

---

# ***Sibner Capital Ltd v Jarvis and another*** **[2022] EWHC 3273 (Ch) and the concepts** **of “good faith” and “absolute discretion”**

---

The concepts of “good faith” and “absolute discretion” were considered in the case of *Sibner Capital Limited v Neil David Martin Jarvis & Suzanne Jane Hughes* [2022] EWHC 3273 (Ch). In this briefing we consider the scope of these concepts in English law and the High Court’s judgment of this case which rejected arguments seeking to imply a duty to act in good faith and duty of rationality in exercising contractual discretion.

## **Introduction to good faith**

While there is no general principle of “good faith” under English contract law, an obligation to act in good faith can be agreed expressly by parties to a contract or may be imposed as an implied term in certain circumstances. The actual meaning of “good faith” has developed through common law and is heavily dependent on the terms of the relevant contract. Interpretations have included:

- an obligation to observe reasonable standards of fair dealings and faithfulness to the agreed common purpose; and
- a requirement for honesty and fidelity to the parties’ bargain.

## **Express provision**

Parties can expressly agree to accept a duty to act in good faith, in which case the extent of the duty will depend on the circumstances and the wording of the provision. Inclusion of a good faith clause in a contract does not impose a wider or more general duty of good faith.

## **Implied provision**

Under English law a duty of good faith may be implied by law into employment contracts and contracts between partners or others where one party is a fiduciary for the other (e.g. acting as a trustee or agent). Arguments are often raised as to

whether a duty of good faith can be implied into commercial contracts. English courts do not readily imply terms into commercial contracts, but, unless expressly excluded, an implied obligation of good faith may well be found in “relational” contracts, i.e. where the contract forms a long-term relationship between the parties to which they make a substantial commitment. This has not gained much traction in the context of finance agreements.

In *Morley (t/a Morley Estates) v The Royal Bank of Scotland plc* [2021] EWCA Civ 338, the Court of Appeal upheld the High Court’s ruling that a lender is not under any implied duty to provide banking services with a duty of good faith following a borrower’s default in repayment of a loan. The court also held that it would not be appropriate to imply any contractual terms into the mortgage as the parties’ relationship is subject to the express terms in the mortgage and the mortgagee’s equitable duties.

## **Braganza duty of rationality and absolute discretion**

The “Braganza duty” implies a duty of rationality in certain situations – this is an implied duty to exercise a contractual discretion not irrationally, arbitrarily or capriciously. A distinction is drawn between (a) a discretion which may be subject to the duty of rationality (e.g. a discretion to change interest rates payable under a loan agreement) and (b) a decision whether to exercise an absolute contractual right (e.g. termination right or right to demand repayment of a loan).

## Factual Summary

Sibner Capital Ltd (“**Sibner**”) provided a loan to Mr Jarvis (the “**Borrower**”) in relation to a property development pursuant to a facility agreement which was guaranteed by the respondents. Sibner, the Borrower and the respondents also entered into a joint venture agreement with the property owner.

The loan was divided into two tranches, Tranche A (being £425,000 to be repaid by 1 December 2020) and Tranche B. It was agreed that the drawdown of Tranche B would only take place after Tranche A had been repaid.

Clause 5.3 of the facility agreement provided that “*the lender may in its absolute discretion accept a sum less than the Tranche A commitment plus interest on the Tranche A Repayment Date in satisfaction of the Borrower's obligation to repay the Tranche A Facility on that Date...*” subject to certain conditions, including a minimum Tranche A repayment of £300,000 and the balance of the unpaid Tranche A loan to be treated as drawn as part of Tranche B and so reducing the amount of the Tranche B commitment.

Clause 5.1 of the joint venture agreement required the parties to act in good faith, provided this would not restrict Sibner's rights under the facility agreement, including any rights which may arise following an event of default.

Sibner agreed to accept repayment of £380,000 (being less than the Tranche A loan) by 22 December 2020 with the balance to be paid by the end of January 2021. The balance was not paid by the Borrower by this date and Sibner served statutory demands on the respondents.

The statutory demands were set aside at first instance on the basis that the respondents had a realistic prospect of demonstrating that there was an implied duty of good faith or an obligation to refrain from acting in a way which was arbitrary, capricious or irrational. It was considered that Sibner had failed to exclude extraneous considerations in exercising its discretion under clause 5.3 of the facility agreement.

Sibner appealed to the High Court on the basis that its discretion under clause 5.3 of the facility agreement was absolute and not restricted by the Braganza duty or any implied term of good faith.

