



Adoption of good faith in English contract law

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Abstract

Good faith in English Contract Law has been prioritized to protect the consumers. However, the aspect of the consideration of good faith in the English Contract law has remained contentious and debatable in the broader aspect of business to business negotiation and other commercial contracts (Cheyne & Taylor, 2001).

Keywords: Good faith, negotiation, transaction

1. Introduction

The English Contract Law today has been able to develop sequence of approaches which aimed at dealing with the behavior of the parties in times of negotiation as behavior bearing on the creation and context of the Contract. This notion has impacted the pre-contractual agreement directly, as most of the necessities of good faith that is being used in negotiations and dealings might not be feasible if the same documents have not been secured for the contract validity (Clarke, 1993) [3]. Since the previous years, former judges have also required to give consideration on good faith into the English Contract law as the government aspect which can be sued to all dealings and contracts. However, such notions have failed to attain such, and some other reforms.

Accordingly, good faith has been regarded as an essential aspect in the system of the Civil Law which runs through the whole Law of Obligations (Beatson & Friedmann, 2002) [1]. The goal of this paper is to analyze the significance of Good Faith in English Contract Law. It will also discuss whether it is important to adopt a general duty to negotiate in good faith.

2. Discussion and Analysis

2.1 Good Faith

In the US Uniform Commercial Code, the lawmakers have been able to generate the good faith concept as an eminent and overriding aspect. This has been done by expressively using fifty out of 400 sections and implies such with many other parts. For instance, from Section 1 to Section 203 of the mentioned code, it has been stated that each duty or contract with such Act implies a responsibility of good faith in terms of enforcement and performance. In this Code, good faith has been referred to as honesty in the context of conducting a transaction or honesty in the conduct of any transaction. Nonetheless, and for all its purposes and intentions, such has been stated by the lawyers from the USA which has trivial meaning than the contextual and procedural fairness that is the nonexistence of dishonesty and fraud, misinterpretation among others.

The American Restatement (Second) of Contracts has also considered a broader context in good faith. For instance, they have defined bad faith as paragraph 205 of the ARSC which includes the evasion of the bargaining spirit, the absence and inadequate diligence as well as slacking off, providing

insufficient performance, the authority to specific conditions, interference with other involved stakeholder's performance or failure in cooperation

An ongoing debate has been focused on the appropriateness to comprehend good faith as a goal standard and not merely become a mindset as a subject of the contractual involved parties. Some scholars who are referred to as the Communitarians have an argument in line with the judges that considers community standards of decency and fairness in terms of the contractual bargains (Mason, 2000) [7], in which other object have been regarded as dangerous in the business cycle. However, this argument has been found to be more confusing. In the English Law it is a big factor on knowing when a contractual condition which operates in the market becomes unfair (Stewart, 1998) [12]. If such term has not been successful, it should be terminated from the application in the market and the courts have their ways of protecting the customers from these unworkable items, by considering highly recognized approaches of using other conditions as well as creating a contract that would generate effectiveness of the business.

In order to ensure these, Good Faith has been regarded as a principle which guides the formulation and implementation of contracts among different provisions and laws. It also guide the hyperactivity of the American merchants and the existing liberal behavior that comply with the court's jurisprudences narrowed and streamlined down to its significance for the Contract of law to the concept known subjective rule which indicates a "good faith purchase". This was a situation which gives consideration on the purchase of properties or the business title and was efficiently expressed on early 18th century, in the *Lawson v. Weston* case, as the empty head and pure heart context, it can be claimed that all the manners of the English Contract law is mostly in consistent with fairness. Accordingly, the English Courts may not be considered as adequate as it should be in accordance with the consideration, the imbalance of the gross in its obligation should still be considered as well (Clarke, 1993) [3].

The conceptual lineage and history of English Contract law can be realized on post-Benthamite Utilitarianism. It has been regarded by Atiyah-an English Scholar who has been stressed out by the neo liberalism concept of Hayek. In view of this, it is considered that if good faith needs a substantial evaluation

and examination rather than being procedural, can this be regarded as a simple part of the general concept from the free market, in consideration of the mirage of social justice (Steyn, 1991) ^[10]. In order to become fair, the English scholar has rejected the extreme perception that substantial fairness is not possible to attain. Nonetheless, since Atiyah strongly perceives that conceptual fairness, in which the English Contract Law has a strong commitment which results to have a relative fairness. The dogma and policy of consideration, although significantly diverse in function and its nature than the dogma of good faith, has been considered in the English Contract Law, which is also essential aspect of objective good faith.

