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Implied Duty of Good Faith: A Comment

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SUMMARY

Justice Finn told us last year in relation to the implied duties of good faith and fair dealing that "for better or for worse (depending on your point of view), you will be forced inexorably to come to terms with them and with what I suspect will be their transforming effect on contract law in Australia whether or not they are used expressly in the terms of the contract".[1]

In the attached schedule, I have included some hypothetical examples of where the issue of the implication of such terms may occasion debate in the resources context.

Professor Farnsworth's paper gives us a special barometer by which to measure and assess Australian law in the context of the implied duty of good faith. We are told regularly and frequently in Australia that the law of the United States embodies this implied duty. It is therefore timely that the Australian Mining and Petroleum Law Association has seen fit to invite a United States scholar of such eminence to address us.

It is true that United States courts have been examining these issues for some time.

UNITED STATES OF AMERICA – DIFFERENCES OF OPINION

Nonetheless, reading Professor Farnsworth's paper suggests to me that there are considerable differences of opinion between different State and federal courts in the United States of America. These differences relate to a number of significant areas. Some of these areas have important parallels and lessons for Australian lawyers. I will comment on three.

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1 P Finn, "Equity and Commercial Contracts: A Comment" [2001] AMPLA Yearbook 414 at 415.

First there is an issue as to whether the implied duty creates an independent cause of action or rather is a canon of construction. As Professor Farnsworth has said:

> "[C]ourts sharing this view have held that the Code's provision on good faith does not create 'independent' rights separate from those created by the provisions of the contract. As one Federal Court of Appeals has put it, the Code Provision 'only guides the construction of contracts and does not create independent duties'. However, not all courts have felt so constrained."

Again Professor Farnsworth says: "Although, under Florida law, the implied covenant of good faith and fair dealing is a part of every contract, the Court held that 'no independent cause of action exists under Florida law for breach of the implied covenant of good faith and fair dealing'."

In Australia you are all familiar with the implied duty to cooperate as enunciated in *Mackay v Dick*.[2] The better view seems to be that this duty is a canon of construction. It does not give rise to an independent cause of action.

Referring to *Mackay v Dick* and the duty to cooperate, Professor Rickett favoured characterisation as a canon of construction.[3] Dr Elisabeth Peden has also written in favour of the duty to co-operate as a canon of construction:

> "The above analysis has shown that co-operation is a general principle of contract law that takes effect as a principle of construction that is applicable in every case and that any other approach can lead to illogical or inappropriate reasoning.
>
> Co-operation is not a term that is implied into every contract. There are no terms that are implied as a matter of law indiscriminately into all contracts. Any such "terms" arise out of construction. For example, it was once thought that contracts contained an implied term about frustrating events. However, today it is accepted as a principle of construction. We do not say it is an implied term in law that frustration will discharge a contract because the doctrine generally applies to all contracts. Once it applies to all contracts the "term" is a rule of construction, applicable to all contracts. Another example is the "implication" of a reasonable time for performance. Repudiation could also join the list, since the implied term rationale there has also been rejected, and co-operation could be seen as the basis of the rule of construction that determines whether there is a lack of readiness, willingness and ability to perform.

[2] (1881) 6 App Cas 251 at 263.

[3] Charles E F Rickett, "Some Reflections on Open-Textured Commercial Contracting" [2001] AMPLA Yearbook 374 at 383.

> As co-operation is a rule of construction, whenever a case comes before the court, the court should construe it to require co-operation as far as is provided for by the parties, as evidenced in their contract. This provides flexibility to ensure the right balance of co-operation is provided in particular cases. Yet at the same time there is sufficient certainty, since parties are assured that courts will construe contracts by reference to a principle of co-operation. This approach renders meaningless the implication in fact of terms for co-operation. To imply such a term and then to construe it to determine its operation and then to apply it is to add an unnecessary step. The same result is achieved by considering the parties' intentions in construction of the contract to ensure co-operation.
>
> That co-operation is a rule of construction is also evidenced by the fact that damages are not awarded for breach of the obligation. For example, *Mackay v Dick* involved an action for the price. Other cases, where damages are awarded, involved repudiation or breach of an express term, rather than an implied term of co-operation. Sometimes, as in *Sprague v Booth*, estoppel is used as a remedy. The reason why damages are not awarded is because co-operation can never form a term on its own, which could be breached to result in an award of damages."[4]

A recent statement from the High Court of this duty is in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd*:[5]

> "But it is common ground that the contract imposed an implied obligation on each party to do all that was reasonably necessary to secure performance of the contract. As Lord Blackburn said in *Mackay v Dick*:[6]
>
> > 'as a general rule … where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part of the carrying out of that thing, though there may be no express words to that effect.'
>
> It is not to be thought that this rule of construction is confined to the imposition of an obligation on one contracting party to co-operate in doing all that is necessary to be done for the performance by the other party of his obligations under the contract. As Griffith CJ said in *Butt v McDonald*:[7]

[4] E Peden, "Co-operation in English Contract Law – to Construe or Imply?" (2000) 16 *Journal of Contract Law* 56 at 66-67.
[5] (1979) 144 CLR 596 at 607-608 per Mason J.
[6] *Mackay v Dick* (1881) 6 App Cas 251 at 263.
[7] (1896) 7 QLJ 68 at 70-71.

> 'It is a general rule applicable to every contract that each party agrees, by implication, to all such things as are necessary on his part to enable the other party to have the benefit of the contract.'
>
> It is easy to imply a duty to co-operate in the doing of acts which are necessary to the performance by the parties or by one of the parties of fundamental obligations under the contract. It is not quite so easy to make the implication when the acts in question are necessary to entitle the other contracting party to a benefit under the contract but are not essential to the performance of that party's obligations and are not fundamental to the contract. Then the question arises whether the contract imposes a duty to co-operate on the first party or whether it leaves him at liberty to decide for himself whether the acts shall be done, even if the consequence of his decision is to disentitle the other party to a benefit. In such a case, the correct interpretation of the contract depends, as it seems to me, not so much on the application of the general rule of construction as on the intention of the parties as manifested by the contract itself."

Even more recently the High Court in *Peters (WA) Ltd v Petersville Ltd and Anor*[8] put it this way:

> "The law already implies an obligation by the respondents to do all such things as are necessary on their part to enable Peters WA to have the benefit of those licence arrangements. It is not now necessary to consider the basis of the implication. The law also implies a negative covenant not to hinder or prevent the fulfilment of the purpose of the express promises made in Art 5."

