CONTRACT AND ATHLETE SELECTION

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This paper examines the contractual basis of athlete selection and proposes that the authority to make selection is confined to the express and implied contractual terms describing the selection process. The paper first considers selections made "objectively" and mandated through express contractual terms. "Subjective" regimes of selection are then considered and the suggestion made that despite selectors possessing the contractual power to apply their own opinion in making selections the entitlement is not unfettered. Under such regimes selectors are obliged, through implication, to apply their discretion honestly and in good faith. It is further proposed that the application of a term of selection is constrained by matters of contract construction and the implication of business efficacy.

Introduction

One is hard-pressed to think of any sporting event, team or individual which does not require contending athletes to undergo a process of selection; a means by which some emerge and others are eliminated. In many events the selection is a matter of ranking, in other cases selection is made by a coach or a panel exercising nothing more than a personal view of who should be included or excluded. For the athlete much rides on this process of selection – selection can lead to prize money, match payments, personal pride and national acclaim, standing on a podium, greater wealth, a university scholarship, advertisements and product endorsement. It can also mean the difference between a job as a labourer or an athlete, and later, a job as a commentator or national coach. To be selected once – just once – can make it all happen, or at least give it a chance of happening. Not to be selected can mean years of effort down the drain and relative oblivion.

Most athletes competing for team selection believe they will be chosen if they are the best athlete. What if the athlete is the best athlete and is not selected - is there any recourse to law? This article explores the relationship between athletes and their sporting organisations in respect of selection, with particular regard to implication, construction and the obligation of good faith in contract.

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For the purpose of context consider the concerns, legal and otherwise, arising from the non-selection of Newcastle Knights rugby league player Kirk Reynoldson in 2007. Under the terms of his contract, Reynoldson, upon playing 15 first grade games, would be granted a new 2008 contract paying $200,000 a season. With three games remaining in the season Reynoldson had already played 14 games. He was not selected to play his 15th game and his contract with the Newcastle Club lapsed. Statistics were produced to show Reynoldson was a better performer than others who had taken the field over preceding weeks. The media claimed the coach was so concerned with the propriety of leaving Reynoldson out of the side that he took "his selected team to the Knights board for approval knowing that Reynoldson"s exclusion would cause further howls of protest among players and supporters".[1] Reynoldson was reported to have been offered a new contract with the Newcastle Club but "with a significant pay cut".[2] The Newcastle Club claimed Reynoldson's non-selection was merely a matter of on-field form. The Newcastle Club was not in a position to make the semi-finals, irrespective of who was selected, fostering speculation that the club had nothing to lose in selecting less capable players. Furthermore, a salary cap imposed on clubs in the NRL competition meant a club could be advantaged in losing a player at the end of a season to make room for other players in the following season – perhaps players of outstanding talent.

The Reynoldson case is an example illustrating the anxiety athletes and their advisers may feel towards the processes of selection. The obvious concern is the possible manipulation of the selection process by a sporting organisation to fulfil a purpose ulterior to the contractual intention of the parties. There is, perhaps, some temptation to dismiss events such as Reynoldson's as mere sporting melodrama, but for the individual wrongly excluded the matter is serious and costly – no less so than any purported breach of contract is for any individual – and, given the limited span of sporting careers, results in costs which may be irrecoverable.

The contractual basis of sports selection

The relationship between an organisation and an athlete is almost always contractual, as are the terms governing the selection process.[3] Upon signing an agreement an athlete contracts to abide by the selection process, as does the club and other signatory athletes. Where athletes are not co-signatories a multipartite contractual relationship may be inferred. In *Integrated Computer Services Pty*

[1] B. Toohey, "Cruel Knights Dump Reyno," *The Daily Telegraph*, 15 August 2007.
[2] B. Toohey, "Buderus: We need Reyno," *The Daily Telegraph,* 7 August 2007.
[3] Excluding of course those consensual arrangements which come under the rule in *Cameron & Others v Hogan* (1934) 51 CLR 358, the principle being, that the court has no jurisdiction to interfere in matters of consensual arrangement which evince no intention by the parties to be legally bound. Note there are many exceptions – in the main where there is a contractual intention or threat to proprietary interests.

Ltd v Digital Equipment Corp (Aust) Pty Ltd McHugh J observed that a contract may be inferred where, "conduct … viewed in the light of the surrounding circumstances shows a tacit understanding or agreement."[4] To illustrate, in *Raguz v Sullivan,*[5] a case involving a selection dispute between two judokas competing for a place in the 2000 Sydney Olympics, the fact that the contending athletes were not co-signatories to a particular document governing selection was irrelevant to claims there was no contractual relationship between the athletes. Spigelman CJ and Mason P noted:

> *"Each athlete knew that every other member of the Shadow Team would both be shown the Selection Agreement and required to execute the standard Nomination Form (and subsequently the standard Team Membership Agreement). This was plainly intended to be an integrated scheme, particularly in a context where a claim by one athlete to a right of nomination (or selection) may, and in the present case must, have the consequence of denying nomination (or selection) to another."*[6]

To challenge his or her non-selection an athlete will need to establish that a contract governed the selection process and that the selection process was not followed. That is, the athlete must prove a breach of the express or implied contractual terms governing the means of selection.

