike civil law jurisdictions such as France and Germany, there is no particular doctrine recognised concerning good faith. Parties have quiet leniency to pursue their interests as long as they don't indulge in breach of contract.⁹ When the parties of contract agree to perform their obligations expressly, discreet drafting is essential to acknowledge their intentions.¹⁰ Parties have discretion in a contract to act in good faith and make a decision where both the parties are affected. Courts also have power to impose general duty of good faith upon parties when creating a contract.

The English law is knowledgeable about good faith subjectively about being righteous with respect to the obligations of contracts like negotiable instruments and property, but not until the recent times, it has acknowledged 'good faith' in its contract law as necessity of fair dealing. It is observed that the concept of good faith exists in English contract law, but insurance law was fabricated in the need of expeditious evolution of UK maritime trade.

In 'Carter v Boehm', Lord Mansfield opined that it is the party's responsibility not to indulge in any malpractices by misleading the underwriters by inducing him to believe any unreal circumstances and making him calculate the risk of circumstances which do not exist or happen.¹¹ To avoid fraudulent practices like the concealment of material facts in insurance law, the concept of good faith was introduced.¹² 'Good faith' is reciprocal in nature and shall apply to 'all contracts and dealings'. The English court overruled that this concept can be applied to insurance instead of all contracts.

The courts in UK conventionally did not consider the concept of good faith for commercial contracts. In a High Court judgement 'Yam Seng Pte Ltd v International Trade Corporation Ltd', after acknowledging 'good faith' being part of commercial contracts, it was held by Legget J

⁹ Jason L. Honigman, *Proof of Good Faith*, 23(8) MICH. L. REV, pp. 870-880, (1925).

¹⁰ Berridge, G. R. "Machiavelli: Human Nature, Good Faith, and Diplomacy." 27 REV. INT. STUD, 539-556, (2001).

¹¹ *Carter v Boehm*, 3 Burr 1905, (1766).

¹² Eric M. Holmes, *A Contextual Study of Commercial Good Faith: Good-Faith Disclosure in Contract Formation*, 39 U. PITT. L. REV. 381 (1977-1978).

that ‘good faith’ shall be incorporated in long-term distribution contracts where the parties are bound impliedly.¹³

In ‘Bristol Ground School Ltd v Intelligent Data Capture Ltd’, the parties were impliedly bound to act in good faith where they manufactured training guidebooks for pilots of commercial aircrafts.¹⁴ The court cogitating the Yam Seng case, opined that parties in here created an implied agreement and one can agree to act in good faith by mutually agreeing on their presumed intentions to work with high trust and cooperation.

3.1 EXPRESS OBLIGATIONS OF ACTING IN GOOD FAITH

In expressed obligations, the parties will mediate with each other about the terms and obligations and agree on the expressed terms where they have to act according to the terms of good faith. The English law provides the leniency in language to be used while creating an obligation of good faith where all negotiations are “open, honest, clear and reliable”. It allows parties to settle down issues amicably when the parties are committed to act in good faith while discharging their responsibilities. The parties are obliged to disclose all the material facts to the other party in good faith and must refrain to act in any manner which can have negative effect in the contract. The parties are not coerced to waive their commercial interests and their contractual rights are not affected negatively.

3.2 IMPLIED OBLIGATIONS OF ACTING IN GOOD FAITH

Contracts that are relational in nature have implied duty to act in good faith.¹⁵ In any contract where the parties are obliged to act in good faith where they are forbidden from conducts which are commercially not acceptable by honest and reasonable people.¹⁶ Any contract is said to be relational if it meets the prerequisites. A contract must be long-term in nature and there must be a remarkable stake of the parties of the contract. The parties should ensure they work with mutual collaboration to execute the contract. Under implied obligations to act in good faith, fast specific terms where the parties are obliged to maintain transactional records

¹³ *Yam Seng Pte Ltd v International Trade Corporation Ltd*, EWHC 111, (2013).

¹⁴ *Bristol Groundschool Ltd v Intelligent Data Capture Ltd & ors.*, EWHC 2145 (Ch), (2014).

¹⁵ Campbell, D., *Good Faith and the Ubiquity of the 'Relational' Contract*. 77(3) MOD. L. REV., 475-492, (2014).

¹⁶ Lockerby, M., Lokker, E., & Modell, C., 18(1), *Implied Duty of Good Faith and Fair Dealing*, FRANCH. LAW J., 31-35, (1998).

and observe and look into accountancy scantiness. Relational contracts prohibit parties to act dishonestly and act in an allegiant manner.¹⁷

¹⁷ Kornblum, G., *Recent cases interpreting the implied covenant of good faith and fair dealing*, 16(4) THE FORUM (SECTION OF INSURANCE, NEGLIGENCE AND COMPENSATION LAW, AMERICAN BAR ASSOCIATION), 856-874, (1981).