What of the implied term of good faith? In Australia is it to be a canon of construction or a separate cause of action? I will return to this later.

Secondly, there is an issue as to whether the implied duty goes much further than the duty to cooperate. As Professor Farnsworth has put it:

> "Turning first to judicial attempts at definition, many courts have endorsed abstract and sweeping formulations. The implied covenant, it is said, enjoins each party 'to do nothing destructive of the other party's right to enjoy the fruits of the contract and to do everything that the contract presupposes they will do to accomplish its purpose'."

In the important Australian case of *United States Surgical Corporation v Hospital Products International Pty Ltd and Ors*,[9] expert evidence was heard at first instance before McLelland J as to

[8] (2001) 205 CLR 126 at 142 per Gleeson CJ, Gummow, Kirby and Hayne JJ.
[9] [1982] 2 NSWLR 766 at 800.

the law of New York/Connecticut in the following terms based on the affidavit of Judge Breitel of 20 April 1982. McLelland J said:

> "Under the law of New York/Connecticut: 'every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement': *Restatement of the Law: Contracts* (2d), s 205. I accept, at least in so far as it would have any application to the facts of the present case, that this obligation 'extends only to the performance of the express terms of an agreement', 'may not be used as a springboard for other implied terms' and 'simply means that neither party to an agreement may do anything to impede performance of the agreement or to injure the right of the other party to receive the proposed benefit' (affidavit of Judge Breitel, par 56). So considered, such an implied obligation would appear not to demonstrate any material divergence from the law of New South Wales, and in substance probably represents the principle stated by the High Court of Australia in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 53 ALJR 745 at 749; 26 ALR 567 at 577, quoting the words of Griffith CJ in *Butt v McDonald* (1896) 7 QLJ 68 at 70, 71:
>
> > 'It is a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract.'"

Thirdly one should consider the extent to which the duty of good faith can be reconciled with the principle that there is no such duty if it conflicts with an express provision of the contract. For example Professor Farnsworth says: "The conservative approach begins with the view that the duty adds little to established law." He goes on to say: "A cornerstone of the conservative view is the pre-eminence of the language of the agreement." However there are judges who take it much further than the conservative view. We are familiar with this difference between conservative and liberal courts. Compare, for example, Priestley JA and Meagher JA in *Renard Constructions (ME) Pty Ltd v Minister for Public Works*[10] and *Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church for the Archdiocese of Sydney*.[11] Compare Finn J in the *South Sydney District Rugby League Football Club v News Ltd*[12] and *Hughes Aircraft Systems International v Air Services Australia*[13] cases and Gummow J in *Service Station Association Ltd v Berg Bennett and Associates Pty Ltd*.[14]

[10] (1992) 26 NSWLR 234.
[11] (1993) 31 NSWLR 91.
[12] (2000) 177 ALR 611.
[13] (1997) 146 ALR 1.
[14] (1993) 117 ALR 393.

Needless to say the Australian courts have not reached a concluded view on this although the position in New South Wales seems firmer than in other jurisdictions.

WHERE ARE WE IN AUSTRALIA?

As some members of the High Court have said recently there is "a debate in various Australian authorities concerning the existence and content of an implied obligation or duty of good faith and fair dealing in contractual performance and the exercise of contractual rights and powers".[15]

In the same case five judges considered it an "inappropriate occasion to consider the existence and scope of the good faith doctrine".[16] The views of the other two judges are discussed later.

Notwithstanding the lack of pronouncement by the High Court there has been a vast amount written on the good faith doctrine judicially and extrajudicially. Many State and federal courts have considered the issue and the Court of Appeal in New South Wales has endorsed the concept on a number of occasions.

The implied duty was first given judicial support in *Renard Constructions (ME) Pty Ltd v Minister for Public Works* [17] by Priestley JA.

Since then it has been adopted to various degrees by State and federal courts. In the recent case of *Burger King Corporation v Hungry Jacks Pty Ltd*,[18] the New South Wales Court of Appeal (Sheller JA, Beazley JA and Stein JA) after referring to cases in which the duty had been held to apply to standard form contracts said

> "a review of cases since *Alcatel* indicates that courts in various Australian jurisdictions have, for the most part, proceeded on the assumption that there may be implied, as a legal incident of a commercial contract, terms of good faith and reasonableness".

Even within those federal and State judges who have adopted the duty enthusiastically there are numerous uncertainties, inconsistencies and differences of opinion.

Accordingly we are looking to the High Court ultimately to determine some (and preferably all) of the outstanding issues in

[15] *Royal Botanic Gardens v South Sydney Council* [2002] HCA 5 at para [44] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.
[16] Ibid at para [44] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.
[17] (1992) 26 NSWLR 234.
[18] [2001] NSWCA 187 at para [159].

relation to the implied duty of good faith. For example the High Court might:

1. Reject an implied duty of good faith. In so doing it would accept the cases on the duty to cooperate (for example, *Mackay v Dick*, *Butt v McDonald* and *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* cases) but go no further, or accept an implied duty of good faith but define it in terms of the duty to cooperate.

2. Accept an implied duty of good faith:
   (a) as a term implied by fact (ad hoc); or
   (b) as a term implied by law.

3. Accept a duty of good faith implied by law:
   (a) in standard form contracts;
   (b) in all contracts; or
   (c) in some contracts, for example, government franchise, or other tender contracts or relational contracts.

4. Accept an implied duty of good faith as a separate cause of action or merely as a canon of construction.

5. Define good faith:
   (a) generally;
   (b) in negative terms of excluding bad faith; or
   (c) in more specific terms.

6. Explain the inter-relationship between good faith, reasonableness, fair dealing and unconscionability – to what extent is there underlap and overlap.

7. Address the issue whether generalised moral standards have a role to play in the implied duty?

8. Address the issue to what extent does the implied duty involve a subjective test or an objective test?

I will consider each of these issues.

REJECTING OR ACCEPTING THE IMPLIED OBLIGATION

First there is the issue of rejecting or accepting an implied obligation.