Criteria governing selection

Objective criteria

Some contracts expressly state the criteria applicable for selection to a team of event. For example, Swimming Australia required swimmers for nomination for the Beijing Olympic team to "have placed 1st or 2nd Australian (in each gender) at the 2008 Telstra Australian Open Swimming Championships". Under these schemes the selection of athletes is "objective" given that the subjective opinion of selectors is irrelevant to an athlete gaining a place within the team.

Subjective criteria

In certain sports there are no listed criteria governing selection. Under such regimes selections are based on the judgment of individual selectors or panels of selectors as to the relative worth of individual athletes. Selection in this sense is "subjective", being dependent on the individual selector's view of the worth of

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[4] Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd (1988) 5 BPR 11,110 at 11,117 per McHugh JA.
[5] *Raguz v Sullivan* (2000) NSWCA 240. See also *Daley v NSW Rugby League Ltd* [1995] NSWIRC 183.
[6] *Raguz v Sullivan* (2000) NSWCA 240 at [80].

an athlete. Where an athlete complains of non-selection he or she may argue that a term of selection by merit is to be implied into the subjective selection regime.

Objective and subjective criteria

Some sporting organisations reserve the right to reject an athlete who, although meeting the objective standard of selection, is otherwise subjectively not suitable. For example, the Athletics Australia nomination criteria for the Beijing Olympics stated that: "As a general rule Athletics Australia will only choose Athletes to be nominated to the Australian Olympic Committee for inclusion in the 2008 Australian Olympic Team who selectors believe current results and previous major international results indicate that the athlete is capable of finishing in the top 16 in their respective event in the 2008 Olympic Games, Beijing."[7]

Extenuating circumstances

The fear that outstanding competitors may be lost to an event through accident appears to have prompted some sporting organisations to incorporate an essentially subjective "Illness/Misadventure/Extenuating Circumstances" term into the sporting contract. For example, Cycling Australia's nomination criteria for the Beijing Olympics allowed the National Selection Committee at their discretion to give weight to extenuating circumstances arising from:

> *"(a) injury or illness;*
>
> *(b) equipment failure;*
>
> *(c) travel delays;*
>
> *(d) bereavement; and/or*
>
> *(e) any other factors reasonably considered .[to] constitute extenuating circumstances".*

On the other hand, a sporting organisation may attempt to prevent athletes from making use of extenuating circumstances in appealing their non-selection. For example, the Boxing Australia Olympic selection criteria for Beijing stated: "For the purposes of determining whether an athlete or team has met the requirements of this Selection Criteria, BAI (Boxing Australia Incorporated) will not have regard to any extenuating circumstances."[8]

Although contractual terms regarding extenuating circumstances often possess a wide ambit, an action in contract remains should the provision be applied incorrectly, for example, where an athlete misses an event because he or she

[7] 2008 Australian Olympic Team, Athletics Australia Nomination Criteria, s A(2).
[8] 2008 Australian Olympic Team – Boxing Australia Nomination Criteria, s 8.

merely slept in but is nonetheless selected under extenuating circumstances criteria.

Contract and objective selection regimes

A selection is purely "objective" where based on known and inalterable criteria rather than through the subjective opinion of selectors. The athlete is selected because he or she is the superior athlete according to these criteria. Commonly, the athlete finishes first, throws further, lifts more, scores more points or betters opponents. Swimming, athletics and golf are obvious examples.

The advantage of objective selection is that of certainty. The athlete knows precisely the performance requirements necessary to ensure his or her entry into the team. From the organisation's perspective the advantage is similar, though bought at the cost of flexibility. When, during selection trials for the 2004 Olympics, 400 metres world record holder Ian Thorpe fell into the pool prior to the firing of the starting gun and was disqualified, the eventual winner, Craig Stevens, was contractually entitled to swim in that event at Athens despite (apparently) being a lesser talent. Had selectors removed Stevens in favour of the record holder it is likely that Stevens could have successfully challenged for breach of contract.[9]

In contracts mandating an objective regime of selection, the complaining athlete need merely prove the objective criteria were not applied. Where athletes are ranked according to their relative ability there are, obviously, few problems in proving one athlete superior to another. Where, however, a subjective form of assessment is added to existing objective criteria the athlete's prospects of successfully challenging his or her omission diminish. The complaining athlete must then prove that the selected athlete was chosen without correct reference being made to the implied terms governing selection – a difficult task where selectors are granted significant autonomy. The case of *Forbes v Australian Yachting Federation*[10] involved a challenge to selection for the Tornado Yachting class 1996 Olympic team. Criteria of selection were both objective and subjective. Objective criteria required boat crews to compete in two specified regattas removing all discretion, according to Santow J, to select crews who did *not* sail in these events. The plaintiffs claimed that a crew had changed a few team members and should, on that basis, be excluded from the Olympic team arguing that points should not be carried over from the "old" to the "new" crew. Santow J found there was "no express prohibition upon future alteration" and that the selection of a "crew" did not mean crew-members could not be changed. According to his Honour, the purpose of selecting crews was to create a team

[9] In a gesture of good will Stevens ultimately withdrew in favour of Thorpe who went on to win the event at Athens.
[10] Forbes v Australian Yachting Federation Inc SCNSW 1467 of 1996 BC9601099 (4 April 1996).

