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**DEEP DIVE III:**

**COMPARATIVE ISSUES IN CONTRACT LAW**

Michael Whitten QC (Panel Leader)



## The importance of comparative analysis in the development of contract law

*Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3  
SLR(R) 598 - no implied term (in law) of good faith

*BOM v BOK* [2019] 1 SLR 349 - a narrow doctrine of  
unconscionability

# Dr Elisabeth Peden

NSW Bar & University of Sydney



The operation and enforceability of standard contract clauses, such as anti-oral variation clauses and attempts to contract out of good faith: *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24 and its likely impact in Singapore and Australia.

## Good Faith in Commercial Transactions

### ‘Test Case’ Drafting and Advocacy Issues

Divergences in academic and judicial schools of thought on contractual good faith across common and civil law countries



**“COMPARATIVE ISSUES IN CONTRACT LAW”: GOOD FAITH IN COMMERCIAL TRANSACTIONS – ‘TEST CASE’ DRAFTING AND ADVOCACY ISSUES**

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# 1. TRANSACTIONAL SIGNIFICANCE



# Transactional Significance

- ‘[Your/Their] Client can do X’  
v
- ‘[Your/Their] Client can **only** do X **provided that** [Your/Their Client] is acting **honestly, cooperatively**, with **fidelity to the mutual bargain**, **non-arbitrarily, non-capriciously**, for **proper contractual purposes**, **without ulterior motives**, and **reasonably** [whatever ‘reasonably’ means in this context!]
- Q1: How close is the current law to this scenario?
- Q2: How far can you draft around this stuff?
- Q3: What avenues of argument are open for negotiation, arbitration, and litigation?
- Q4: What’s the state of play in the common law world?
- Mindset shift in Australia:
  - Not just about ‘terms’ (in or out/excluded)
  - Not just about contracts (but also pre-contractual and post-signing conduct)
  - Not just commercial contracts (but also consumer dealings)
  - Not just general contract law (eg carve-out for franchising contracts)

# Different Standpoints on Good Faith



# Australian Consumer Law (ACL) Sections on Good Faith



## Australian Consumer Law (ACL) Sections 21(1) and 21(4):

‘A person must not, in trade or commerce, in connection with [supply/acquisition of goods/services] engage in conduct that is, in all the circumstances, unconscionable.’

‘It is the intention of the Parliament that:

... (c) in considering whether conduct to which a contract relates is unconscionable, a court’s consideration of the contract may include consideration of:

- (i) the terms of the contract; and
- (ii) the manner in which and the extent to which the contract is carried out;

and is not limited to consideration of the circumstances relating to formation of the contract.’

**ACL Section 22:** ‘Without limiting the matters to which the court may have regard for the purpose of determining whether a person [the supplier/acquirer/customer] has contravened section 21 ... the court may have regard to:

- ... (g) the requirements of any applicable industry code; and
- (h) the requirements of any other industry code [under particular conditions]; and
- ... (i) the extent to which [the parties] acted in good faith.’

# CJ Allsop 2015 – The Cross-Roads for Australian Contract Law on Good Faith



*“If good faith is simply a term implied in fact (which can itself be construed and applied, and found a separate head of damages), then the concern of various courts as to whether the principles of BP Refinery have been satisfied, or whether ‘entire agreement’ clauses operate to the exclusion of good faith, can be understood. If however good faith is recognised as an informing but binding principle or duty – a means by which the courts can recognise and give effect to an expected standard of behaviour (linked, but not limited, to honesty) – then there is no debate as to whether or not the principle is applicable; it is simply a basic assumption of all contractual dealings ... However in Australia the majority of case law on good faith appears to have focused on the first understanding [and] Australian doctrine on good faith [has] characterised good faith as an implied term, capable of being excluded by express or by inconsistent provisions, rather than as a legal standard that underpins the bargain. **It will be necessary to address this fundamental distinction before any unity in Australian contract law on good faith or fair dealing can be achieved.**” (emphasis added)*