Absent High Court authority one could be excused from thinking that the implied duty of good faith was an entrenched part of Australian law. Nevertheless, there is the possibility, some might say likelihood, that the High Court may limit the parameters of the duty. One means by which it could do so would be to limit its operation to the principles laid down in the "duty to co-operate" cases. Professor Rickett in last year's AMPLA Conference took the view that "it is difficult to see just how the implied term of good faith and fair dealing adds very much to the rule of construction, or even implied duty, of mutual co-operation".[19] Support for that narrow view could be found in comments of Gummow J in *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd*[20] where he said:

> "Professor Farnsworth … has said that many of the uses 'to which the new concept of good faith is put today do not go beyond those to which the traditional techniques of interpretation and gap filling were put in the yesteryear'."

He went on to say:

> "Invocation of 'community standards' may be no more than an invention by the judicial branch of government of new heads of 'public' policy 'something long ago regarded as a risky enterprise'."[21]

And:

> "Anglo-Australian Contract law as to the implication of terms has heretofore developed differently, with greater emphasis upon specifics, rather than the identification of a genus expressed in wide terms. Equity has intervened in matters of contractual formation by the remedy of rescission, upon the grounds mentioned earlier. It has restrained freedom of contract by inventing and protecting the equity of redemption, and by relieving against forfeitures and penalties. To some extent equity has regulated the quality of contractual performance by the various defences available to suits for specific performance and for injunctive relief. In some, but not all, of this, notions of good conscience play a part. But it requires a leap of faith to translate these well established doctrines and remedies into a new term as to the quality of contractual performance, implied by law."[22]

In Royal Botanic Gardens,[23] Kirby J said:

> "such an implied term appears to conflict with fundamental notions of *caveat emptor* that are inherent (statute and equitable intervention apart) in common law conceptions of economic

[19] Rickett, op cit n 3 at 397.
[20] (1993) 117 ALR 393 at 403.
[21] Ibid at 405.
[22] Ibid at 406.
[23] *Royal Botanic Gardens v South Sydney Council* [2002] HCA 5 at para [87].

> freedom. It also appears to be inconsistent with the law that has developed in this country in respect of the introduction of implied terms into written contracts which the parties have omitted to include."

In *Royal Botanic Gardens*, [24] Callinan J considered it unnecessary to answer the questions "raised by the rather far reaching contentions of the appellant".

Why might the High Court take a conservative view? Conservative judges may derive some comfort from the argument that an implied obligation of good faith is not necessary in every contract because equity and statute have already intervened to fill the void.

A former Chief Justice (Sir Anthony Mason) has pointed to the development of equity and statute law to fill a void in this area.

> "Due partly to the absence of good faith doctrine regulating contract performance, it has become the subject of statutory regulation. What is more important is that, in various jurisdictions, the courts have had recourse to equitable principle to fill the void. This movement in the law of contract is not as visible in the United Kingdom as it is in Canada, Australia and New Zealand. There is no doubt that the United Kingdom's isolation from this movement is associated with the importance that United Kingdom judges and lawyers attach to London's position as a centre of international commerce and finance. The contrast between the modern spirit of the common law (using that term to include equity) as it exists in Australia and the English approach is vividly seen in the recent decisions on unconscionable conduct and relief against forfeiture."[25]

Similarly Gummow J (now a High Court judge, but at the time a Federal Court judge) spoke of equity's intervention:

> "Anglo-Australian contract law as to the implication of terms has heretofore developed differently, with greater emphasis upon specifics, rather than the identification of a genus expressed in wide terms. Equity has intervened in matters of contractual formation by the remedy of rescission, upon the grounds mentioned earlier. It has restrained freedom of contract by inventing and protecting the equity of redemption, and by relieving against forfeitures and penalties. To some extent equity has regulated the quality of contractual performance by the various defences available to suits for specific performance and for injunctive relief. In some, but not all, of this, notions of good conscience play a part. But, it requires a leap of faith to translate

[24] Ibid at para [155].

[25] A F Mason, "Contract Good Faith and Equitable Standards in Fair Dealing" (2000) 116 LQR 66 at 83.

> these well established doctrines and remedies into a new term as to the quality of contractual performance, implied by law."[26]

The Chief Justice of the High Court published an article when he was Chief Justice of New South Wales pointing out the limitations on reading a contract in isolation:

> "In the result, for a number of reasons, some to do with the work of legislatures, some to do with judicial law-making, and some to do with temper and spirit of the times, we can no longer say that, in all but exceptional cases, the rights and liabilities of parties to a written contract can be discovered by reading the contract."[27]

Conservative judges may also argue that an implied obligation will add to uncertainty. As Henry J said in *Bilgola Enterprises Ltd v Dymocks Franchise Systems (NSW) Pty Ltd*:[28]

> "the significance of the need for certainty, particularly where parties to an arm's length commercial transaction have carefully set out the details of their relationship, must be an important factor in any particular case."

However as former Chief Justice Mason said:

> "Some commentators suggest that the United States experience shows that there good faith and fair dealing doctrines have generated ambiguity and uncertainty. Even if there is a measure of truth in this statement, the experience does not appear to have been unduly detrimental to commerce in that country."[29]

IMPLICATION AD HOC OR IMPLICATION BY LAW

The second issue is the term necessary to give business efficacy to a contract (implied in fact) or is it implied as a matter of law as a legal incident of a particular class of contract (implied by law)?

There has been some debate and some confusion as to whether the implied duty of good faith if it exists, is an implication in fact (or ad hoc) or an implication by law.

For the implication to be ad hoc the famous test in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* must be satisfied.[30] A term may be implied if it meets the following criteria:

[26] *Service Station Association Ltd v Berg Bennett and Associates Pty Ltd* (1993) 117 ALR 393 at 406.
[27] M Gleeson, "Individualised Justice: the Holy Grail" (1995) 69 ALJ 421 at 428.
[28] (2000) 3 NZLR 169 at 180.
[29] Mason, op cit n 25 at 94.
[30] (1977) 16 ALR 363 at 376.

- it must be reasonable and equitable;
- it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it;
- it must be so obvious that "it goes without saying";
- it must be capable of clear expression;
- it must not contradict any express term of the contract.