"with the best chance of winning medals at the 1996 Olympic Games", such that the "guidelines are clearly designed to serve that purpose and circumstances may well arise where they need modification to do so". [11]

Contract and subjective selection regimes

Subjective selection occurs where an athlete is selected according to the opinion or judgment of a selector. Often there are no express guidelines which ensure flexibility in selection and utilise the expert knowledge of the selectors. Even where statistics are available to guide selection, such as goals scored or tackles made, selectors are free to ignore these statistics in the exercise of their judgment. Indeed, depending on the terms of the contract, it may be permissible to select a less skilled player given his or her "fit" within a particular team structure.

Athletes aggrieved at their non-selection may argue that an implied term was ignored and, as such, the athlete was wrongfully denied entry to the team. In almost all cases the proposed implied term is one requiring selection to be based on "merit". That is, the complaining athlete claims he or she is more worthy of selection than the athlete selected in his or her stead. Of course, the argument is confined to subjective selection processes given that objective selection is, by definition, based on non-personal indicators of merit.

Subjective selection is common to interactive team sports (particularly ball sports) where the variety of skills and a preponderance of unquantifiable capacities exclude objective measure. Obvious examples are netball, AFL, rugby and soccer. In practice, selectors must balance out the relative strengths of players across a range of attributes such as ball skills, agility, speed, endurance, and courage, amongst many others and perhaps, ultimately, base the selection on their overall impression. Any guidelines of selection are often very general permitting selectors to apply their opinions freely. For example, the Hockey Australia selection policy states that players will be:

> *"assessed ... on their ability to perform at the highest level as part of the Australian team. They must meet acceptable performance standards and requirements of national coaches. Assessments will be made on player performance in international competition, Australian Hockey Leagues, Australian championships, regional competitions, club fixtures, training camps and training sessions."* [12]

Often under such schemes there is no regulation of the selection process. For example, in *Daley v NSW Rugby League Ltd* the court was informed that, "there

[11] Forbes v Australian Yachting Federation Inc SCNSW 1467 of 1996 BC9601099 at BC 62-63.
[12] 2008 Australian Olympic Team, Hockey Australia Selection Policy.

are no guidelines, resolutions or directives to the selectors as to matters required to be taken into consideration ... it is not possible to specify all the considerations which enter into the selection or to generalise as to that matter. Furthermore, the process of selection is, by its very nature largely subjective and the selectors often disagree on relative playing merits of players and the appropriate reason or reasons for which they should or should not be selected."[13]

With an emphasis upon the personal judgment of selectors, subjective selections are, for two reasons, difficult to challenge in breach of contract. One, there are no objective criteria acting as terms of the contract to match against the relative performances of athletes and, two, the selectors are permitted, under contract, to apply their good judgment to the selection process rather than that of, say, the reasonable bystander. Nevertheless, there are contractually imposed limits to subjective selection.

Subjective criteria and implied contractual terms

The basis of implication

A term may be implied into a contract where doing so is necessary to give the contract its proper and intended operation. The court, in essence, fills a gap in the text of the contract by incorporating an implied term. In *Codelfa Constructions v State Rail Authority* an implied term was described as: "…. one which it is presumed that the parties would have agreed upon had they turned their minds to it – it is not a term that they have actually agreed upon".[14] An implied term carries the same contractual authority as an express term and, where repudiated, may give rise to a suit in breach of contract. In *BP Refinery (Westernport) v Shire of Hastings*[15] the court stated that a term may be implied into a contract where it is:

- reasonable and equitable;
- necessary to give the contract business efficacy;
- so obvious it goes without saying;
- capable of clear expression; and
- does not contradict an express term.

There has been, it may be noted, some debate as to whether every element must necessarily be present before a term can be implied into a contract or,

[13] *Daley v NSW Rugby League Ltd* [1995] NSWIRC 183 affidavit of Don Furner.
[14] Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337 at 346 per Mason J.
[15] BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266 per Privy Council approved in Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337.

alternatively, whether the element "efficacy" and the element "obviousness" are singularly and separately sufficient.[16]

In addition to the formula espoused in *BP Refinery (Westernport)* it may also be necessary to imply a term to give the proper and intended application to a particular word used within a contract. In *Brambles Holdings Ltd v Bathurst City Council* Heydon JA observed that terms may be implied through "implications contained in the express words of the contract". There Brambles contracted to manage the Council's garbage depot and collect "general commercial waste" in return for retaining a percentage of the fee charged to depositors of garbage. At first the only waste collected was "dry waste". Brambles, after some time, came to accept liquid waste and claimed it was entitled to retain all fees for this form of waste as it "had no contract with Council for liquid disposal". The appeal concerned the interpretation the trial judge had given the words "general commercial waste" when determining that commercial waste included "liquid waste". In explaining the ruling the trial judge stated, "this is not an implication of a term ... on the basis of business efficacy; but rather the drawing out of what is implied by the language of the contract itself".[17] Heydon JA approved and noted that implication from express words "employed processes of construction".[18] In this sense a term is implied, as a matter of construction, to give the correct legal effect to the word in question. That is, an express word implies, or connotes, a function in addition to its literal meaning. For example, a term may be implied to give legal effect of the word "selection" used within a sporting contract – what did the parties intend the legal effect of "selection" to be when they chose that word to be included in the contract.