The consideration must be of some value and not entirely insulting and cynical, and this should not be immoral and illegal. In a later paper, it has been regarded that such formalistic aspect, considered in New Zealand Court has been overemphasized by a better concept of majority of the juries who considers that one of the critical roles of contract law is to provide effective approach for contractual dealings based on achieving sensible and rational expectations and needs of the involved parties. Also there is not a place of different objectives between the rational expectation of the involved parties and the needs of good faith (Steyn, 1997) ^[11]. The context of the obligation to give consideration to good faith in considering contractual dealings is integrally offensive and repulsive in terms of the adversarial condition of the parties when conducting a negotiation. Herein, each of the party involved has given the chance to show their interest and concerns, as long as such person does not commit misinterpretations in the court.

The obligation considers negotiation through good faith has been recognized to be irrelevant both in practice and frameworks. This has been consequently inconsistent in its dogma as part of the negotiating team in line with the case under Lord Ackner such as *Walford v Miles*. Different opinions, even positive or negative ones, have been concerned with the dogma of the good faith and the feasibility of highlighting the policy and aspect into English Contract Law. Therefore, as mentioned in Peel (2007) ^[8], in spite of the idea that the aspect of good faith has been improved in different legal systems all over the world, lawyers, still do not consider ideas and contexts that a specific body should act as well as work in good faith.

The dogma of good faith is a universal situation or circumstances of enforceability of a negotiation which indicates that both parties have moved in good faith. For instance, it has been explained that the policy of good faith as well as fair transactions and negotiations noted that in practicing the obligations and accountabilities, each of the involved entities must act with regard to fair negotiation and good faith as well as they should not consider or they should restrict the given responsibility. Hence, good faith in the conduct and enforcement of negotiations as a highly recognized concept are being considered in various legal systems which include the English Contract Law.

2.2 Adoption of Good Faith in English Contract Law

As regarded above, the principal objective of this is to analyze and discuss the policy and dogma of good faith as being adopted and not be dismissed by the English Contract law, to make it more capable in enforcing the laws and rules in binding contract. With this concept, the case of *Stiletto Visual*

Programmes Ltd v Interfoto Picture Library must be regarded as reference. In this case, the complainant has hired forty seven photographs to the Offender. These photographs were sent with a note and were put in a jiffy bag. The note composed of nine terms which include clause that provided that a cost of £5.00/transparency/daily should be paid if said items were kept for more than fourteen days. However, the Offender has not used said items and forgot about it. In this case, the complainant has sued the Offender.

It has been asserted that in some civil law structures and approach, and perhaps in majority of the legal system external to the common law. Under the provision of responsibilities and the provision of the overarching principles, both parties should consider and act in good faith when enter into contract (Quillen, 1988) ^[9]. This do not merely means that the parties must not trick or misinform one another; the effect could be most pertinently implied by the symbolical context of fair playing, being clean or relaying one's cards to face upward.

The principle of good faith should be fair and open in negotiations and transaction. It has also been mentioned that the English Contract law has been able to consider piecemeal resolutions as a reply to illustrate the issues and conflicts of unfairness instead of entrusting and obligating itself to no such superseding and intervening policy and regulations. In this case however, the court has rejected the second condition, while the defendant declined and denied in paying the obligation. Thus, the jury has ruled favoring the complainant. In this respect, it can be interpreted in the concept of market-individualism in which consumer have perceived that the concept of good faith has been unlimited and open ended healthy policy or principle (Cole, 1994) ^[4].

On one hand, *British Telecommunications plc v Timeload Ltd* could be described as the case in which irrespective and good faith in the negotiation, definitely come near on such technique. In this case, nonetheless, the determination of its closeness should be delegated or represented by this aspect in to the English Contract Law and the distances of the courts in accepting this principle. This can be respondent with *Walford v Miles*, in which in line with the closeness of the principle to be represented shows that unless the confrontational and accusatorial ethics of the English Contract Law has been neglected and with the notion that it is not that distant. For some instances, the case of *Marks and Spencer plc v Baird Textile Holding Limited* have shown that eagerness and court's promptness to be extended by the embedment of good faith. In this regard, the Court of Appeal give consideration on the behaviour and conduct from classical individualistic ideologies as well as the opposing arguments Bair in terms of the cooperative type and description of the formers connection and affiliation with Marks & Spencer. Thus, even to such aspect, that is, good faith is noticeable; the unique as well as distinctive doctrinal concept is visible.

