

Perfidious Albion or are we all European now?

The charge of “Perfidious Albion” has not been raised diplomatically against England in recent years. However it is a robust description which could still be used in relation to English contract law - in that there is no general duty to perform contracts in good faith.

Civil law countries, such as France and Germany, recognise a requirement of good faith. It is even recognised in Common Law countries like the USA and Australia.

This duty of good faith has been described as:-

“... An overriding principle that in making and carrying out contracts, parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed as... ‘playing fair,’ ‘coming clean’ or ‘putting one’s cards face upwards on the table.’ It is in essence a principle of fair open dealing.” [Interfoto Picture Library case (1980)].

Key reasons why English law has not to date adopted such a general duty of good faith are:-

- Contracting parties should be free to pursue their own self-interest in negotiations and subsequent contract performance provided there is no misrepresentation or breach of a contract term;
- Recognition of such a general duty of good faith would create too much uncertainty as to what specifically had been agreed;
- Where there are specific concerns, these may be addressed on a case by case basis.

Put simply, unless there is an express term in a contract obliging a party to do, or refrain from doing, something, then that party can act in its own interest even where it might be detrimental to the other party.

English law does however recognise that a contract does not express all terms and some terms may be implied. In a recent case [Yam Seng (2013)], the court has held that an obligation to act in good faith could be implied in a contract. The judge in this case observed:-

- The good faith obligation in European civil law countries in turn influences EU directives which in turn are implemented into English law;
- English law already recognises a duty of good faith in certain areas such as employment or partnership contracts;
- The test to imply a term in a contract (in the absence of an express term) is : – what would the contract -read as a whole against the relevant background- reasonably be understood to mean;
- That the relevant background includes shared values and norms of behaviour and that other courts have found that these values can include such aspects as honesty and fidelity to the parties bargain;
- As it is based on cultural norms, good faith need not always mean ... ‘playing fair,’ ‘coming clean’ or ‘putting one’s cards face upwards on the table.’

- Rather and consistent with the case by case approach of English courts, the extent and meaning of an implied duty of good faith will depend on context and the construction or interpretation of the respective contract.

So, are we all now going European and adopting a duty of good faith to other parties with whom we contract? Not quite yet, as:-

- This was a judgement at first instance and appeal courts may not follow it;
- Even where English courts may in future imply a duty of good faith, what may or may not be implied will be dependent on the specifics of each case.

But -- for most business contracts, where the parties are looking for repeat business, then it will often make good commercial sense for the parties to act fairly towards each other;

And -- wherever possible, it is better that terms should be clearly expressed in a contract rather than seeking to imply a term which may be disputed by the other party.