Subjective selection and implication in fact

Where the term "selection" appears in a sporting contract, an aggrieved athlete may ask the court to imply an additional term; that selection is to be made according to "merit".[19] To do so requires the court to consider the elements of implication. To paraphrase *Codelfa*, if the organisation and the athlete were asked if selection was to be merit based, they would reply "that is so obvious it goes without saying". The court must also be satisfied that the term to be implied meets the other requirements of implication, in particular whether the implication is necessary "to give business efficacy to the transaction as must have been intended at all events by both parties ..."[20]. In essence, is the implied term necessary to give effect to the intention of the parties? Whether the court will

[16] JM Paterson, "Terms implied in fact: The basis for implication", (1998) 13 *JCL* 103.
[17] Brambles Holdings Ltd v Bathurst City Council [2001] NSWCA 61 at [28] per Heydon JA.
[18] Brambles Holdings Ltd v Bathurst City Council [2001] NSWCA 61 at [28] per Heydon JA.
[19] There may be other implications apart from merit, such as building a team for the future, which would require a different argument.
[20] *The Moorcock* (1889) 14 PD 64. At least where a single element is thought to be insufficient.

imply a term of merit will hinge on the intention of the parties inferred from the purpose to be achieved under the contract:

> *"The so-called implication in fact is really implication by judge based on the judge's view of the actual intention of the parties drawn from the circumstances of the particular contract, its language, and its purposes."*[21]

By way of simple illustration; if the predominant intention is to win the competition, a term of selection on merit is more readily implied into the contract than where, say, the intention is to create a balance between youth and experience or where the purpose is merely to enjoy the company of fellow team mates.

In *Zusman v Royal Western Australian Bowling Association (Inc)* the purpose to be achieved in selecting the Western Australia bowls team prompted the court to imply a term of merit into the contract. Zusman, the plaintiff, believed the executive of the Bowling Association had interfered with the selection process and in so doing expunged merit as a criteria of selection. Zusman argued "there is to be implied into the agreement between the members and the Association on a term that the selectors would act fairly". The Association countered that Zusman had been treated fairly, "and even if he has not, there is no obligation to be fair to the plaintiff or indeed to other members of the Association hopeful for selection".[22] McKechnie J saw "fair" as meaning "a fair review of his merits by the selectors …"[23].

The purpose of the selection process in this case was to supply top-rated players to represent the State. Meeting this purpose then required as a matter of implication that those of greater merit be selected over those of lesser merit. McKechnie J stated:

> *"A term may be implied into a contract if it is so obvious that anybody asked would have said in effect, 'That goes without saying'.*
>
> *"Selection for the state team is no doubt the desire of all competitive bowlers. If they were to be told that the selection process does not have to be fair and it may consider anything the selectors wish, including their own prejudices, I suspect that the response would be*

[21] Renard Constructions (ME) Pty Ltd v Minister of Public Works (1992) 26 NSWLR 234 at 255 per Priestley JA.
[22] Zusman v Royal Western Australian Bowling Association (Inc) [1999] WASC 86 at [3].
[23] Zusman v Royal Western Australian Bowling Association (Inc) [1999] WASC 86 at [44].

> *rude and resounding. In my view the plaintiff has established an arguable case that there is such a term of fairness to be implied."*[24]

In *Farrell v Royal King's Park Tennis Club* in contrast, merit selection as it related to business efficacy was not implied. Farrell, a squash player, claimed she had "been denied the privileges and benefits associated with membership ... which includes the right to be considered for selection to represent the (Club)". Farrell sought to have implied into her contractual arrangements with the Club, a term that selection was to be based on "ability".[25] Farrell had lived in England for some time and had competed on the professional circuit and in the British Open. Johnson J found her to be, at the relevant time, "a world class masters squash player and ... on ability alone, would have been suitable for selection in an A grade pennant team."[26] Evidence indicated personal animosity towards Farrell and that she had been omitted from the team because the Ladies Captain and other team members did not wish to play with her.

