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| **Essay Question/Title:** | “We are, in my view, right to be cautious about adopting a general requirement of good faith in contracts” Goode, The Shaping of Commercial Law in the Hamlyn Lectures, Commercial Law in the next Millennium [1997] p19Critically discuss the English Courts’ approach to good faith in the light of the above statement |
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**1. Introduction**

In the global legal system, British contract law has its own unique features. For one to protect the sacredness of the agreement and also the autonomy of the parties, the British contract law did not introduce the principle of good faith. Secondly, British law is rooted in the traditional belief of self-determination of contract and is unwilling towards accepting the alleged vagueness of the principle of good faith. Instead, they are willing to accept guidance from more specific cases. Finally, some scholars believe that the introduction of a vague and general concept of the principle of good faith will lead judges to add personal subjective feelings into judgment.

This article will focus on the following aspects. What is the status of the code of upright belief as a legalized moral obligation in the British legal profession? What are the attitude of the British courts and the British legal community towards the code of upright belief? What are the attitudes toward the principle of good faith and the reasons towards this? Should the principle of good faith be introduced to the UK contract law?

**2. Basic introduction towards the principle of good faith in the UK**

What is the principle of upright faith, it seems difficult to give a clear definition? According to Professor *Roy Goode* he said that *“…we do not know quite what [upright faith] means”*[[1]](#footnote-1).In the UK legal system, there is no such thing as upright faith. The principle of upright faith is reflected in some cases. While British law courts have always been unwilling to acknowledge the overall principles of good faith, most judge’s worry that if they recognize the overall code of upright faith, they will take a huge influence on the principle of self-determination of an agreement and the certainty of the contract*.  For instance, in James Spencer & Co Ltd v Tame Valley Padding Co Ltd, Potter LJ* held[[2]](#footnote-2): there is no overall principle of upright faith in the English law of agreement. As long as the plaintiff does not violate the terms of the contract, they can do whatever they want

Traditionally, English law courts have refused to take the principle of upright faith. This is not only because accepting the code of upright faith will lead to the expansion of discretion of judges, and judges are very likely to bring personal subjective feelings into the case (in civil law countries, they mainly rely on the abstract principles of good faith to make up for specific legal systems blank space. The judge's equity function is reflected in the abstract principle. On the contrary, the British have already established the principle of equity before the code of upright faith). Secondly, the code of upright faith is too general, there is no certain concept, and it cannot be judged and summarized from the case. This is unacceptable for a case law country like the United Kingdom. Third, the United Kingdom is an ancient business empire, and the state advocate’s classical contract theory. If the principle of good faith is introduced, it will cause double-issue to shrink when contracting, affecting the freedom of contract and the sacred contract.

**3. English courts’ approach to good faith**

British law does not recognize general upright faith, as if acknowledging the responsibility of the upright faith would lead to some kind of awkward social disease[[3]](#footnote-3). As mentioned above, the contract signatory is not obliged to inform the other party of adverse terms or a potential risk. Although there is no uniform standard on the code of upright faith, in many cases we can draw the attitude of the British courts to this principle.

*In CPC Group, Ltd v Qatari Diar Real Estate Investment Co6 Vos* J [[4]](#footnote-4)( then was) held that the code of upright faith is to abide by fair and reasonable commercial standards, follow the reasonable business objectives of the parties, and to perform in accordance to the reasonable anticipations of the parties involved. However, such a statement does not mean that the parties to the contract will leave behind the advantages of the free negotiations which are in the agreement act.

In other words, it is problematic to give a specific concept to the obligation of upright faith. How to determine whether it is ‘good faith’ or ‘bad faith’ depends mainly on the meaning of the context. *In Yam Seng Leggatt J ‘emphasised’*[[5]](#footnote-5) that the responsibility of upright faith includes two aspects, the first is one to be honest, and the second is to be faithful to the contract between the two parties. From these two cases, we can draw several conclusions. The general good faith described in the British contract law is a figurative obligation, and it is very necessary to comprehend that the upright faith in combination with the context. This means that although there is no general fiduciary duty in the UK contract law, honesty often appear as an implied obligation when necessary. This obligation that is always hidden are always recognized by the court as an agreement or a contract.

