

## GOOD FAITH IN CONTRACTUAL AGREEMENTS IN SINGAPORE

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### I. NO IMPLIED DUTY OF GOOD FAITH IN LAW

In *Ng Giap Hon v Westcomb Securities Pte Ltd* [*Ng Giap Hon*],<sup>1</sup> the Court of Appeal firmly established that it would not endorse an implied duty of good faith as a matter of law in the context of contractual performance.

The primary reason for the Court's rejection of the doctrine of good faith in the practical sphere stems from its fear of uncertainty surrounding the theoretical foundations of the doctrine.<sup>2</sup> The Court perceived the doctrine as a fledgling one in English and Singaporean contract law, and highlighted the relative dearth of case law coupled with an abundance of academic literature which suggest that the doctrine is far from settled.<sup>3</sup>

As noted in *Ng Giap Hon*, there is still no consensus on the definition of good faith. One of the proposed definitions is the "excluder thesis" which regards good faith as the exclusion of bad faith.<sup>4</sup> Other definitions propound that good faith imports concepts like honesty, reasonableness, "fair and open dealing", and/or "fidelity to the bargain".<sup>5</sup> Opponents of the good faith doctrine have cited the uncertainty over the definition of good faith as a reason for rejecting the doctrine so as to preserve predictability for the facilitation of business transactions.

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<sup>1</sup> [2009] 3 SLR(R) 518; [2009] SGCA 19.

<sup>2</sup> *Ibid* at [60].

<sup>3</sup> *Ibid* at [51].

<sup>4</sup> Robert S. Summers, "Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code" (1968) 54:2 Va. L. Rev. 195.

<sup>5</sup> Colin Lew, "A Leap of Good Faith" [2012] 2 SJLS 416 at 418.

The uncertainty surrounding the doctrine is also evident in other jurisdictions. For instance, the Court has mentioned that “the situation in the Australian context is, at best, ambiguous”.<sup>6</sup> Even in America – where good faith is established as an implied covenant under the Uniform Commercial Code – there is the view that the doctrine is currently in a state of flux.<sup>7</sup>

Dissidents have also rejected the doctrine for its inconsistency with the widely held perspective of contract as a “vehicle for self-interested exchange” for the individual. This perspective arises from a capitalist view of the world in which contracts are formed solely for the purpose of profit maximisation. The doctrine of good faith is antithetical to such an economic view because it would constrain an individual and require him to consider the interests of the other party.<sup>8</sup> This criticism of the doctrine of good faith was also recognised by the House of Lords in *Walford v Miles* [*Walford*],<sup>9</sup> where Lord Ackner stated that the duty of good faith is “inherently repugnant to the adversarial position of the parties involved in negotiations” as each party should be entitled to pursue his own interest.<sup>10</sup>

## II. IS THE DOCTRINE REALLY THAT NOVEL AND UNCERTAIN?

The doctrine of good faith should not be perceived as a novel one as many distinct solutions that have been developed to deal with problems of unfairness are fundamentally built on the concept of good faith. These solutions include well-established contractual principles such as undue influence, promissory estoppel, specific performance and injunction.<sup>11</sup> Essentially, the doctrine of good faith has actually long been utilised to deter parties from engaging in bad faith conduct, even though it has not been recognized as a general principle. Indeed, the existence of these tools have

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<sup>6</sup> *Supra* note 1 at [56].

<sup>7</sup> Howard O Hunger, “The Growing Uncertainty about Good Faith in American Contract Law” (2004) 20:1 JCL 50; *Ng Giap Hon* at [57].

<sup>8</sup> Matthew Harper, “The Implied Duty of ‘Good Faith’ in Australian Contract Law” (2004) 11:3 MurUEJL 22.

<sup>9</sup> [1992] 2 AC 128.

<sup>10</sup> *Supra* note 1 at [55].

<sup>11</sup> Zimmermann & Whitaker, ‘Good Faith in European Contract Law’ (United Kingdom: Cambridge University Press, 2000).

led proponents to suggest that the common law is already poised to recognise a general principle of good faith.<sup>12</sup>

This notion is further reinforced by Professor McKendrick who stated that most rules of English contract law “conform with the requirements of good faith and cases which are not dealt with in other systems under the rubric of good faith and fair dealing are analysed and resolved in a different way by the English courts, but the outcome is very often the same.”<sup>13</sup>

With respect to the ongoing debate over the definition of good faith, the lack of consensus should not prevent local courts from recognizing a general principle of good faith. Courts have managed to embrace and apply legal tools similarly imbued with imprecision – such as the concept of “reasonableness” in the law of negligence – without undue difficulty.<sup>14</sup>

Seen from this perspective, the content of the good faith doctrine might not be as elusive or uncertain as the courts appear to suggest. After all, the essence of good faith has already been embedded in many long-standing legal principles that have been consistently applied in the practical sphere.