Johnson J considered the case in respect of the "elements" of implication[27] and referred to the Constitution of the Club, the pertinent clause reading:

> *"The objects for which the Club is established are to promote and encourage the playing of lawn tennis, squash and other sports and for those purposes ... to promote, hold, or enter into tournaments and other competitions and matches ..."*[28]

His Honour found the business purpose of the contract was for members the use and enjoyment of club facilities, rather than the fielding of representative teams and was, as such, "workable and commercially effective without the implication of the proposed term". The club existed to promote the sport of squash and "the evidence is that the management are content for members to form their own team if they wish". His Honour found that to imply a term of fairness would put the club to the expense and inconvenience of "obtaining all relevant information … maintaining awareness of changes in performance, identifying and justifying the basis of decisions … It is difficult to accept the management of a voluntary organisation, established to promote and encourage the playing of certain sports at an amateur and social level, would envisage such an obligation."[29] Similarly, given the nature of the club it did not "go without saying", that the membership contract implied a term of merit selection. Furthermore, there was evident difficulty in determining how the implied term Farrell suggested should be

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[24] Zusman v Royal Western Australian Bowling Association (Inc) [1999] WASC 86 at [32-33].
[25] Farrell v Royal King's Park Tennis Club (Inc) [2006] WASC 51 at [75].
[26] Farrell v Royal King's Park Tennis Club (Inc) [2006] WASC 51 at [14] and [81].
[27] BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266.
[28] *Farrell v Royal King's Park Tennis Club (Inc)* [2006] WASC 51 at [72]. Note that Farrell's case included breaches of both the rules of the Club as an incorporated association and a breach of common law contractual obligations.
[29] Farrell v Royal King's Park Tennis Club (Inc) [2006] WASC 51 at [118].

expressed: "It is by no means clear that it is the proposed term which the parties would have agreed on, in the event that they agreed to there being a fair selection process." It would be a "matter of speculation".[30] His Honour summarised: "Success in competition is not an object of the Club."[31]

The plaintiff, Ms Farrell, may have been successful had the sole object of playing been that of "winning" rather than of promoting the game of squash. In this respect Johnson J drew a distinction between selection for State representation as per *Zusman*, where the purpose was to win, and the circumstances of Farrell's non-selection:

> *"The defendant's position is that the proposed implied term is not necessary to give the Contract business efficacy. The Constitution defines the membership category by reference to use certain facilities, not by reference to pennant competition. Further, it is said that the evidence shows that while membership is necessary to enable a player to play pennant squash for the Club, the converse is not true. A member need not play pennants and, in fact, the majority do not. Significantly, a member can play pennants for someone else without losing the entitlements of membership. I accept each of these statements of fact. ... I accept the proposition that the test of necessity for business efficacy is more easily met with respect to the implication identified in this case, where the Club is constituted for the purposes of playing a particular sport. I would add that the argument that there is an obvious need for a selection process to be conducted fairly in order for the Contract to have business efficacy, is strengthened considerably where … the club or the State association for a particular sport and carries out selection for membership of a State team."*[32]

Ms Farrell's difficulty was that the purpose of the membership contract was to use club facilities and to promote the game of squash. Johnson J linked the object and purpose of the contract with business efficacy and accepted the proposition that if the Association were formed for the purpose of playing pennant squash and if the "contract of membership for all its members were solely referrable to that purpose ... it could well be arguable that the Contract lacked business efficacy if it did not include a process of selection".[33] In short, it could not be implied that selections were intended to be merit-based when this would defeat the express purpose of forming a team in the first place. As suggested by Johnson J, had the purpose been to select a "State team" the outcome could have

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[30] Farrell v Royal King's Park Tennis Club (Inc) [2006] WASC 51 at [135-136].
[31] Farrell v Royal King's Park Tennis Club (Inc) [2006] WASC 51 at [131].
[32] Farrell v Royal King's Park Tennis Club (Inc) [2006] WASC 51 at [123].
[33] Farrell v Royal King's Park Tennis Club (Inc) [2006] WASC 51 at [123].

been different. Playing at State level is not, of course, done with the intention of socialising – it is to win.

Johnson J in Farrell drew a clear distinction between the facts in that case and those of Zusman. According to his Honour "... the principal basis on which Zusman can be distinguished is that the defendant party was the State organisation for the particular sport and had the responsibility for selection of the State team. A failure to act fairly would have grave consequences for those seeking selection in the State team".[34] It would seem that the grave consequences his Honour was referring to were those arising from the selection not achieving the contracted intention of the parties and the more meritorious of players being excluded from State representation.

In *De Pasquale v The Australian Chess Federation*[35] the plaintiff sought a declaration from the court that the failure of the Chess Federation to select him for a Chess Olympiad to be held in Istanbul, Turkey, was invalid. The selection by-laws established criteria for selecting team members:

> *" (a) selectors may consider whatever information in respect of each candidate as they may consider relevant.*
>
> *(b) Selectors shall list all applicants in order of playing strength ..."*

The plaintiff proposed the existence of an "implied term to act fairly was variously expressed as containing an obligation to give due weight to current form or, alternatively, as a process of replacing or overriding selection in accordance with the criteria of playing strength...".[36]

Whilst the term "playing strength" was indicative of merit the contract did not mandate "current form" as the only measure of merit. The rules permitted the selectors to consider any information they thought relevant in ranking according to "playing strength" - a subjective appraisal. That is, the selection by-law only mandated that "relevant" matters be considered and further, that which was to be deemed "relevant" was a decision for the selectors alone. The defendant did, however, admit to the existence of an implied obligation not to take, "completely irrelevant considerations into account".[37] Gray J described evidence regarding the assessment of "current form" as serving to "confirm what a subjective and uncertain concept it is".[38]

