

# GOOD FAITH

## GOOD FAITH: JUST DESSERTS, OR PIE IN THE SKY?

*“A duty to act in good faith, where it exists, is a modest requirement. It does no more than reflect the expectation that a contracting party will act honestly towards the other party and will not conduct itself in a way which is calculated to frustrate the purpose of the contract or which would be regarded as commercially unacceptable by reasonable and honest people.”*

### ROUND TABLE LUNCH WITH:

- Host: Damian James of Damian James Quantum and Delay Experts.
- Karen Kirkham, Chair of the JCT and Head of Construction at BDB Pitmans.
- Chantelle Vermeulen, Legal Counsel at Equans.
- Shy Jackson, Partner at BCLP.
- Philip Norman, Partner at law firm CMS.

# Introduction

In August 2023, a select group of experts from the construction and legal sectors came together to look at ‘Good Faith’. The lively discussion ranged from issues of contract drafting to how different parts of the world from the UK to Africa, the UAE and Israel tackle concepts of good faith.

## What is Good Faith?

As noted in an earlier article by Damian James, Good Faith<sup>1</sup> is an ancient concept and is treated very differently by differing legal systems. It’s recorded in Roman society - faith did not mean for the Romans a religious faith as it is interpreted now. It is rather a degree of integrity and trustworthiness. As Adams<sup>2</sup> observes, the Romans regarded it as one of their first virtues. They had a well-known saying, “Punica fides” referring to the untrustworthiness of a Carthaginian.

Good faith then, has been creating debate for thousands of years. Yet it remains a term often used with only limited understanding and arguably even less definition in legal terms.

[1] <https://ciarbkenya.org/wp-content/uploads/2023/02/Vol-111.pdf>

[2] <http://www.csun.edu/~hcfl004/fides.html> (Retrieved 27/01/2023)



## Avoiding and Resolving Disputes

The team kicked off with a look at disputes and the challenges of what happens when things get to the stage of formal resolution. Damian notes that good faith presents a number of challenges to the avoidance of disputes. If good faith was truly in operation then it might be possible to avoid the dispute in the first place. However contractual dispute processes may stifle opportunities to resolve issues less formally.

Philip questions whether to address good faith through a contract.

This is something that stimulates much discussion. There has been, as Shy Jackson notes, much discussion around the nature of the contract in the recent Post Office litigation and how the law will impute an obligation of good faith in certain contracts described as relational.

Shy notes that there are lawyers who would very much prefer to avoid a contractual good faith obligation. He observes that “most parties would agree to act in good faith” but lawyers foresee it creating complications. Is it therefore easier to accept that parties may or will act in bad faith?!

In some cases, the panel observed, the employer may even set out to damage its contractors. For example, in *ICI v Merrit Merrell*<sup>1</sup> there was evidence in disclosure that the client tried to push the contractor to insolvency to achieve a better commercial outcome. Is this a violation of good faith? Does it matter?

Could COVID be one of the best examples of the application of good faith in recent years, Karen asks? The CLC guidance<sup>2</sup> aims to ensure that parties work together to achieve a common goal rather than working in a more adversarial fashion. She observes that the guidance helped parties to understand that if a party is driven to insolvency by a dispute, “being right” may not necessarily help the project or lead to a successful outcome.

[1] <https://www.bailii.org/ew/cases/EWHC/TCC/2017/1763.html>

[2] <https://www.constructionleadershipcouncil.co.uk/news/site-operating-procedures-version-9/>

## Good Faith to Who?

Contractually, why should good faith take precedence over other terms in the contract? Chantelle suggests there should be “a balance”. Whilst there’s a need to observe contractual rights, good faith sits in the background – it’s a challenging tightrope which needs careful handling by legal advisors.

Shy provides an example: You have one party in possession of information they know would help another. Nothing in the contract obliges them to disclose the information, but without it, the project will be delayed. Would withholding the information be in breach of good faith?

Another issue which the group found interesting is that of to whom good faith is owed. For example, does information which would be relevant to the value of a company lead to an obligation of good faith to shareholders, though they likely wouldn't be a party to a contract?

## International Variations

It's almost impossible to discuss the subject of good faith without considering the varying international perspectives. The assembled guests have a broad range of geographical experience, Shy is from Israel and has worked internationally. Similarly, Damian though from Manchester, spends much of his time across Africa and working in the Middle East. Chantelle is a South African lawyer and Philip spent many years living and working in Qatar. As chair of the JCT, Karen brings a domestic perspective.

Shy's observation is that where formal good-faith agreements exist, conflicts and disputes are more likely to be reduced. In contrast, Chantelle suggests that in South Africa, which remains untouched by innovations such as the Woolf reforms, formal disputes remain the main forum for dispute resolution. South Africa remains far more adversarial, meaning that disputes are generally more protracted and more costly.