It seems clear that the terms "implied ad hoc" and "implied by law" in practice may have some overlap. By overlap, I mean that there may be circumstances in which the implication could be made out under either or both tests. As Priestley JA said:

> "Although the authorities discussed by Hope JA in *Castlemaine Tooheys* seem to require a sharp distinction to be drawn between implication ad hoc and by law, assigning the former to the facts of a particular contract, and the latter to the legal incidents of contracts of different classes, consideration of the contract in the present case shows there may be a good deal of overlap between the two categories."[31]

As Finn J said, citing Priestley JA in *Renard*, "for particular contracts in particular settings 'there may be a good deal of overlap between the two categories'".[32]

Again in Justice Finn's commentary at last year's AMPLA Conference he said:

> "While it is true that in the *South Sydney* case I indicated, as Professor Rickett suggests, that our law has not yet committed itself unqualified to the proposition that every contract imposes on each party a duty of good faith and fair dealing (and I believe that was then an accurate summary of the law), the implication when it is made should in my view be an implication of law."[33]

It is clear that this term will normally be implied as a matter of law. In *Burger King*[34] the court said: "There also seems to be increasing acceptance that if terms of good faith and reasonableness are to be implied they are to be implied as a matter of law. We consider that to be correct."

The court also said: "For a term to be implied at law in a new category of case, it must be both reasonable and necessary."[35]

[31] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 260 per Priestly JA.
[32] *Hughes Aircraft Systems International v Air Services Australia* (1997) 146 ALR 1 at 38.
[33] Finn, op cit n 1 at 418.
[34] *Burger King Corporation v Hungry Jacks Pty Ltd* [2001] NSWCA 187 at para [164] per Sheller JA, Beazley JA and Stein JA.
[35] Ibid at para [167].

For the meaning of "necessity" see *Byrne v Australian Airlines Ltd*[36] where McHugh and Gummow JJ said:

> "Many of the terms now said to be implied by law in various categories of case reflect the concerns of the courts that, unless such a term be implied, the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless, or perhaps, be seriously undermined. Hence the reference in the decisions to 'necessity'…. This notion of 'necessity' has been crucial in the modern cases in which the courts have implied for the first time a new term as a matter of law."

TYPES OF CONTRACT

The third issue to be considered is to what sort of contract the implied obligation does or should apply. At last year's AMPLA Conference Justice Finn said: "I would add that consideration of legal formalism apart, I can see no possible reason why such a duty should not arise in all contracts."[37]

It may be easier to argue the case for an implied term in standard form contracts (including standard form construction contracts and government tender contracts). There is support for the view that the implied term should apply in government tender contracts (see, for example, *Hughes Aircraft*[38] and *Cubic Transportation Systems Inc v State of New South Wales*[39]).

In *Burger King*[40] it was summed up as follows:

> "this necessarily brief survey of the case law post *Alcatel* indicates that obligations of good faith and reasonableness will be more readily implied in standard form contracts, particularly if such contracts contain a general power of termination. Clearly, however, the cases where these terms are to be implied are not limited to standard form agreements. *Alcatel* itself, which involved a 50 year lease agreement of commercial premises, provides an example of a one off contract where such terms were implied."

Finkelstein J in the Federal Court said:

> "Recent cases make it clear that in appropriate contracts, perhaps even in all commercial contracts, such a term will ordinarily be implied; not as an ad hoc term (based on the

[36] (1995) 185 CLR 410 at 450.
[37] Finn, op cit n 1 at 418.
[38] *Hughes Aircraft Systems International v Air Services Australia* (1997) 146 ALR 1.
[39] [2002] NSWSC 656.
[40] *Burger King Corporation v Hungry Jacks Pty Ltd* [2001] NSWCA 187 at para [163].

presumed intention of the parties) but as a legal incident of the relationship."[41]

It has also been suggested that the implication should arise in relational contracts. This view was put forcefully in a recent New Zealand decision by Thomas J in the Court of Appeal, in *Bobox Marketing Ltd v Raymond Marketing Ltd*,[42] (a decision handed down on 3 October 2001) Thomas J said:

> "We have already noted that a duty to exercise good faith in the performance of a contractual obligation is most often asserted in the context of relational contracts, such as agency relationships, distributorships, partnerships, franchise arrangements and joint ventures. Readiness to import such a term is founded on the fact that the parties have a mutual interest in the successful performance of their agreement.
>
> There is again no need for a dissertation on the characteristics of relational contracts as the present agreement undoubtedly falls within that category. Relational contracts are often long-term contracts, but not necessarily so, but long-term contracts by their nature are likely to be relational. In essence, relational contracts recognise the existence of a business relationship between the parties and the need to maintain that relationship; the difficulty of reducing important terms to well defined obligations; the impossibility of foretelling all the events which may impinge upon the contract; the need to adjust the relationship over time to provide for unforeseen factors or contingencies which cannot readily be provided for in advance; the commitment, likely to be extensive, which one party must make to the other, including significant investment; and that they are in an economic sense likely to be incomplete in failing to allocate, or allocate optimally, the risk between the parties in the event of certain future contingencies.
>
> Consequently, a relational contract is one which involves not merely an exchange but a relationship between the contractual parties. The parties are not 'strangers' in the accepted sense and much of their interaction takes place 'off the contract' requiring a deliberate measure of communication, co-operation and predictable performance based on mutual trust and confidence. Expectations of loyalty and interdependence mark the formation of the contract and become the basis for the rational economic planning of the parties. The norms of the ongoing relationship, of necessity, tend to supplement the express contractual obligations. Good faith is required to ensure that the requisite communication,

[41] *Garry Rogers Motors (Australia) Pty Ltd v Subaru (Australia) Pty Ltd* (1999) ATPR 41-703 at 43,014.

[42] [2001] NZCA 24, at para [42-44].

co-operation and predictable performance occurs for the advantage of both parties."

Obviously this is an area where some ultimate guidance from the High Court would be helpful.

CAUSE OF ACTION v CANON OF CONSTRUCTION

The fourth question on which it would be helpful to have some guidance is whether an implied obligation of good faith would constitute a separate cause of action or whether it is merely a canon of construction.

The conservatives and progressives divide on this issue as they do in the United States.