Where the job of selectors is to rank players according to merit but, where in doing so, the selectors are permitted to consider wide criteria, it is extremely

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[34] Farrell v Royal King's Park Tennis Club (Inc) [2006] WASC 51 at [130].
[35] De Pasquale v The Australian Chess Federation Incorporated [2000] ACTSC 94.
[36] De Pasquale v The Australian Chess Federation Incorporated [2000] ACTSC 94 at [13].
[37] De Pasquale v The Australian Chess Federation Incorporated [14].
[38] De Pasquale v The Australian Chess Federation Incorporated [20].

difficult for an aggrieved athlete to successfully challenge his or her non-selection on grounds of breach of an implied term. In such circumstances an implied term could well, impermissibly,[39]contradict an express term authorising selectors to use their own judgment. As such, provided the selection is an honest exercise of judgment the decision will be unassailable.

In passing, it is worth noting that the intention of contracting parties is taken to be the intention existing at the time of contracting. The attention to timing can become important where the rationale of selection changes to meet differing priorities of the organisation over time. For example, a club signing an athlete at the beginning of the season may be clearly focused on using that player to help win the competition. If, however, towards the end of the competition it becomes clear that the team will not make the semi-finals, the rationale behind making a selection may, for example, change to that of deliberately losing matches to improve draft choices for the following season – this new purpose is irrelevant to the intention of the parties at the time of contract formation.

Subjective selection and implication through construction

Although not likely to have resulted in a different outcome, the case of *Farrell* may well have been argued as a matter of contract construction. Contract construction requires the court to interpret the linguistic meaning of terms used within the contact and/or the legal effect of those terms to, perhaps, reveal a breach of contract.[40] In essence the task of the court is, by objective reference to the express words of the contract, to give the term in question the construction the parties intended.[41] The terms governing selection create legal rights and obligations and where wrongly constructed those rights and obligations are obviated. In the context of selection, an athlete aggrieved at his or her non-selection will propose that selectors did not give the term governing selection the construction intended by the parties.

When the word "selection" appears in a sporting contract the natural question to ask is what the word means in the context of this sport, and what is its scope of operation? Does the word "selection", for example, contractually empower a selector to make an unfettered decision ignoring the relative merits of contending athletes? In this sense the word "selection" may have a particular meaning or legal effect beyond the literal meaning of the word itself. Discerning the intention of the parties requires that the court "place itself in thought in the same factual matrix" as that of the parties when the contract was formed.[42] Where the intention is not expressed the intention of the parties will be inferred.

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[39] BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266.
[40] Life Insurance Co of Australia Ltd v Phillips (1925) 36 CLR 60.
[41] Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337.
[42] *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 at 997 per Wilberforce LJ.

To determine the meaning or effect of a term, the context (factual matrix or surrounding circumstances) is all important. As stated by Lord Wilberforce in *Prenn v Simmonds*:

> *"In order for the agreement … to be understood, it must be placed in its context. The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on linguistic considerations. … We must … inquire beyond the language and see what the circumstances were with reference to which the words were used, and the object, appearing from those circumstances, which the person using them had in view. . Moreover … it has been clear enough that evidence of mutually known facts may be admitted to identify the meaning of a descriptive term."*[43]

> *"… evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the "genesis" and objectively the "aim" of the transaction."*[44]

The High Court stated, in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*:

> *"The meaning of terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction."*[45]

Similarly, in *Pacific Carriers Limited v BNP Paribus*, a case concerning letters of indemnity, the High Court said:

> *"The construction of the letters of indemnity is to be determined by what a reasonable person in the position of Pacific would have understood them to mean. That requires consideration, not only of the text of the documents, but also the surrounding circumstances known to Pacific and BNP, and the purpose and object of the transaction."*[46]

To continue the theme, Steyn LJ in *Sirius International Insurance v FAI General Insurance* stated:

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[43] *Prenn v Simmonds* [1971] 1 WLR 1381 at 1383.
[44] *Prenn v Simmonds* [1971] 1 WLR 1381 at 1385.
[45] Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52 at [41].
[46] Pacific Carriers Limited v BNP Paribus [2004] HCA 35 at [22].

> *"The inquiry is objective: The question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of the specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual sense."*[47]

In respect to linguistic meaning, Carter and Peden comment:

> *"…linguistic meaning refers to the meaning which would be placed on the words of a contract according to the applicable standard of interpretation (it is assumed due account is taken of context). The standard of interpretation may be that of the community at large, that of a defined portion of the community (for example, those in a particular trade) or the parties themselves (where the meaning is unique). Linguistic meaning cannot be determined without first establishing the applicable standard of interpretation."*[48]

In regard to this comment it is suggested here that the linguistic meaning to be given to the word "selection" is best determined in reference to "the parties themselves where the meaning is unique". Sport as a "community" or "trade" would appear inapplicable as a "defined community" in the sense referred to by Carter and Peden in evaluating the linguistic meaning of "selection" - given the variation in selection norms across sport in general there can be no inclusive community. [49]

The fact that the applicable intention is that of "a reasonable person in the position of the parties" indicates that construction may be referenced more narrowly than the reasonable person on the "omnibus", to focus upon, in this case, the reasonable person within the sport in question. The point being made is that "sport" possesses mores and customs different to other forms of industry. These mores form part of the factual matrix the court must come to terms with in discerning the meaning and legal effect of the word "selection". There may, for example, be some recourse to matters of "fairness" not likely to feature in argument in more traditional industries.