As Karen notes, there are major UK projects where very few (public) disputes are reported. Many of the issues on such projects are resolved through more amicable / less confrontational methods. Crossrail is cited as an example of a project where very little major dispute resolution has arisen. There have been some issues to resolve, but little excess money has been spent on legal fees.

## Is the UK Getting it Right?

Is it perhaps the case that (contrary to the expectation) English projects and contracts are succeeding at operating with good faith more than our civil code neighbours, especially if that is seen as the basis for the use of collaborative contracting? This is despite the concept of good faith not being formally codified or recognised in law. Projects such as Crossrail and the Olympics seem to have led to fewer major final account disputes than similar projects in other regions of the world.

Is it possible that these major UK public sector projects are providing examples of how projects can be run without the need to resort to costly and time-consuming litigation? Is it possible to impute a form of good faith through innovations such as dispute boards?

TfL's "Conflict Avoidance Panel" (CAP) and Network Rail's "Dispute Avoidance Panel" (DAP) are some examples of using collaboration to avoid escalation to more formal dispute resolution. Equally on large projects with major developers, there are long-term business relationships in place. Time tends not to be wasted on arguments and disputing.

## Conclusions

In conclusion, it seems that Good Faith remains, as ever, a difficult thing to pin down. As a concept, it seems critical to those of us for whom a Rousseau-style social contract remains important. But human behaviour changes when faced with conflicting commercial, personal and ethical interests. Whether the contract or the law should enforce a form of ethical behaviour is a point that will likely be debated by lawyers for as long as lawyers exist.

The panel seem to suggest that in English law at least, there is a notional acceptance of some form of good faith, at least when looking at collaborative or relational construction contracts. Albeit, that good faith is not a codified concept as it is in other places. The English legal system and construction industry seem to have established a form of good faith, particularly in major projects. In other common-law jurisdictions such as South Africa, the concept may require a little more digging and development before it becomes normal but others, such as Canada, have accepted it as part of the legal system.

Although there may be a little bias as most of the panel were of English / Western origin, it seems there was consensus that the notion of good faith, may actually be more prevalent in English law than it perhaps is in some civil code jurisdictions.

However, it seems perhaps unlikely there will ever be a conclusion to the debate on whether good faith exists, where it exists and how it should be defined in law.

## Round Table Attendees

### Host - Damian James

Damian James is a leading expert in the area of quantum, delay, disruption and cost evaluation. He has been appointed as an advocate in arbitrations and as an expert in adjudications. He is widely experienced in engineering and construction claims and dispute resolution. Damian has particular expertise in the preparation of detailed claims to recover client entitlements

Damian is also qualified as an arbitrator and was recently accepted as an arbitrator at the Dubai International Arbitration Centre ([DIAC](#)).

### Karen Kirkham - Chair, The JCT, Head of Construction, BDB Pitmans

Karen joined BDB in 2015 and heads up the firm's construction practice. She was admitted as a solicitor in 2001. Prior to joining private practice she qualified as a barrister and enjoyed a varied career including as legal director of the Construction Confederation, where she sat on various JCT committees and in local government.

Karen has worked for developers, funders, institutional investors, contractors and consultants including on major urban regeneration, infrastructure and commercial projects.

In 2021, Karen was appointed the new chair of JCT and is the first woman to hold the post.

### Chantelle Vermeulen, Senior Legal Counsel, Equans

Chantelle is an experienced advocate with a history of working in the legal industry and a particular focus on construction law. She has a strong legal professional background and is skilled in the resolution of construction disputes.

Chantelle is also experienced in representing clients in the resolution of general commercial litigation, and the preparation and presentation of pleadings, and opinions.

Chantelle joined Equans as senior legal counsel in March 2023. With 74,000 employees in 17 countries, in the UK and Ireland, the business focuses on technical, FM, regeneration and energy services

### Shy Jackson - Partner, BCLP

Shy specialises in construction and engineering and his practice covers project advice and acting in disputes related to UK and international projects. His experience covers litigation, arbitration, adjudication and ADR and he has advised on all main forms of contract. He is a Fellow of the CI Arb and a Fellow of the CICES.

Shy has been listed in Chambers & Partners since 2011. He is also listed in Legal 500 and as a Thought Leader in the International Construction Who's Who Legal 2020.

### Philip Norman - Partner, CMS

Philip Norman is a partner in the CMS Infrastructure, Construction and Energy Team. For nearly 30 years Philip has focused on international dispute resolution, with a specialism in international arbitration and project support in energy and infrastructure.

He has represented clients from over 35 countries in over 100 disputes in international commercial arbitration, adjudication, mediation, expert determination, and negotiations. Philip was previously based in the Middle East for over a decade, from where he also undertook work in Africa.

Now based in London, Philip continues his international work. In addition to representing clients as counsel, Philip often takes appointments as an arbitrator in complex and high-value disputes.



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