

**Good faith in commercial contracts:
What is its scope?
What does it mean?
How do you show compliance?**

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‘I sincerely believe I
acted out of good faith’



- *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2012] EWHC 111 (QB) – Leggatt J:
- “...there seems to me to be no difficulty, following the established methodology of English law for the implication of terms in fact, in implying such a duty in any ordinary commercial contract based on the presumed intention of the parties.”



- *Mid Essex Hospital Services NHS Trust v Compass Group UK* [2013] EWCA Civ 200 – Jackson LJ said that:
- *‘If the parties wish to impose such a duty, they must do so expressly’*
- *Hamsard 3147 Ltd v Boots UK Ltd* [2013] EWHC 3251 (Pat) – Norris J said that:
- He did not regard the decision in *Yam Seng* as authority for the proposition that, in commercial contracts, it may be taken to be the presumed intention of the parties that there is a general obligation of "good faith".



Mid Essex Hospital Services NHS Trust v Compass Group UK

- Clause 3.5:
- *“The Trust and the contractor will cooperate with each other in good faith and will take all reasonable action as is necessary for the efficient transmission of information and instructions and to enable the Trust or, as the case may be, any Beneficiary to derive the full benefit of the contract. At all times in the performance of the Services, the contractor will cooperate fully with any other contractors appointed by the Trust or any Beneficiary in connection with other services at the Location.”*



***TSG v South Anglia Housing* [2013] EWHC 1151 (TCC)**

- Clause 1.1:
- “[1] The Partnering Team members shall work together and individually in the spirit of trust, fairness and mutual cooperation for the benefit of the Term Programme, within the scope of their agreed roles, expertise and responsibilities as stated in the Partnering Documents, and [2] all their respective obligations under the Partnering Contract shall be construed within the scope of such roles, expertise and responsibilities, and [3] in all matters governed by the Partnering Contract they shall act reasonably and without delay....”



Bristol Rovers (1883) Ltd v Sainsbury's Supermarkets Ltd [2016] EWCA Civ 160

- Under Clause 31.1 both parties agreed to:
- ***'act in good faith in relation to their respective obligations in this Agreement and to assist the other in achieving an Acceptable Store Planning permission for the Store Development and the Stadium Development.'***
- Clause 32 was headed 'General Obligations'. It provided that:
- ***"32.1 No party shall take any action or suffer anything to happen which is or is likely to be or become detrimental to, or increase the cost of the other's endeavours to satisfy their obligations contained in this Agreement.***
- ***32.2 All parties shall (at no cost to that party) lend such assistance as the other may reasonably and specifically request and lies within their ability to give."***



What does it mean?

- Black's Law Dictionary:
- *“(1) A state of mind consisting in honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage”*



What does it mean?

- The US Second Restatement of Contracts:
- *"Good faith performance or enforcement of a contract emphasises faithfulness to an agreed or common purpose and consistency with the justified expectations of the other party"* and *"good faith excludes a variety of types of conduct characterised as involving "bad faith" because they violate community standards of decency, fairness or reasonableness."*



What does it mean?

- *In summary:*
- Acting honestly towards the other party
- Observing reasonable commercial standards of fair dealing
- Genuinely striving to achieve the contractual purpose
- Acting consistently with the justified expectations of both parties



How do you prove compliance and/or breach?

- Breach will be proved by showing bad faith
- Proving honesty or lack of malice not enough to show compliance
- Subjective and objective test
- Need to show:
 - Not only honest belief
 - But also a conscientious approach to the exercise of contractual powers



A conscientious approach to the exercise of his powers?