*In Greenclose Ltd v National Westminster Bank plc[[6]](#footnote-6) Andrews J DBE* describe the background as the most important. *In TSG Building Services plc v South Anglia Housing Ltd*,[[7]](#footnote-7) the judge inspires the understanding of the text and the background of which the contract is laid. The most recent incident happened when D&G Cars v Essex Police Authority[[8]](#footnote-8) .Dove J claimed that the word he used‘integrity’ is the same as the phrase ‘upright faith’ and this was mostly used by Leggatt J in Yam Seng[[9]](#footnote-9).Although integrity may rule out dishonest behavior, it may also increase the distrust of the parties in the contract negotiations and reduce the confidence of both parties.All in all, good faith can be roughly summed up as commercially acceptable.

**4. General practice of the court**

The people working in the construction industry are aware of the methods of contracts used locally have responsibilities that can be referred to as upright faith type of obligation. For instance, they are mostly usually apparent partnering contracts indicated in section 10.1 of NEC3, which indicates that the involved parties ought to act in agreement to the given agreement regarding mutual trust and cooperation. While it is accepted in concepts of fairness in the deal which can be accepted in English courts reaction in the relation of construction and implication of terms, the fact is that English contract law in the court has shown reactance in recognizing any unescapable duty of upright Faith[[10]](#footnote-10).

Due to the unwillingness of the England law courts in implying the obligation of upright faith is due to the concerns of undermining contractual honesty. Instead, Courts in English have as stated by *Justice Bingham* said in *Interfoto Picture Library Ltd v Stiletto Visual Programs Ltd*[[11]](#footnote-11), wished to progress *“fragmentary explanations in response to demonstrated glitches of injustice.”* There isn’t any acknowledged explanation of the perception in English law. However, during the judgment, Lord Justice Bingham defined upright faith as the most appropriately showed by the idioms as coming clean or acting fair concluding.

If the English court doesn’t define good faith in contracts, the involved parties will have a sense of argument on what upright faith in a contract setting means in cases where different parties have comprised upright faith in their contract. The method is that the English law courts will have to seek consequence of expressing provisions that tell to the real act of a specific responsibility.

The court judgment in 2003 case that involved *Yam Seng pte vs. International Trade Corporation Ltd*[[12]](#footnote-12) had expectations that the court would be exposed to the universal role of upright faith being indicated mostly in the profitable contracts. A number of other cases, recently MSC shadowed the method used by Yam Seng[[13]](#footnote-13). However, appeal court did overturn the MSC decision which was recently reverted to the historical position that English courts do not recognize the overall duty of upright faith.

**5. The unwillingness of English Courts**

Historically English courts have shown reluctance in implying good faith. In the courts where there are two or more parties negotiating contract terms, each party is deemed to have the ability to check out on its own interests in both the negotiating and performance of the contract[[14]](#footnote-14). By applying good faith, it would work against this. Due to this nature the British law courts have termed the implication of good faith as vague since it would bring uncertainty since the parties agree their obligations under a contract. Courts have also preferred a piece meal solution to unfairness in certain contracts. Courts depend on implication and construction when appropriate instead of having an overarching principle[[15]](#footnote-15). In many cases, courts have implied good faith when the contract lacks practical or commercial coherence which is very rare.

**Will good faith become a recognized in common law?**

It is said that good faith will become recognized as a principle in the courts? These are by lowering barriers and increasing the incentive of the recognition[[16]](#footnote-16). In lowering the barriers there is an erosion of obstacles in the common law courts that resist its recognition of the good will principle, they are composed of individualism reason, and uncertainty reason. If these reasons are resolved there would be nothing to resist the common law from recognizing upright faith principle.