The surrounding circumstances bearing upon the construction of terms of selection, of course, depends upon the sport in question and the particular event for which an athlete is contending. Grand-finals are obviously different to pre-season games. Events of great prestige such as world championships or the Olympics are different to club matches. One-off events differ to matches played

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[47] Sirius International Insurance v FAI General Insurance [2005] 1 ALL ER 191 at 200.
[48] JW Carter and Elisabeth Peden 'The "Natural Meaning" of Contracts' (2005) 21 *JCL* 277.
[49] In some sports an argument may be put that the term 'selection' has a customary use. To do so requires the athlete to produce evidence that the custom was 'well known, notorious, reasonable and certain'.*Asset Insure Pty Ltd v New Cap Reinsurance Corp Ltd (in liq)* (2006) 225 CLR 331 at 353.

each week. Remuneration and the level of remuneration are likely to feature as circumstances bearing upon intention and construction. The need for national teams to be viable over long time periods will predictably require more experienced players to make way for developing players. The possibilities are naturally wide. Nevertheless, the overriding argument in any professional sport or where athletes contend for a prestigious event will be that the intention of the parties was to select according to relative merit.

Subjective selection and the exercise of discretion

A subjective selection regime involves selectors in the exercise of discretion. Where contracts of selection are concerned, it is suggested here that this discretion can only be exercised "honestly". That is, the selector is required, under the implied terms of the contract to give an honest appraisal of the relative merits of the athletes vying for selection. It goes without saying, therefore, that any selection made with an ulterior motive is done so in breach of contract.

Consider the comparisons within the case of *Meehan v Jones*.[50] The vendors agreed to sell land in Queensland on which an oil refinery had been built. The purchaser was protected by a "subject to finance" clause enabling him to avoid the contract if he was unable to secure finance satisfactory to his needs. The pertinent clause read:

> *"The Purchaser or his nominee receiving approval for finance on satisfactory terms and conditions in an amount sufficient to complete the purchase."*

Satisfactory finance was, in fact, secured by the purchasers. The vendors, however, apparently changing their minds, attempted to void the contract on the grounds of uncertainty in that the subject to finance clause left "... to the discretion of the purchaser whether he will perform the obligations which the contract purports to describe, so that what appears to be a contract is really illusory".[51] That is, the discretion removed from the purchaser any obligation to perform, resulting in a "non-contract". The High Court found the clause was not illusory. Our interest, though, is with the High Court's view of the obligations attaching to the purchaser's exercise of the discretion and any legal constraints which may be placed upon parties charged with exercising a discretion in a wider sense.

Gibbs CJ stated in respect of determining whether the subject to finance clause was suitable that:

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[50] *Meehan v Jones and Ors* (1982) 149 CLR 571.
[51] *Meehan v Jones and Ors* (1982) 149 CLR 571 at [7].

> *"No doubt it may be implied that the purchaser will act honestly in deciding whether or not he is satisfied."*[52]

Similarly, Mason J expressed the view:

> *"The primary object of the condition being the protection of the purchaser, it is sensible to treat it as stipulating for finance that is satisfactory to the purchaser or his nominee, subject to an implied obligation that he will act honestly, or honestly and reasonably, in endeavouring to obtain finance and in deciding whether to accept or reject proposals for finance."*[53]
>
> *The judgment of the purchaser as to what constitutes finance on satisfactory terms … must be reached honestly or honestly and reasonably."*[54]

Wilson J commented:

> *"… subject always to the construction of the contract in a particular case, the court will imply no greater obligation on the purchaser than that he is obliged to act honestly in determining whether the available finance is satisfactory. … The requirement of an honest judgment may be thought to provide the vendor with the maximum protection which is available under the clause."*[55]

The majority of the Court recognised that in exercising the discretion, one existing for the benefit of the purchaser, the decision-maker must do so "honestly".[56] Does, however, the principle espoused in *Meehan v Jones*, one relating to the exercise of a discretion as to the suitability of finance, have a broader application? Much depends on the juridical basis for holding that such an option should be exercised honestly.

Honesty as an implication

From the passages above it is quite clear that the High Court's ruling is one grounded on implication. To repeat the words of Gibbs CJ:

> *"No doubt it may be implied that the purchaser will act honestly in deciding whether or not he is satisfied. However, it does not seem to me necessary, in order to give business efficacy to a contract, that a*

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[52] *Meehan v Jones and Ors* (1982) 149 CLR 571 per Gibbs CJ at [11].
[53] *Meehan v Jones and Ors* (1982) 149 CLR 571 per Mason J at [18].
[54] *Meehan v Jones and Ors* (1982) 149 CLR 571 per Mason J at [22].
[55] *Meehan v Jones and Ors* (1982) 149 CLR 571 per Wilson J at [2]. See further discussion below.
[56] Murphy J indicating the exercise of the discretion was entirely a matter for the purchaser.