## 2. COMPARATIVE STATE OF PLAY



# Major Cross-Jurisdictional Developments on Good Faith in Commercial Transactions



- Good faith is core in commercial transactions but applies differently in civil/common law and international/national law
- Importance of transnational consistency for MNCs on good faith in dispute resolution from commercial centres with judges/arbitrators trained in the common law (Sydney/Melbourne v HK/Singapore v London/Paris/Dubai)
- Good faith debates in common law world set against background of broader judicial debates about construction/implication, tests for implied terms, and use of extrinsic evidence
- New wave of case law 2013-2019 in major common law jurisdictions (eg Australia, UK, Canada, and Singapore) to inform 'test case' arguments across jurisdictions (eg ongoing UK debate between good faith 'sceptics' and 'evangelists' since 2013 *Yam Seng* case))
- Fragmentation of Australian views on good faith's nature, meaning, and tests, and cross-fertilisation (statutory unconscionability) and carve-outs (franchising contracts)
- Increasing cross-jurisdictional engagement by courts with academic views (especially Professor Elisabeth Peden) on the nature, scope, tests, and limits of contractual good faith

# Transnational Features of Good Faith Debates at Highest Judicial Levels



- Grappling with overlaps and differences between:
  - Implied obligations of cooperation, best endeavours, and good faith
  - Good faith, unconscionability, and reasonableness (intermingling)
  - Duress, undue influence, unconscionability, unfair terms, and good faith and fair dealing (distinct sub-fields)
- Recent cross-jurisdictional acknowledgement of:
  - Nuances of implication and construction
  - Presence of good faith within contract law as some kind of ‘organising principle’ (UK, Australia, and Canada)
  - Unhelpfulness of broad ‘morality’ standards (eg disapproval of ‘moral obloquoy’ in statutory unconscionability discourse in *ASIC v Kobelt* [2019] HCA 18 and ‘morally reprehensible manner’ in general unconscionability discourse in *BOM v BOK* [2018] SGCA 83)
- Some divergences across common law jurisdictions:
  - Recognition of implied mutual trust and confidence in employment contracts (accepted in UK, rejected in Australia, and left open in Singapore)
  - Recognition of mandatory good faith obligations (accepted in Canada for all contracts, in Australia for franchising contracts, but not generally in contract anywhere else)
  - Non-consensus on ‘broad’ and ‘narrow’ unconscionability (see *Amadio* in Australia and *BOM v BOK* in Singapore)
- Some commonalities across common law jurisdictions (eg reference to *BP Refinery* test for implied terms)

# Supreme Court of Canada in *Bhasin v Hrynew* 2014 SCC 71 (Nov 2014)



- *‘There is a general organising principle of good faith that underlies many facets of contract law.’*
- *‘It is appropriate to recognise a new common law duty that applies to all contracts as a manifestation of the general organising principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.’ (emphasis added)*
- *‘Because the duty of honesty in contractual performance is a general doctrine of contract law that applies to all contracts, like unconscionability, the parties are not free to exclude it.’*

# Convergence I – UK and Singapore



*“(W)e note that the present position in Singapore as set out in the decision of this court in Ng Giap Hon v Westcomb Securities Pte Ltd and others [2009] 3 SLR(R) 518 (“Ng Giap Hon”) is that there is no implied duty of good faith based on a “term implied in law”. However, this court in Ng Giap Hon was prepared to leave open the possibility that such a duty could be implied by way of the narrower category of “terms implied in fact”. Whilst it is thought in some quarters that the English High Court decision in Yam Seng Pte Ltd v International Trade Corporation Ltd [2013] 1 Lloyd’s Rep 526 heralded a more expansive approach towards the doctrine of good faith, a close analysis of the judgment itself (especially at [131]) suggests that the English position is not that much different from the existing Singapore position in Ng Giap Hon ...”*  
(Singapore Court of Appeal in *The One Suites Pte Ltd v Pacific Motor Credit Pte Ltd* [2015] SGCA 21 at [44])

- “*In Paciocco ...*, in the Federal Court of Australia, Allsop CJ summarised the usual content of the obligation of good faith as an obligation to **act honestly** and with **fidelity to the bargain**; an obligation **not to act dishonestly** and **not to act to undermine the bargain** entered or the substance of the contractual benefit bargained for; and an obligation to **act reasonably** and with **fair dealing** having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained. In my view, this summary is also consistent with the English case law as it has so far developed ...’ (Justice Leggatt in *Sheikh Tahnoon Bin Saeed Shakhboot Al Nehayan v Kent* [2018] EWHC 333 (Comm))” (emphasis added)

