

# Now you see it, now you don't

The concept of good faith remains just out of reach despite best efforts to push it into the mainstream of commercial contracts, says **Julian Acratopulo**



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**L**aw students learn early on that there is no duty generally implied by law to act in good faith in commercial contracts. Indeed, it may well be that the absence of any generalised obligation of good faith is one of English law's international attractions. Yet rumours abound and there has been a citing of this



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## beguiling and elusive concept off Fleet Street.

In *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), against the backdrop of a short, informal, distribution agreement for Manchester United branded cosmetics, Leggatt J sidestepped this long established principle and concluded that the obligation could be implied as a matter of fact under the normal approach to implication. Moreover, he seemed to be suggesting that this obligation should be implied as a matter of course unless the parties excluded it.

On what was clearly a topic of considerable intellectual interest to him, the judge explored carefully the justification for the implication of such a duty. He highlighted that the duty has long been recognised in the US and is increasingly being recognised in other common law jurisdictions, as well as European countries. In his view, the implication of the duty was consistent with the move toward harmonisation of EU contract law and its penetration into English law via EU legislation, such as the Unfair Terms in Consumer Contract Regulations 1999. In circumstances where the expectation of honesty and fair dealing was a norm underlying all contractual relationships, the judge saw no difficulty in implying on a case-by-case basis an obligation to act in good faith by reference to the objective standard for reasonable and

honest people. This fidelity to the bargain was not at odds with the parties' freedom to pursue their own interests and would not create uncertainty.

However, it is clear that other members of the bench remain to be convinced. Commenting on Leggatt J's views in what he tellingly described in *TSG Building Services plc v South Anglia Housing* [2013] EWHC 1151 as "an extremely illuminating and interesting judgment", Akenhead J concluded that cases and contracts are sensitive to context and therefore he would not draw any principle from *Yam Seng* of general application to all commercial contracts.

Likewise, the Court of Appeal subsequently considered *Yam Seng* in *Mid Essex Hospital Services NHS Trust v Compass Group* [2013] EWCA Civ 200 concluding that if the parties wish to impose a duty of good faith in a contract, they must do so expressly (Jackson LJ at paragraph 105). Even if the parties expressly require good faith, the court will take care not to construe a general and potentially open-ended obligation to act in good faith, lest it cut across the specific provisions agreed by the parties (Beatson LJ at paragraph 154).

Like a legal will-o'-the-wisp, it seems therefore, the concept remains tantalisingly out of reach, notwithstanding Leggatt J's best efforts to push it into the mainstream of commercial contracts. **SJ**

## PARADIGM EXAMPLE

**The *Yam Seng* case is probably a paradigm example of the old adage that hard cases make bad law.**

Subsequent decisions suggest the notion of a general implied duty to act in good faith in commercial conflicts is confined to the circumstances of *Yam Seng* and the views of the particular judge.

Even absent such a general implied duty, ultimately, the common law remains sufficiently flexible to police the conduct of parties in their contractual dealings. It is that non-prescriptive flexibility that makes English law one of our great exports.

Practitioners must nonetheless be mindful of the lurking presence of the concept and how (as in *Yam Seng*) it may shape other duties, which may be implied into a contract. Likewise, if parties do wish to expressly include good faith obligations in their contracts, careful drafting will be required to define the precise scope and application of those duties, in the face of courts taking a narrow approach to their interpretation.