Earlier I referred to the fact that the duty to cooperate has been widely regarded as a canon of construction rather than a cause of action. Dr Elisabeth Peden has argued that the implied duty, if it exists at all, should be a canon of construction:

> "If the courts want the notion of good faith to apply in all situations, what they should be looking to do is use good faith as a principle or tool of construction. That is, to construe all contracts on the basis that there is an expectancy of good faith in all terms, unless there is something explicit to suggest otherwise. Unlike terms implied in fact or law, which apply specifically to a contract or a class of contracts, rules of construction apply generally to all contracts. For example, the doctrine of frustration is based on construction. So too, good faith should be.
>
> This approach would have several advantages. There would be no uncertainty as to whether a term is implied or not and no confusion about which test should be applied. Furthermore, an obligation of good faith could still be avoided by commercial parties that made their contracts sufficiently clear, since construction is dependent on the nature of and factual matrix of the contract in question."[43]

In *Burger King* the court held that there was an implied term of reasonableness and good faith in the relevant contract. After examining the facts in some detail the court held that Burger King's conduct was in breach of its implied obligation. This seems to be a clear endorsement of the view that the implied duty can give rise to a cause of action. At last year's AMPLA Conference, Professor Rickett said of this decision:

[43] E Peden, "Incorporating Terms of Good Faith in Contract Law in Australia" (2001) 23 Syd L Rev 222 at 230-231.

> "*Burger King Corporation v Hungry Jack's Pty Ltd* runs counter to the majority of recent decisions, in implying terms of reasonableness and good faith, and then determining they were indeed breached. Would BK, *as a matter of contract law*, have got away without being held to be in breach had there not been these implied terms? Assume the facts had occurred in pre-*Renard* days. What might have been the result then? I doubt BK would have fared any differently. I suspect a court, in interpreting the relevant contract terms, would have adopted a construction standard of commercial co-operation or legitimate expectation of honest men such that reasonableness and good faith would on the facts have won the day in any event."[44]

MEANING OF GOOD FAITH

The fifth question on which it would be helpful to have some guidance is the meaning of good faith. The concept does not lend itself to easy definition. It has been described as "a concept which means different things to different people in different moods at different times and in different places".[45] "The concept of good faith appears in different areas of law, in each case with a distinct body of authority as to its meaning and application."[46] Einstein J in *Aiton Australia Pty Ltd v Transfield Pty Ltd* said:[47] "The good faith concept acquires substance from the particular events that take place … the standard must be fact intensive and is best determined on a case by case basis."

Accordingly, there is no satisfactory definition of good faith. Some authorities adopt what has been called an "excluder analysis", that is, good faith may be considered as no more than an excluder of bad faith. It is easier to recognise bad faith.

Professor Farnsworth attributes the "excluder" analysis to Summers who argued that the function of good faith is to rule out – to exclude – various kinds of behaviour according to its context, "The idea is that it is easier to spot bad faith than it is to define good faith, so good faith is the absence of bad faith." This has been recognised in the Second Restatement.

For an example in Australia see Barrett J in *Overlook Management BV v Foxtel Management Pty Ltd*:[48]

[44] Rickett, op cit n 3 at 401.
[45] Bridge, "Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?" (1984) 9 Can Bus LJ 385 at 407.
[46] *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* (1993) 117 ALR 393 at 401, per Gummow J.
[47] (1999) 153 FLR 236 at 263.
[48] [2002] NSWSC 17 at para [68].

"In many ways, the implied obligation of good faith is best regarded as an obligation to eschew bad faith. This is borne out by the following succinct statement by Lord Scott of Foscote in *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd* [2001] 2 WLR 170, a case concerning the duty of good faith in the insurance context:

> 'Unless the assured has acted in bad faith, he cannot, in my opinion, be in breach of a duty of good faith, utmost or otherwise.'

The approach which regards a duty of good faith as a duty to eschew bad faith is also supported by United States jurisprudence to which resort may appropriately be had: *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Burger King* at para 147ff. Writing in 1968, Professor Summers described the duty of good faith imposed by the United States Uniform Commercial Code as an 'excluder': R S Summers, 'Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code', (1968) 54 Va L Rev 195. Its operation and effect were stated as follows:

> 'It is a phrase without general meaning (or meanings) of its own and serves to exclude a wide range of heterogeneous forms of bad faith. In a particular context the phrase takes on specific meaning, but usually this is only by way of contrast with the specific form of bad faith actually or hypothetically ruled out.'

In *Tymshare Inc v Covell* 727 F 2d 1145 (1984), Scalia J concluded that:

> 'The doctrine of good faith performance is a means of finding within a contract an implied obligation not to engage in the particular form of conduct which, in the case at hand, constitutes "bad faith".'"

As mentioned elsewhere in this commentary there are similarities and overlap between good faith, fair dealing, unconscionability and reasonableness.

Sir Anthony Mason said that the concept of good faith embraced three related notions:

- an obligation on the parties to cooperate in achieving the contractual objects (loyalty to the promise itself);
- compliance with honest standards of conduct; and
- compliance with standards of conduct which are reasonable having regard to the interest of the parties.[49]

[49] Mason, op cit n 25 at 69.

It is also clear that the "fiduciary principle is stronger than the good faith doctrine in that it gives primacy to the interests of the party to whom the fiduciary obligation is owed".[50]

Professor Farnsworth would no doubt agree. He says that "it is certain that the standard is not as exacting as the standard of good faith applied to agents and other fiduciaries".

The duty is applied to all parties. It is not simply imposed on one party. Warren J in *Forklift Engineering Pty Ltd v Powerlift (Distribution) Pty Ltd*[51] held that both parties were in breach because "in the commercial context of the arrangement between these parties their obligations were to a large extent interwoven". Accordingly, one party could not rely on the breach of good faith of the other when there had been breaches on both sides.

Other cases have circumscribed the duty of good faith by holding that a party must not act arbitrarily, capriciously or for an extraneous purpose.

Sheller JA in *Alcatel Australia Ltd v Scarcella*[52] said:

> "If a contract confers power on a contracting party in terms wider than necessary for the protection of the legitimate interests of that party, the courts may interpret the power as not extending to the action proposed by the party in whom the power is vested or, alternatively, conclude that the powers are being exercised in a capricious or arbitrary way or for an extraneous purpose, which is another way of saying the same thing."

For example Finkelstein J in *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd*[53] said:

> "In my view, a term of a contract that requires a party to act in good faith and fairly imposes an obligation upon that party not to act capriciously. It would not operate so as to restrict actions designed to promote the legitimate interest of that party. That is to say, provided the party exercising the power acts reasonably in all the circumstances, the duty to act fairly and in good faith will ordinarily be satisfied."

In *Burger King*[54] a discretion "was required to be exercised reasonably so that it could not be used for a purpose foreign to that for which it was granted".

