

An express duty of good faith – an enforceable obligation?



It is well established in English contract law that (save in limited circumstances) there is no general or implied duty of good faith owed between contracting parties. There are a number of reasons for this, not least the preservation of certainty and the autonomy of parties agreeing binding contractual terms. There is a risk that a general implied duty of good faith would give rise to obligations that are too vague and subjective to be enforceable or understood by the parties.

However, the absence of a general implied duty does not prevent contracting parties from agreeing an express duty to act in good faith. The courts will recognise and enforce such an obligation, provided that what is expected of the parties is sufficiently certain.

Brooke Homes (Bicester) Ltd v Portfolio Property Partners Ltd & Ors [2021] EWHC 3015 (Ch)

As seen in the case of *Brooke Homes*, an express duty of good faith can sometimes be a significant factor in the outcome of disputes arising from the performance of agreements, particularly where the primary obligation to be performed is (in and of itself) unenforceable, such as an ‘agreement to agree’.

In this case a property developer (Brooke Homes) entered into ‘Heads of Agreement’ with a property company (PPP) relating to a proposed purchase of at least 100 acres of a 500 acre site for development of an ‘eco-town’ near Bicester, Oxfordshire (with options for some of the remaining land). The Heads of Agreement provided that, subject to obtaining planning permission, Brooke Homes would purchase an initial (unspecified) 100 acres of the



land from PPP.

Under the Heads of Agreement, the parties agreed that they would: “... use all reasonable endeavours to enter into a final binding Agreement which captures legally these Heads of Agreement acting in good faith towards each other...”.

Some 3 years after the Heads of Agreement were finalised a conditional sale agreement had still not been entered into. With relations between the parties breaking down, Brooke Homes commenced proceedings in the High Court against PPP, seeking (amongst other things) specific performance of the Heads of Agreement (i.e. asking the court to compel PPP to perform its obligations).

The claim for specific performance failed for a number of reasons: the primary obligation (in relation to which the parties owed a duty of good faith) was effectively an agreement to enter into another agreement, and not itself an enforceable agreement for the sale of land. Furthermore, there had been no precise identification of the 100 acres of land to be sold, so there could be no binding contract of sale.

That could have been the end of the matter. However, as noted above, the parties were required to “...use all reasonable endeavours...” to enter into a binding sale agreement, and also to “...[act] in good faith towards each other”.

What does acting in good faith mean?

On the express obligation to act in good faith, having distilled the relevant case law, the judge observed that (absent anything to the contrary in the relevant agreement) in commercial contracts a duty of good faith normally requires the parties to:

- act honestly, judged by reference to reasonable and honest people;
- observe reasonable commercial standards of fair dealing;
- exercise fidelity or faithfulness to the common purpose, or contractual purpose; and
- more generally, act consistently with the justified expectations of the parties.

The court’s decision

The court concluded that in this instance, whilst there was no binding sale contract that could be enforced, PPP had breached its positive obligations to use all reasonable endeavours to enter into a binding sale contract, and to act in good faith towards Brooke Homes. Specifically, PPP had not identified or provided plans identifying the 100 acres to be sold – something that the court concluded could reasonably have been done. It was also clear that after 3 years, PPP no longer wished to be bound by the Heads of Agreement for commercial reasons. They were not acting with fidelity or faithfulness to the common purpose contemplated by the Heads of Agreement, and preferred to deal with third parties.

Consequently, the court ordered PPP to pay damages to Brooke Homes to compensate it for its loss of opportunity to secure a conditional sale agreement on beneficial terms.

It should be noted that *Brooke Homes* concerned a commercial agreement. In certain other types of contracts, such as shareholder agreements (which exist within a comprehensive framework of company law) the conduct required of parties under an express duty of good faith is likely to be construed more narrowly.



Conclusion

An express duty of good faith can be a valuable provision in an English law agreement. As *Brooke Homes* demonstrates, such a duty can be of particular assistance where parties agree to work towards a common goal which is not necessarily an enforceable obligation in its own right. Express duties of good faith can therefore provide useful compulsion in pre-contract documents such as Heads of Terms, Letters of Intent, or Memoranda of Understanding, for example.

How we can help

If you would like advice on this or associated topics, please get in touch with our [commercial dispute resolution team](#), who will be very happy to assist.



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