Nevertheless, the feasibility of adopting good faith by covertness may be considered by the pressures that have been established by such adoption. Those pressures includes the world of the civil and the common law, which has been authoritative in viewing that good faith negotiations has been the basis of other system in the concept of contract law (MacMillan, 2003) ^[6]. In addition, most of the legal systems of other nations that have been unified because of the EU have also give consideration to good faith doctrine among negotiations and contracts. This has been considered in two

directives which include the Unfair Terms in Consumer Contracts and Commercial Agents. The first is considered unfair if as opposed to the needs and demands of the aspect of good faith, leading to a significance imbalance with rights and responsibilities of both entities that arise under such contract which may lead to the loss and disadvantage of the consumers. On the other hand, Commercial Agents directives are regarded as the dutiful act and the act of good faith to the interest of both parties. With these directives, the context of Good Faith has become a familiar concept. In addition, it is also logical to note that the English Contract law as exerted by its doctrine and because of the pressures faced has accepted it. Nonetheless, it can also be essential to consider that lawyers can state that the use of good faith as generic guidelines would be considerable.

In addition, in the case of *First National Bank v Director General of Fair Trading*, the condition in a typical and usual aspect of loan dealings enabled bank to raise additional payments as well as interest in which the loaner defaulted on its repayment and consider deal in paying their debt via installment with a longer period. Accordingly, Regulation 3(2) (b) states that the negotiations and agreements which are relevant to the competence and acceptability of remuneration should also be tested in line with fairness. Consequently, the term as far as the House of Lords are concerned, was fair enough, however, the Lordships have regarded that the good faith indicates fair and open negotiations. In the same manner, Steyn have warned that any decently, morally and essentially processed in terms of interpretation of the needs in good faith must not be included.

In this regard, the context of good faith in English Contract Law should be given enough consideration. The cynical and doubtful view has given five adverse and unconstructive arguments against the adoption of the general doctrine of good faith in English Contract law. The first is that, a principle of good faith when it requires both entities in considering the legitimacy of the expectations and interests of each other, cuts against the significantly individualist ethic that is under the concept of English contract law.

For instance, in the case given above such as *Walford v Miles*, it has been stated that considering the needs for good faith would be incompatible with the accusatorial ethics that underpins English Contract Law. On the second aspect, it can be noted that the concept of good faith, assumes a set of moral standards in opposed as to which the contractors are being judged, however it was not clearly stated whose or which morality should be considered. As relevant to the second aspect, the third concern notes that the principle of good faith would lead to having different inquiries and questions into the state of minds of the contractors. The next is that good faith has the capability of controlling matters of aspects that consider the remedial concept while eliminating the authority and power of the negotiating entities. If the aspect of good faith has indicated unspecified choice integrated with the notion that such aspect gives challenge on the authority of the negotiating entities then there exists a clearer concept that individuals should be skeptical.

It is essential to consider that the advantage and disadvantages of the arguments on considering good faith and also relies on which framework and model of good faith should be suitable for a specific case or situation. There are three frameworks of good faith, according to Fried (1981)^[5], which an individual should comprehend before allowing positive or negative

arguments. The first one is that requirement of good faith that generates on the aspect of having a fair dealing that are already existing in a particular terms and conditions of such negotiation. The next is the good faith that behaves on the aspect of fair negotiations that are directed by a crucial cooperative morality. The difference between the first two good faith models is that the latter do not have the capability of tracking determined standards, on a contrary, it attempt to generate the market in a more rational subscribing the rules of cooperation. The last one is what is known as the visceral justice by Michael Bridge. Herein, the judges response in an impressionistic manner to the merits of the conditions and complete the cases on time, all in the sense of good faith. This model is also considered with judicial license.

3. Conclusion

With the discussed cases and the analysis, the principle of good faith in negotiation should be adopted by English Contract Law. Different sample cases have shown the usefulness of considering the good faith. However, there are still arguments and debates about this principle. In this regard, the courts should be able to set a precedent regarding this matter. Although, the principle of good faith may not be recognizable and in some cases, might not be applicable, it does not affect the set of a good standard in English Contract Law. Hence, the aspect to deal as well as negotiate using good faith is capable of implementation and application only as obligatory negotiation. In this respect, it should be expected that the English Law should consider the use of good faith as one of the essential and mandatory requirements.

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