[50] Ibid, at 84.
[51] [2000] VSC 443, at para [94].
[52] (1998) 44 NSWLR 349 at 368.
[53] (1999) ATPR 41-703 at 43,014.
[54] *Burger King Corporation v Hungry Jacks Pty Ltd* [2001] NSWCA 187 at para [187].

Bryson J in *Macintosh & Ors v Dylcote Pty Ltd*[55] referred to "proportionality between the outcome of termination without compensation and the nature of the underlying problem".

He went on to say that a power must not be exercised "for any improper purpose or any purpose extraneous to the power".

In *Far Horizons Pty Ltd v McDonalds Australia Ltd*[56] Byrne J held that:

> "there is to be implied in a franchise agreement a term of good faith and fair dealing which obliges each party to exercise the powers conferred upon it by the agreement in good faith and reasonably, and not capriciously or for some extraneous purpose."

Recently in *Cubic Transportation Systems Inc v State of New South Wales*[57] Adams J, having held that the nature of the contractual obligations involved in the tender requires the implication of a term of reasonableness and good faith, went on to say: "that is not to say that specific reservations of unqualified powers must be read down but I think that they cannot be exercised capriciously or dishonestly."

He cited *Burger King* as authority "that the Australian cases make no distinction between the implied term of reasonableness and that of good faith".[58]

He continued:

> "I think that the obligation of the Principal and of the Government was to act honestly, reasonably and fairly. However that does not mean that the Principal 'is not entitled to have regard only to its own legitimate interests' in exercising its obligations and powers under the contract but 'it must not do so for a purpose extraneous to the contract'."[59]

Since *Burger King* the implied duty has been expressed this way by Barrett J in *LMI Australasia Pty Ltd v Baulderstone Hornibrook Pty Ltd*:[60]

> "As the recent decision of the Court of Appeal in *Burger King Corp v Hungry Jack's Pty Ltd* [2001] NSWCA 187 shows, there is good reason to think that there are to be found in virtually every commercial contract terms of good faith and reasonableness implied by law. The content of such terms is, in a general sense, that the party bound by them, although free to promote his, her

[55] [1999] NSWSC 230 at para [16].
[56] [2000] VSC 310 at para [120].
[57] [2002] NSWSC 656 at para [44].
[58] Ibid.
[59] Ibid.
[60] [2001] NSWSC 886 at para [74].

or its own interests, must act fairly and reasonably in all the circumstances. Furthermore and as the High Court has recently reaffirmed in *Peters (WA) Ltd v Petersville Ltd* [2001] HCA 45 referring to *Secured Income Real Estate (Aust) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 and *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359, the law already implies an obligation by a party contracting to confer a benefit to do all such things as are necessary on its part to enable its counterparty to have that benefit, at the same time desisting from conduct which hinders or prevents the fulfilment of the purpose of the express promise made.

It is important to recall, however, that the implied terms mentioned are, of their nature, incapable of rising above express terms. In *Burger King*, the Court of Appeal quoted the following passage from *Metropolitan Life Insurance Co v RJR Nabisco Inc* 716 F Supp 1504 (1989).

> 'In other words, the implied covenant will only aid and further the explicit terms of the agreement and will never impose an obligation 'which would be inconsistent with other terms of the contractual relationship'…. Viewed another way, the implied covenant of good faith is breached only when one party seeks to prevent the contract's performance or to withhold its benefits…. As a result, it thus ensures that parties to a contract perform the substantive, bargained-for terms of their agreement.'

Note the reference to implied terms not rising above express terms. Compare *South Sydney District Rugby League Football Club v News Ltd*[61] where Finn J put it this way:

> 'recent decisions suggest that the implied duty of good faith and fair dealing ordinarily would not operate so as to restrict decisions and actions, reasonably taken, which are designed to promote the legitimate interests of the party and which are not otherwise in breach of an express contractual term.'"

Again Barrett J in *Overlook Management BV v Foxtel Management Pty Ltd*[62] put it this way:

> "the implied obligation of good faith underwrites the spirit of the contract and supports the integrity of its character. A party is precluded from cynical resort to the black letter. But no party is fixed with the duty to subordinate self-interest entirely which is the lot of the fiduciary: *Burger King* at para 87. The duty is not a duty to prefer the interests of the other contracting party. It is, rather, a duty to recognise and to have due regard to the

[61] (2000) 177 ALR 611 at 697.
[62] [2002] NSWSC 17 at para [67].

> legitimate interests of both the parties in the enjoyment of the fruits of the contract as delineated by its terms."

OVERLAP BETWEEN TERMS

The sixth question on which it would be helpful to have some guidance is the degree of overlap between terms like good faith, fair dealing, unconscionability and reasonableness.

Priestley JA refers to "the considerable degree of interchangeability between the expressions fairness and good faith".[63]

In the same judgment he says:

> "Similarly, there is close association of ideas between the terms unreasonableness, lack of good faith and unconscionability. Although they may not always be co-extensive in their connotations … there can be no doubt that in many of their uses there is a great deal of overlap."[64]

And again: "the ideas of unconscionability, unfairness and lack of good faith have a great deal in common."[65]

In *Burger King*[66] in the joint judgment the court said: "it is worth noting that the Australian cases make no distinction of substance between the implied terms of reasonableness and that of good faith."

Different judges use different terminology. In *Burger King*, the defendant was in breach of an implied obligation of "reasonableness" and "good faith", whereas Finn J refers to "good faith" and "fair dealing".

Sir Anthony Mason in the paper referred to earlier said that the concept of good faith embraces three related notions:

- an obligation on the parties to cooperate in achieving the contractual objects (loyalty to the promise itself);
- compliance with honest standards of conduct; and
- compliance with standards of conduct which are reasonable having regard to the interest of the parties.[67]

Sir Anthony's paper and the three concepts have been referred to judicially in a number of judgments. The first limb may not add anything to the duty to cooperate. The second limb of honesty

[63] *Renard Construction (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 265.
[64] Ibid at 265.
[65] Ibid at 268.
[66] *Burger King Corporation v Hungry Jacks Pty Ltd* [2003] NSWCA 187 at para [169], per Sheller JA, Beazley JA and Stein JA.
[67] Mason, op cit n 25 at 69.

already has judicial recognition in *Meehan v Jones*.[68] The third limb again indicates the parallels between good faith and reasonability.