The Refuting of the individual reason obstacle postulates the ethos of the self-centeredness inherent is conflicting to the obligation of acting in upright faith in a common law contract. On another view, a confrontational and self-centered partnership is not a must at odds required to act in upright faith. Upright faith is never co-extensive with unselfishness; it doesn’t need a party to make a concession in regards to other parts interest[[17]](#footnote-17). For instance, when a lawyer is representing a client in court in view of common law, the lawyer would be branded to be having a confrontational association with each other. Advancement of self-interest is conditioned through a requirement to act in good faith, on the extent that it requires keeping off from bad faith conduct[[18]](#footnote-18). Thus, a general good faith principle never conflicts the ethos of the common law of self-interest. These are obvious from the fragmentary explanation that is established by the common law to deal with evil faith conduct.

The other obstacle that hinders good faith is uncertainty; uncertainty is on the view that good faith is vague. Some people view that upright faith brings about the exclusion of the bad faith, on the other hand, it imports rationality, honesty, far and opens dealing, reasonableness or fidelity to the bargain. Costs and Delays are incurred when the question of what good faith effect meant in a given case to be litigated[[19]](#footnote-19). These clearly indicates a general principle of good faith which ignores contractual certainty which is highly prized by the common law.

**6. Good faith in 'relational' contract.**

Court of appeal having discouraged this trend indicating that it opts the concept of traditional piecemeal solution[[20]](#footnote-20). However, in recent years, a trend in recent years has begun to emerge on the importance and need of implying good faith in specific ‘relational’ long term contracts, such as franchise agreements, distribution agreements, and joint venture agreements. It puts into consideration that good faith recognition would be of significant in the development of contracts that have a potential of reaching far.

**7. How is good faith enforceable in an English Court?**

Historically an agreement in negotiation had been termed as ineffective due to its absence of inevitability in them. In cases of English courts, “no one is able to tell whether the negotiations would be successful or it would fail; or if successful what the result would be.” Handley JA also expressed the same statement. He was mainly involved in the *New South Wales Court of Appeal in a case involving Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd*[[21]](#footnote-21), Handley was mainly involved in the two companies negotiation. The negotiation mainly comprised of*;“may withdraw or continue; accept, counter offer or reject; compromise or refuse, trade-off concessions on one matter for gains on another and be as unwilling, willing or anxious and as fast or as slow as they think fit”*[[22]](#footnote-22). While negotiating, a more venturous arrangement in the Cliff Collieries case which had been unenforced on the stand of indecision, in the court majority of the delegates had disagreed with Handley J.A traditional view and rejected to come to agreement through negotiations in good faith. Their views were that good will would work in a different situation such as when there is a third party. The third party would be granted power to resolve uncertainties during the negotiation process. The position was expanded through the *Rail V NSW Court of appeal in 2009 in United Group Rail Services Limited.*

Companies in New South Wales[[23]](#footnote-23), where the court of appeal gave some direction on requirement for the parties who were to use negation in upright faith.

**8. The duty of Good Faith in England**

It is arguable that English courts at a point never have a role in performing contracts in good faith. It was augmented by *Lord Mansfield's* argument in the year 1766. His argument stated that the law of upright faith had to be used in all the contracts[[24]](#footnote-24). However, in the 19th century, the English law never clarified the uncertainty in these principles. The duty to agree on agreements in upright faith were in relation to the goals of the different parties involved[[25]](#footnote-25). It was never vibrant if that role extended to an agreement then negotiations[[26]](#footnote-26). More general duties were implied to contracts on the functional ground as being important to ensure there is business efficiency in a particular contract[[27]](#footnote-27).