### III. FREEDOM TO ADVANCE SELF-INTEREST IS NOT AN ABSOLUTE ONE

One of the main criticisms against recognition of a general duty of good faith is its inconsistency with the advancement of self-interest inherent in contract law. However, cooperation between parties to implement a contract is similarly fundamental in this area of law.<sup>15</sup> It has been established that the utility of contractual agreements for the advancement of self-interest comes attached with the condition that parties should not engage in conduct with bad faith. This is evinced by the necessity for principles such as misrepresentation and undue influence which are primarily developed to mitigate problems of unfairness arising from undesirable conduct. Hence, the advancement of self-interest and the concept of good faith should not be regarded as antithetical

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<sup>12</sup> *Supra* note 5 at p 421.

<sup>13</sup> McKendrick, “Good Faith: A Matter of Principle” in Forte, A.D.M., ed, *Good Faith in Contract and Property* (Oxford and Portland, Oregon, 1999) at 41

<sup>14</sup> *Supra* note 5 at p 419

<sup>15</sup> *HSBC Institutional Trust Services Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 at [39]

to each other as contracting parties would still be entitled to serve their self-interests as long as they do not engage in bad faith conduct and undermine the common purpose of the bargain that they have entered into.

It should also be noted that Lord Ackner's dictum in *Walford*<sup>16</sup> regarding the inconsistency of the good faith doctrine with the advancement of self-interest was set in the context of pre-contractual negotiations and not performance of the contract. It has been argued that Lord Ackner's prohibition of the doctrine does not necessarily extend to the way in which a contract should be performed as it is "important to retain a clear analytical differentiation between contract performance and contract formation". Pre-contractual good faith should not serve as a basis for the rejection of the general concept of good faith.<sup>17</sup>

#### IV. EXPRESS 'NEGOTIATE IN GOOD FAITH' CLAUSES

Although there is no general good faith duty governing contractual agreements in Singapore, in the recent Court of Appeal case of *HSBC Institutional Trust Services Ltd v Toshin Development Singapore Pte Ltd* [*Toshin*], it was stated that an express agreement to "negotiate in good faith" could be enforceable.<sup>18</sup> The Court in *Toshin* supported its holding by noting that such 'negotiate in good faith' clauses are in the public interest as they promote the consensual disposition of any potential disputes. The Court then went on to elaborate that such good faith provisions are "consistent with our cultural value of promoting consensus whenever possible".<sup>19</sup> It was also noted in *Toshin* that the concept of good faith, at its core, encompasses the requirements of honesty and observance of accepted commercial standards of fair dealing.<sup>20</sup>

It is arguable that the reasons provided in *Toshin* to render clauses to negotiate in good faith similarly support agreements to perform contracts in good faith. Like the former, obligations to

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<sup>16</sup> *Supra* note 8.

<sup>17</sup> V Sims, "Good Faith in English Contract Law: Of Triggers and Concentric Circles" (2004) 1:2 Ankara L.Rev. (Winter) 213 at 217.

<sup>18</sup> [2012] 4 SLR 738; [2012] SGCA 48 at [40], [42].

<sup>19</sup> *Ibid* at [41].

<sup>20</sup> *Ibid* at [45].

perform contracts honestly and fairly would also go a long way towards preserving consensus and cooperation between the parties. This is ultimately more conducive for public and commercial interests, as opposed to a categorical rejection of the doctrine of good faith. Taking this argument even further, these same reasons also reinforce the argument for an implication of a general good faith obligation in all contracts.<sup>21</sup> Furthermore, with respect to the English jurisdiction, it has already been noted that “there are signs that the traditional English hostility towards a requirement of good faith might be abating”.<sup>22</sup>

## V. CONCLUSION

There is substantial impetus for Singapore in recognizing good faith as a general principle in contract law as many major economies such as the USA, China and Japan have already done so. Acknowledgement of the general principle of good faith would help align the local jurisdiction with that of the major economies and render the nation more accessible and commercially attractive to investors.<sup>23</sup>

The concept of good faith is coherent with the fundamental objective of contract law which aims to “protect the reasonable expectations of honest men”.<sup>24</sup> In order to achieve this purpose, essential virtues such as honesty, rationality and fidelity to the bargain must be upheld. Indeed, it has been stated that it is difficult to see how contracts could be agreed in the absence of mutual trust and sincerity.<sup>25</sup> The uncertainty of the doctrine and its alleged inconsistency with fundamental interests protected in contract law should not be overstated. Instead, a thorough re-analysis of the viability and necessity of good faith would be appropriate in light of growing recognition of the role that good faith plays in ensuring that contractual powers are not exercised for improper purposes.<sup>26</sup>

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<sup>21</sup> *Supra* note 5 at p 439.

<sup>22</sup> Ewan McKendrick, *Contract Law*, 7<sup>th</sup> Ed (United Kingdom: Oxford University Press, 2016) at p 265.

<sup>23</sup> Lee Shen Yang, “A Look at ‘Good Faith’ in the Common Law” [unpublished, archived at CJ Koh Law Library] at p 12.

<sup>24</sup> *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] SGHC 71 at [151].

<sup>25</sup> *Supra* note 5 at p 440.

<sup>26</sup> *Ibid* at p 440.