CHAPTER IV

GOOD FAITH IN UK LAW

The law of UK recognises good faith under insurance contract and incorporated the principle of good faith under section 17, Marine Insurance Act, 1906. If the parties fail to adhere to this principle, then the contract stands void. It was incorporated to circumventing fraudulent practices, misrepresentation and concealment of known material facts. The act has been playing a major role in marine and non-marine contracts for over a century and the concept of good faith in insurance law was changed in the year 2012 due to continuous demands for its amendments to fit the expeditious evolution.

In 2012, the Consumer Insurance (Disclosure and Representations) Act was enacted which abrogated good faith for insurance of consumer contracts which was to be in effect from 2013. It was done to protect consumers with consistent measures and remedies from being innocent in involving in malpractices. In 2015, the insurance act focused on the principle of fair representation rather than good faith while dealing with business contracts. But the obligation of acting in good faith under section 17 is unchanged.

The courts in UK backed that 'good faith' shall be used as a shield but not as a sword explaining that in 2016, an amendment was made about insurers having a vital role to play in such contracts by paying claims within acceptable period. They also have post contractual obligation of acting in good faith while dealing with such claims. In the case of 'Inter foto Picture Library Ltd v Stiletto Visual Programmes Ltd', Lord Bingham have put forth that law in UK provides inchmeal remedies to the repercussions arising out of unfair behaviour and acts. Section 61(3) of Sales of Goods Acts mentions good faith to act honestly, irrespective of the act being negligent or not.

Although there is sleek development of good faith in English law, it can be said that there is no proper general application of the principle of good faith in UK as there are some instances where English courts have raised doubts of the application of the principle. In 'Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd', Appeal court in UK did not recognize that Yam Seng case established the general principle of good faith.¹⁸ The English court also said that if any party to be made liable for the loss of another due to

¹⁸ *Mid Essex Hospital Services NHS Trust v Compass Group UK & Ireland Ltd (trading as Medirest)* [2013] EWCA Civ 200, 15 March 2013

negligence, it is necessary that a duty of care must be established and the parties must act honestly while carrying out their obligations.

4.1 REMEDIES DUE TO BREACH OF GOOD FAITH

In every contract, parties should act in good faith while executing such contract. If any party fails to act in good faith while enforcing contract, the other party may suffer loss due to such breach of acting in good faith. In most of the systems, the suffered party can seek remedy for not performing the contract based on good faith. But the remedy which can be sought by the suffered is limited. If any party didn't perform any of his minor obligations, the suffered party cannot put the contract to end or stop enforcing his obligations temporarily.¹⁹ Parties may also put contract to an end by mutually agreeing to do so in good faith. They also can terminate contract for indeterminate period in good faith even it is not a remedy for not performing the contract.

The right of suffered party to claim specific performance of contract is limited.²⁰ Under the right of specific performance, the suffered can demand the other party to discharge his liabilities by enforcing the contract as per agreed terms and conditions.

In UK, if any insurer violated the obligation of acting in good faith, damages are not given till now. If any assured did not unfold any material facts or if in case he misstates them, then the insurer can elude the contract in defence of violation of good faith by the party. In case where any party had misrepresented any facts, then insurer can seek damages under the Misrepresentation Act, 1967. In recent times, insurers have frequently agreed to consequences arising from breach of good faith, as they indemnified the loss of the party irrespective of any breach of duty where he is affected by any fraudulent act.

When parties have sought remedy for the loss occurred due to violation of good faith, there has been ambiguity and volatility as there are certain instances where English courts sometimes ruled without considering specific rules concerning good faith. Many scholars view that English law has been considering the concept of good faith in a piecemeal manner. Few scholars put forth their view that the courts must reckon on the facts and circumstances of the parties when they created contract. It should also take the purpose for which the parties

¹⁹ Samuel W. Buell, *Good Faith and Law Evasion*, 58 UCLA L. Rev. 611 (2010-2011).

²⁰ Burton, S., *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94(2) HARV. L. REV., 369-404, (1980).

entered into the contract. It would make a positive impact when courts try to appreciate the contract and decide on the pertinent principles to be applied.

CHAPTER V

CONCLUSION AND BIBLIOGRAPHY

5.1 CONCLUSION

Originating from Roman law, the principle of good faith had traversed long path to reach to the contemporary position. While many countries accept the good faith doctrine, UK law has been recognising the concept in an inchmeal manner. Parties can create obligation of good faith either expressed or impliedly. They have to divulge all the known material facts without concealing them while creating a contract. The court considering the pre-contractual intentions of the parties is very essential to determine cases. Parties can also seek remedies along exercising rights to terminate contract if needed in case when other party breached his duty to act in good faith. While English law saw varied developments in this sphere, but there has to be a lot more development in incorporating good faith in its regular laws.

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