The key considerations for determination were:

1. Did Sibner have an absolute discretion to accept less than full repayment of Tranche A?
2. Was Sibner under an implied duty of good faith?
3. Was Sibner's ability to exercise its absolute discretion subject to an implied duty to act in good faith or the Braganza duty?



## What did the court decide?

The High Court found in favour of Sibner and overturned the first instance decision to set aside the statutory demands.

It was held that there was no realistic prospect of the respondents establishing that Sibner was under a duty of good faith or other Braganza style duty when exercising its discretion pursuant to clause 5.3 of the facility agreement. In particular the court considered:

1. Clause 5.3 of the Facility agreement was unqualified and expressly stated that the discretion was absolute.
2. Authorities including *Greenclose Limited v National Westminster Bank PLC* [2014] EWHC 1156 (Ch) which stated that “*When a contract gives one of the parties an absolute right, a court will not usually imply any restrictions on it*”, and *Mid-Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200, which distinguished between a “*simple decision whether or not to exercise an absolute contractual right*” or a discretion involving “*making an assessment or choosing from a range of options, taking into account the interests of both parties*”.
3. The joint venture agreement, while containing an obligation for the parties to act in good faith, stated that such good faith obligation would not affect Sibner's rights under the facility agreement.
4. The contract was between two experienced commercial parties and drawn up with legal assistance.
5. The court considered the characteristics of the parties, the terms of the contract as a whole and the contractual context and concluded that it was not the sort of provision where it would be appropriate to imply a duty of good faith.

Accordingly, there were no substantial grounds for disputing the debt on the basis of implying a duty of good faith.



## What lessons can be taken from this case?

1. English courts do not readily imply terms into a contract.
2. It is essential for an absolute discretion clause to be drafted with clarity to ensure it is not subject to an implied duty to act in good faith or an obligation to refrain from acting in a way which was arbitrary, capricious or irrational.
3. The court, when considering the application of the Braganza style duty, will take into consideration the characteristics of the parties, the contractual context and the specific terms of the contract.
4. Even where the contract grants a party an “absolute” discretion (as opposed to an absolute right), it will be important for the party to demonstrate that it has exercised its discretion rationally – by, for example, having documents that demonstrate the decision-making process and the calculations undertaken.
5. If commercial parties with the benefit of legal advice freely agree to include a clause granting an unqualified absolute discretion, the courts are unlikely to imply any restrictions on the contractual exercise of the discretion.

## **CMS** Law-Now™

Your free online legal information service.

A subscription service for legal articles on a variety of topics delivered by email.

[cms-lawnow.com](http://cms-lawnow.com)

The information held in this publication is for general purposes and guidance only and does not purport to constitute legal or professional advice. It was prepared in co-operation with local attorneys. CMS Legal Services EEIG (CMS EEIG) is a European Economic Interest Grouping that coordinates an organisation of independent law firms. CMS EEIG provides no client services. Such services are solely provided by CMS EEIG's member firms in their respective jurisdictions. CMS EEIG and each of its member firms are separate and legally distinct entities, and no such entity has any authority to bind any other. CMS EEIG and each member firm are liable only for their own acts or omissions and not those of each other. The brand name “CMS” and the term “firm” are used to refer to some or all of the member firms or their offices; details can be found under “legal information” in the footer of [cms.law](http://cms.law).

**CMS Locations:** Aberdeen, Abu Dhabi, Amsterdam, Antwerp, Barcelona, Beijing, Belgrade, Bergen, Berlin, Bogotá, Bratislava, Brisbane, Bristol, Brussels, Bucharest, Budapest, Casablanca, Cologne, Cúcuta, Dubai, Duesseldorf, Edinburgh, Frankfurt, Funchal, Geneva, Glasgow, Hamburg, Hong Kong, Istanbul, Johannesburg, Kyiv, Leipzig, Lima, Lisbon, Liverpool, Ljubljana, London, Luanda, Luxembourg, Lyon, Madrid, Manchester, Maputo, Mexico City, Milan, Mombasa, Monaco, Munich, Muscat, Nairobi, Oslo, Paris, Podgorica, Poznan, Prague, Reading, Rio de Janeiro, Rome, Santiago de Chile, Sarajevo, Shanghai, Sheffield, Singapore, Skopje, Sofia, Stavanger, Strasbourg, Stuttgart, Tel Aviv, Tirana, Vienna, Warsaw, Zagreb and Zurich.