# Barker HCA Majority Judgment Quote – Framework for Implied Terms of Good Faith?



*‘Courts have implied terms in contracts in a number of ways:*

- *in fact or ad hoc to give business efficacy to a contract;*
- *by custom in particular classes of contract;*
- *in law in particular classes of contract; or*
- *in law in all classes of contract.*

*Contractual terms implied in law may be effected by the common law or by statute. If effected by the common law they may be displaced by the express terms of the contract or by statute.’*

# 3. PRACTICAL, TACTICAL, PLEADING, AND ADJUDICATION IMPLICATIONS



# Unresolved 'Test Case' Issues for Ultimate Courts of Appeal Across Jurisdictions



- General elements of an obligation of good faith, beyond honest performance
- Implication/construction:
  - Conceptually, an implied term or not? (eg see judicially cited views of Professors Peden and Carter, against good faith properly being characterised as an implied term)
  - Practically, is it excludable and, if so, to what extent (eg excluding broad reasonableness but not honesty)?
- Intermingling of public law notions and contractual good faith:
  - whether reasonableness in GF limited to *Wednesbury*-like irrationality?
  - whether analogous 'fraud on the power' doctrines are necessary and translate across?
- Capacity of an implied term of good faith to meet the test for implication of terms (ie 'necessity' in Australia, post-*Barker*)
- Correlation between contractual good faith and good faith under statutory unconscionability (in Australia), with major doctrinal and transactional significance:
  - Transactional integrity undermined if good faith means different things under contract and statutory unconscionability
  - Statutory unconscionability's influence upon contractual good faith, under analogous reasoning from statute:
    - Influence upon the content/scope of good faith?
    - Influence upon the likelihood of implying good faith?
  - Implications for exclusion through drafting
  - Australian precedential considerations under the *Farah Constructions* rule – eg only the HCA could now rule that:
    - good faith is **not** capable of being an implied term
    - good faith is implied in **all** (commercial) contracts
    - good faith is limited to honest performance alone and does not embrace other elements
    - an obligation to negotiate in good faith to resolve disputes under a pre-existing agreement is inherently unenforceable

# Commercial Lawyers, Companies, and Courts – Actions and ‘Test Case’ Arguments



## • Law Firms/In-House Counsel:

- Consistency of approach across different practice groups in the same firm (eg commercial, litigation, financial services, construction, property, CMT etc)
- Client publications/training, lawyers’ CPD, internal research memos, and in-house precedents (eg guidance notes, standard documents, and opinions)
- Choice of negotiating/drafting approach (eg industry/client expectations, applicable soft law standards, desirable combination of clauses)
- Review adequacy of ‘boilerplate’ clauses in law firm precedents and standard client contracts (ie fee-earning work):
  - Eg governing law, sole discretion, entire agreement, exclusion, ‘no dilution of rights’ etc clauses

## • Litigators/Barristers/Judges:

- Pleading in the alternative - implied term &/or other GF manifestations, &/or breach of statutory unconscionability
- Frame desired term as one implied in fact, to lessen its precedential significance as one implied by law (see Prof H. Collins)
- Define the relevant class of contracts widely/narrowly, depending on the desired outcome: eg legislation desirable because of range of contracts affected (see Prof H. Collins)
- Realise your conceptual approach to GF affects your approach to test of ‘necessity’: a necessary underlying basis for contract v not necessary for workability (cf Allsop CJ, Carter et al, & Collins)
- Construe standard exclusion clauses as having/not having precluded all GF manifestations: eg standard exclusion clauses limited to implied terms only
- Assert that the implication arises from commercial construction, rather than as an additional term by implication (especially if the test of ‘necessity’ is not met)
- Construe express GF terms broadly (eg whole contract) or narrowly (eg limited to stated purposes, ‘fraud on power’ etc)
- Consider the ‘test case’ arguments raised about:
  - Differences between construction and implication
  - Application of public law concepts to contract
  - Reasoning by analogy from statute



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