Professor Farnsworth describes the use that has been made of the legitimate business judgment test in the United States in applying the duty.

FLEXIBLE STANDARDS

Seventhly the extent to which generalised standards have a role to play in the implied duty has been discussed a little in this country judicially and was discussed at last years conference.

Professor Farnsworth referred to flexible standards. He indicated that three factors had contributed to these flexible standards, namely a change in the pattern of contracting, activist and intrusive judges and globalisation. All three of those have unquestionably contributed to the trend. There are numerous areas of Australian law where flexible standards are already applied, for example, unconscionability, s 52 of the *Trade Practices Act*, s 51AC of the *Trade Practices Act*.

Priestley JA in *Renard* referred to the fact that people "have grown used to the courts applying standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance".[69]

Finn J in *Hughes Aircraft*[70] said:

> "I should add that, unlike Gummow J, I consider a virtue of the implied duty to be that it expresses in a generalisation of universal application, the standard of conduct to which all contracting parties are to be expected to adhere throughout the lives of their contracts. It may well be that, on analysis, that standard would be found to advance little the standard that presently may be exacted from contracting parties by other means …. But setting the appropriate standard of fair dealing is, in my view, another matter altogether from acceptance of the duty itself."

Finn J reverted to this topic in the AMPLA Conference last year:

> "In many of the commentaries on the good faith obligation – and I refer for example to the commentaries both to Art 1:201 of

[68] (1981) 149 CLR 571.
[69] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 268.
[70] *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1 at 37.

the European Principles and to Art 205 of the *Restatement of Contract, Second* – it is said that the purpose of the obligation is to enforce 'community standards of decency, fairness and reasonableness'. It is at about this point that lawyers become uncomfortable – not because they object to the aspiration as such, but because of the intrinsic uncertainty in the measure and content of those standards. I, for one, have long been a sceptic of the use of 'community standards' in legal rhetoric and have said so repeatedly in print.

But this unpromising start is not cause for despair. In my view the principal contours of 'fair dealing' can be discerned in much the same manner that we can discern the principal contours of the 'unconscionability' concept with which there is in any event a degree area of overlap. I would not, though, wish to suggest there is agreement as to what the obligation comprehends in all of its possible reaches. But then can one really anticipate human ingenuity and the proper responses to be made to it?

There is, I think, a reasonable degree of acceptance that the obligation operates as a break on self-interest behaviour – not, as in fiduciary law, so as to preclude such behaviour, but rather so as to moderate it by the need to have regard to the legitimate interests and reasonable expectations of the other party. This points up one major manifestation of fair dealing and that is to provide a potential check on the exercise power in a relationship and, in particular, on the exercise of contractual rights and powers."[71]

SUBJECTIVE AND OBJECTIVE TESTS

The eighth and final issue on which it would be helpful to have some direction is the issue of whether the test is subjective or objective.

Justice Finn argued in last year's AMPLA Conference paper that "good faith means honesty and fairness in mind which are subjective concepts. Fair dealing means observance of fairness in fact which is an objective test".[72]

Other writers have supported that by saying:

> "it is commonplace that good faith can be read as having both a subjective sense (requiring honesty in fact) and an objective sense (requiring compliance with standards of fair dealing) …It is also commonplace that the most troublesome aspects of good

[71] Finn, op cit n 1 at 421-422.
[72] Ibid at 418.

> faith relate to its objective dimension. In particular if good faith is understood as prescribing standards of fair dealing, who are the good faith standard setters, by what authority do they set such standards, and what are the standards that they so set."[73]

In *Burger King*[74] the court upheld the trial judge's application of an objective standard "in deciding that BKC's actions were neither reasonable nor for a legitimate purpose".

Professor Farnsworth tells us that the United States courts "have often been perplexed as to whether good faith is to be judged solely by the traditional subjective standard of honesty or also by an objective standard of reasonableness".

I will briefly address two other issues raised by Professor Farnsworth.

BEST ENDEAVOURS AND REASONABLE ENDEAVOURS

It seems that in the United States there is little, if any, difference between the expressions "best endeavours" and "reasonable endeavours". A plain reading of both these expressions indicates that each imposes some positive obligation, though not necessarily to expend money. In Australia and England, although courts have liked neither of these expressions as there were no criteria by which to judge them,[75] lawyers have traditionally considered "best endeavours", which would require a party to leave no stone unturned,[76] to be a higher standard than "reasonable endeavours". But recently, courts have been of a view that "best endeavours" are determined by what is reasonable in the circumstances.[77] They have found it difficult to see any difference between the two concepts,[78] and it seems likely that a court will nowadays construe a "best endeavours" clause by references to notions of "reasonableness in all the circumstances".[79] It would seem that practically either expression can be used to achieve the same result, however care must be taken when using both expressions in the one contract, as this may give a court some grounds for distinguishing between the two standards.

[73] Brownsword, Hird and Howells (eds), "Good Faith in Contract – Concept and Context" (1999) in *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236 at 260 per Einstein J.
[74] *Burger King Corporation v Hungry Jacks Pty Ltd* [2001] NSWCA 187 at para [189].
[75] *Bower v Bantam Investments Ltd* [1972] 3 All ER 349 at 355 per Goff J.
[76] *Sheffield District Railway Co v Great Central Railway Co* (1911) 27 TLR 451.
[77] *Transfield Pty Ltd v Arlo International Ltd* (1980) 144 CLR 83 at 101 per Mason J.
[78] *Oversea Buyers Ltd v Granadex SA* [1980] 2 Lloyd's Rep 608 at 613 per Mustill J.
[79] *Pips (Leisure Productions) Ltd v Walton* (1980) 43 P & CR 415.