Whatsoever if the significance of the lawful expansions in the 12th century English law[[28]](#footnote-28), the overall responsibility to enforce votive promises are limited in upright faith in the current English Law. During negotiation of upright faith law in English law is not mostly recognized, only in other cases where it is a pre-existing contract. English Judges in courts understand it just as a widespread code “a man should never be allowed to take gain of his own wrong[[29]](#footnote-29)”. Most of the time they don’t do all of their duties with a god heart.[[30]](#footnote-30). mostly there isn’t any strong line in modern cases to the obligation[[31]](#footnote-31). However, courts have been comfortable in performing some duties in good faith.

**9. Recommendations for using good faith**

In an English court when parties want to use good faith, there are a variety of issues one should consider. These are because the courts are reluctant to imply terms added in commercial parties where they are legally represented[[32]](#footnote-32). Although there is flexibility, the parties should take care of the duties how they are framed as the courts find some wording like "champion the partnering relationship, “that is too uncertain in imposing a duty[[33]](#footnote-33).

The parties are also recommended to be specific on during the acting in good faith on every party duty. It is recommended the parties to be honest and act with integrity in what is required of them, such as disclosing information[[34]](#footnote-34). In cases where the party is acting against their commercial interest, they should be clear to extent that upright faith does not require the parties to act contrary to own interest.

There are cases where a good will mostly is breached, considering this there are mitigation measures that different parties should put into consideration. In cases where good will performance is impossible or ineffective, the parties involved have to ensure that the damage is minimized as a result of the agreement no matter the fault[[35]](#footnote-35). The mitigation duty has much adequate importance either economic and stresses of upright faith[[36]](#footnote-36). In some cases, a party may tempt to cause economic injuries to improvement a good edge. On the other hand, it is a matter of malice. Despite the incentive, its disappointment to have a mitigation measure is characterized as an unfair deal. The parties should work together in order to mitigate damages through informing each other if there is an inability to perform or an intention to suspend a contract since all this implicate a failure to an agreement.

By considering the above recommendation, the parties that are involved in the act in good faith act in a defined and express way in their contracts. Through this impunity and uncertainty of the terms of the contract is avoided.

**10. Conclusion**

English courts associations with the principle of upright faith has seemed to change overtime. There isn’t any responsibility of upright faith in the English law contract. However, it is finding its way to commercial contracts in both inclusion and terms in its implication. By recognizing good faith is welcoming growth in the country. With the help of the courts good will in contracts will be enhanced by giving effect. On the other hand, Good faith will promote fair and honesty dealing among commercial operators. English courts have much work to be done to the standards of good will, for instance, it never answers what are the ways forward if a party breaches the terms. Good faith comes up with new terminology by shifting attention to matters that have never been recognized as significant. However, the legal method remains no matter whether is through good will or reasonableness. It cannot be opposed that the recognition of good will principle will bring indecision in the English law. The importance of having good will consume more time, and raising queries practical and theoretical that continue to be answered.

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See C.C. Turpin, “Bonae Fidei Induciae” [1996] C.L.J. 260. See also Barbudev v Eurocom Cable Managements Bulgaria EOOD and others [2011] EWHC 1560 (Comm).

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6. [2014] EWHC 1156 (Ch) [150] [↑](#footnote-ref-6)
7. [2013] EWHC 1151 (TCC) at [36]. [↑](#footnote-ref-7)
8. [2015] EWHC 226 (QB). [↑](#footnote-ref-8)
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11. [1989] QB 433 [↑](#footnote-ref-11)
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16. Ibid. at 2 (quoting Sir Henry Maine, Ancient Law, ed. Sir Frederick Pollock, J. Murray, 1930, 52) [↑](#footnote-ref-16)
17. Common and civil law systems have adopted different approaches to the good faith obligation at the nego O'Connor, Joseph F. Good faith in international law. Dartmouth Pub Co, 1991.tiation stage. See infra notes 17-26. [↑](#footnote-ref-17)
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23. [2009] NSWCA 177. [↑](#footnote-ref-23)
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30. On the distinction between good faith duties in English and codified civil law systems of Europe, see

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