

Good Faith in Contract Law

Professor Roger Halson, Contract law

Hello, my name is Roger Halson. This is the first video blog for the law of contract for this year. What I'm going to talk about today is the topic of good faith. We've touched upon this in one of the written blogs, what I want to do is just to put this topic of good faith in a wider context. The main place in the study guide where good faith is discussed is in relation to the certainty requirement for the formation of a contract. A case called *Walford v Miles* in the House of Lords is discussed on page 63 of the contract study guide. The issue in that case was whether parties negotiating for a contract owed an obligation to each other to act in good faith in those negotiations.

The House of Lords decided that it was antithetical to the adversary positions of the parties when negotiating to impose a duty of good faith. In other words, when parties are negotiating for a contract, they are entitled to think about themselves only. So long as they are not deliberately dishonest or fraudulent, they can proceed thinking only of their own self advantage, and they don't have to think about the interests of the other party to the negotiations.

In many jurisdictions, there's a much wider notion of good faith. This is particularly a feature of civil law countries. Countries with a civil law base jurisdiction are countries where the origins of their law lies in the Roman law. That's most of mainland Europe. Common law countries, in contrast, derive their law from the law of England, where it is the decisions of the courts, rather than general codes that are the starting point for the law on a particular topic. If you look at a map of the world, and there is one with quite indistinct shading on page 13 of the study guide, you might form the impression that the civil law is more prevalent or more dominant in the world in the common law.

34% of the landmass of the world is subject to civil law jurisdictions, whereas 28% of the landmass of the world is subject to common law jurisdictions. However, when you look at the populations living under the different jurisdictions, the emphasis is a little bit different. 23% of the world's population is subject to civil law jurisdictions, 35% to common law. But if you then look at a measure of economic activity in the different jurisdictions, you find that 40% of the world's GDP, gross domestic product, measure of the economic activity in the country, occurs in common law jurisdictions and only 23% in civil law. This is why we associate the common law with international trade and commerce.

Now, when we think about whether the low income countries should adopt a wider, more extensive use of the concept of good faith, we do have to recognize that in some places, in some common law jurisdictions, there is still, there is already a doctrine of good faith operating. In the United States, for example, in the uniform commercial code, in article 1304. There is a general obligation for contractors to act in good faith towards each other in the performance of a contract. Good faith is defined in article 1201 as honesty in fact, and acting in accordance with reasonable commercial standards.

Now, if we compare that provision in the uniform commercial code with the case of *Walford v Miles*, the first important point to note in this discussion arises. That is that, when you consider whether we should have a more general doctrine of good faith, you need to consider in relation to which episode in the life of a contract. In *Walford v Miles*, the issue was whether the parties owed duties to each other when negotiating a contract. The provision I've just referred to in the uniform commercial code referred to the performance of a contract.

It is far more obvious, or more readily accepted, that when I've entered contractual relations with another and that we've posed confidence in each other sufficient to enter the contract, then we should look out for the interests of the other and not act opportunistically towards that other when performing that contract. It is less obvious why when negotiating for contract that hasn't yet come into existence, we should in the marketplace not be able to just pursue our self-interest and not take account of the others interest.

Now, to say that we don't have a general doctrine of good faith in the common law doesn't mean that we condone or encourage bad faith. There are various subjects you've studied which really are directed to controlling bad faith. The law of misrepresentation in chapter nine of the study guide is the main doctrine, the main vehicle which the common law uses to control parties making misleading statements prior to entering a contract, i.e. joined negotiations.

The doctrine of promissory estoppel, which you looked at in chapter three of the study guide, and the doctrine of economic duress in chapter 10, are both chiefly concerned with the modification of a contract. Not its formation, not its negotiation, not its termination, but its modification. They control or regulate parties conduct when they seek to modify a contract.

The second important question in relation to good faith is whether the assertion is that there is an implied, or alternatively, an express obligation. The general respect which the law of a contract has towards what the parties actually say means that if they include in their contract an express provision that one party should act in good faith towards the other, then that will generally be upheld. What is more contentious is whether if they fail to specify such a duty, the court should imply one.

The reasons for this hostility in English common law towards a general implied duty of good faith is partly for the reason I've already mentioned, that the law of contract is often thought to be about empowering and enabling individuals to pursue their own self-interest, and to operate in a free market to the advantage of all. There's a certain notion of individualism and self-determination which is central to our contract law. But also, it's thought that that preeminent position of the common law, as the law of international trade, is based upon its certainty, and that certainty and predictability would be reduced if we introduced a notion of a general duty of good faith.

That really concludes my overview of the doctrine of good faith. There are people who are very enthusiastic. Mr. Justice Leggatt, in the Yam Seng case, was a great champion and promoter of a general idea of good faith. Subsequent cases in the Court of Appeal withdrew from his proposition that there is a general duty of good faith to be implied into contracts. But an interesting future lies ahead of us, because in his final case in the commercial court, Lord, Mr. Justice Leggatt as he then was, did indicate his continued enthusiasm for a general doctrine of good faith.

That was just at the point where he has in fact been promoted to the Court of Appeal. I think we'll expect to hear much more in the future about a general doctrine of good faith, and he will be the person, I am sure, who will be championing it. Thank you very much.