PRE-CONTRACTUAL NEGOTIATIONS

My discussion on the implied duty of good faith was limited to situations where a contract was already existing between the parties. What of pre-contractual negotiations? An obligation to negotiate in good faith significantly differs from an obligation to act in good faith.[80] At common law there was no implied duty of good faith in contractual negotiations. This was different of course if the parties were in a fiduciary relationship[81] in which case equity imposed duties, among others, of good faith, though not all fiduciary duties would apply in pre-contractual negotiations.[82] Still, in Australia there are statutory provisions which require some level of decency in negotiations, even if this is not labelled "good faith". The most important of these is s 52 of the *Trade Practices Act*, which has been mentioned above. Will courts enforce an express agreement to negotiate in good faith? Traditionally the answer was "no". The law did not recognise a contract to enter into a contract[83] or an agreement to agree at some time in the future.[84] A duty to negotiate in good faith was seen as inherently repugnant to the adversarial position of the parties when involved in negotiations[85] and was regarded as being unworkable in practice because it lacked the necessary certainty.[86] However in more recent cases, courts have recognised that an agreement to negotiate in good faith could be enforceable provided that the promise was clear and part of an undoubted agreement between the parties.[87] Further recognition was given recently by a court which doubted that a good faith requirement in negotiation was too vague and uncertain to be meaningful to enforce.[88] The court observed a distinction between an obligation to "negotiate in good faith in an endeavour to reach agreement" and one to 'negotiate in good faith to achieve an outcome satisfactory to both parties', the former capable of having an outcome that may be viewed as unsatisfactory by either or both parties but one which, for whatever reason, both sides accept as resolving the dispute.[89]

[80] As was enunciated in *Tobias v QDL Ltd* (unreported, NSW Supreme Court, 12 September 1997, Simos J).
[81] *United Dominions Corporation Ltd v Brian* (1985) 157 CLR 1.
[82] S*toelwinder v Southern Health* [2001] FCA 115, at para [47].
[83] *Courtney and Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd & Anor* [1975] 1 All ER 716 at 720, per Lord Denning MR.
[84] *Booker Industries Pty Ltd v Wilson Parking (Queensland) Pty Ltd* (1982) 149 CLR 600 at 604, per Gibbs CJ, Murphy and Wilson JJ.
[85] *Walford v Miles* [1992] 2 AC 128 at 138, per Lord Ackner.
[86] Ibid at 138 per Lord Ackner.
[87] *Coal Cliff Collieries v Sijehama* (1991) 24 NSWLR 1 at 26, per Kirby P (with whom Waddell A-JA agreed). Special leave to appeal to the High Court was refused.
[88] *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236 at 254 per Einstein J.
[89] Ibid at 259.

With the growing judicial and academic support[90] for the enforceability of agreements to negotiate in good faith, the tide may be turning.

CONCLUSION

The High Court of Australia has yet to pronounce on the implied obligation of good faith. Federal and State courts have adopted an implied obligation of good faith. It is a term implied by law. It is implied in many if not all commercial contracts and more easily in standard form and relational contracts. It most likely constitutes a separate cause of action. Its meaning must be derived from the facts of a particular case. Flexible standards may be implied by a court. It is likely that there are objective and subjective elements.

SCHEDULE

GOOD FAITH

1. Under the Joint Venturers Agreement (JVA) each joint venturer grants a pre-emptive right over its participating interest in the event it agrees to sell its participating interest to a third party.

   A joint venturer's immediate parent purports to sell shares in the joint venturer to a third party. Does this trigger pre-emption or involve a breach of an implied duty of good faith?

2. Under the JVA each joint venturer grants pre-emptive rights over its participating interest in the event it agrees to sell its participating interest to a third party or the immediate parent of the joint venturer agrees to sell shares in the joint venturer to a third party.

   The ultimate parent purports to sell shares in the immediate parent to a third party.

   Does this trigger pre-emption or involve a breach of an implied duty of good faith?

3. The Manager of the JVA enters into an (EPC) construction contract. (The EPC Contract is a fixed price turnkey contract). It

[90] See, for example, J Paterson, "The Contract to Negotiate in Good Faith: Recognition and Enforcement" July (2000) *Law Institute Journal* 48; D Cremean, "Agreements to Negotiate in Good Faith" (1996) 3 *Commercial Dispute Resolution Journal* 61at 64; G Flint, "Enforce Them All: The Beleaguered Agreement to Negotiate" (1995) 13 *Australian Bar Review* 263.

permits termination on 90 days notice without cause and termination on 30 days notice with cause.

The contractor purports to terminate without cause; or

the Manager (on behalf of the joint venturers) purports to terminate without cause.

Could the termination involve a breach of the implied duty of good faith? If so, in what circumstance?

4. On an issue requiring unanimity a joint venturer votes against (that is, effectively vetoes the issue) because:
   (a) it considers the proposition not well founded, would be better done another way and is not in the best interest of the joint venture; or
   (b) it wishes to hold out so as to obtain a benefit in another project from one of the joint venturers.

   Could that vote constitute a breach of the duty of good faith?

5. Bank A makes a secured loan to Company B secured only over B's Participating Interest, product, sales contracts and proceeds from the project.

   Bank A also provides an overdraft facility to B's parent. The overdraft is payable on demand.

   Bank A is concerned about the way the project is being developed; and

   Bank A makes demand on B's parent knowing that inability to pay would cross default in to the project secured loan.

   Could that demand constitute a breach of the duty of good faith?

6. All of the joint venturers under a JVA enter into an agreement (the Agreement) with a company (Related Company) which is related to one of the joint venturers. Certain rights of the joint venturers under the Agreement require the approval of all of them before they can be exercised.

   A decision is required to be made by the joint venturers to exercise one of the rights under the Agreement which, if exercised, will benefit the joint venture and, if not exercised, will not benefit the joint venture but will benefit the Related Company. The joint venturers are under no express obligation (either under the terms of the JVA or the Agreement) to take into account any joint venture matters or other considerations when making the decision.

The joint venturer which is related to the Related Company decides not to exercise the rights on the basis that the benefit to the company group, of which it and the Related Company are members, outweighs the benefit to it as a joint venturer.

Does the joint venturer's decision breach an implied duty of good faith?

7. Company A is:
   (a) a long-term sales agent for the Major Resources Joint Venture between A's subsidiary (45%), B (30%) and C (25%) for the sale of a specified amount of product from the Major Resources Project; and
   (b) the long-term sales agent for the Substantial Resources Joint Venture between another subsidiary of A (30%), D (35%), E (25%) and F (10%) for the sale of a specified amount of the same product from the Substantial Resources Project; and
   (c) the short-term sales agent for the Minor Resources Joint Venture between another subsidiary of A (60%) and G (40%) for the sale of a specified amount of the same product from the Minor Resources Project.

   Does each sales agency agreement have an implied obligation of acting in good faith?

   If so, how does Company A allocate sales to particular purchasers as between the two projects without breaching that implied obligation to act in good faith?

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