> *condition should be implied that the purchaser will make reasonable efforts to obtain finance."*[57]

The second sentence of the passage is important because it indicates that his Honour's reasoning as regards implication is based on the notion of "business efficacy". It may equally be argued that the parties would have intended such an application "as being so obvious that it goes without saying" had they turned their minds to the question of how the subject to finance clause should operate.

Mason J also based his judgment on an obligation arising through implication and additionally introduced, but did not elaborate on, an obligation related to the "legitimate expectations" of the other party:

> *"To say that a "subject to finance" or "subject to finance on satisfactory terms and conditions" clause denotes finance which is satisfactory to the purchaser is not to say that he has an unfettered right to decide what is satisfactory. To concede such a right would certainly serve the object of the clause in protecting him. But it would do so at the legitimate expectations of the vendor by enabling the purchaser to escape from the contract on a mere declaration that he could not obtain suitable finance. With some justification the vendor can claim that the agreement made by the parties is not an option but a binding contract which relieves the purchaser from performance only in the event that, acting honestly, or honestly and reasonably, he is unable to obtain suitable finance."*[58]

So then, the juridical basis for the Court determining that the discretion is to be applied honestly is that of implication. The fact that the purpose of the discretion was for the benefit of the purchaser did not expunge the requirement of the discretion to be applied with an honest appraisal of its suitability to the purchaser. Arguably, *a fortiori*, this applies where an honest appraisal is to the benefit of the other party.

There is no practical reason to extensively discuss whether the parties to a sporting contract intend the exercise of a discretion in selection to be made honestly or dishonestly. To argue other than an honest appraisal is to suggest the parties would, had their minds turned to the subject, have intended selections to be made dishonestly. The requirement of honesty as a matter of implication, in such circumstances, speaks for itself. Of course, the argument of honest appraisal is discussed in reference to the relative merit of contending athletes. Where, however, merit is not the intended object of selection, honesty as to "merit" will not apply. Nevertheless, wherever a selection is made to achieve a particular

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[57] *Meehan v Jones and Ors* (1982) 149 CLR 571 per Gibbs CJ at [11].
[58] *Meehan v Jones and Ors* (1982) 149 CLR 571 per Mason J at [22].

purpose the selectors must be honest in attempting to meet that purpose. For example, where the purpose is to blood youngsters for the future, the selectors must act honestly in selecting those youngsters with the best chance of performing well in the future.

It is worth noting that Mason and Wilson JJ in *Meehan v Jones* also made reference to whether the discretion, through implication, should be exercised "reasonably". What is "reasonable" of course suggests an objective standard for determining how the discretion is to be exercised.[59] In contracts dealing with subjective selection, such an implication conflicts with the selectors express capacity to use their expert and subjective judgment as to merit and cannot, without more, be incorporated as a term.[60]

Subjective selection and the contractual obligation of good faith

Although selectors are entitled to base decisions on their subjective belief, it is suggested here that this entitlement is fettered by an obligation to act in good faith. That is, in exercising its contractual rights, the organisation or its selectors must permit the other party, the athlete, to access the benefits of the contract.[61] In short, the "obligation of good faith and reasonableness in the performance of a contractual obligation or the exercise of a contractual power may be implied as a matter of law as a legal incident of a commercial contract"[62] or may be found as an implication arising from the express contractual terms.[63] Note, however, that the implied obligation of good faith performance may be expressly excluded[64] and further, there is no "duty to subordinate self-interest entirely which is the lot of the fiduciary".[65]

The status of good faith in contract

Although yet to be fully accepted as a cause of action the High Court by majority in *Royal Botanic Gardens v South Sydney City Council* acknowledged "good faith" as a live issue stating, "... whilst the issues respecting the existence and scope of a "good faith" doctrine are important, this is an inappropriate occasion to consider them".[66] There is, nevertheless, substantial reference, or indeed

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[59] See later discussion of reasonableness in 'Subjective selections and objective unreasonableness'.
[60] Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337.
[61] Burger King Corp v Hungry Jacks Pty Ltd [2001] NSWCA 187; Far Horizons Pty v McDonald's Australia Ltd [2000] VSC 310; Vodafone Pacific Ltd v Mobile Innovations Ltd [2004] NSWCA 15.
[62] *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15 at [125]. There is no attempt in this paper to discuss whether good faith should be implied as a matter of law to all sporting contracts.
[63] Farrell v Royal King's Park Tennis Club (Inc) [2006] WASC 51 at [69] BC200601478.
[64] Vodafone Pacific Ltd v Mobile Innovations Ltd [2004] NSWCA 15.
[65] Overlook v Foxtel [2002] NSWSC 17 at 67 referencing Burger King Corp v Hungry Jacks Pty Ltd [2001] NSWCA 187.
[66] Royal Botanic Gardens and Domain Trust v South Sydney City Council (2002) 186 ALR 289 at [40] and [156]. Kirby J dissenting.

acceptance, of a doctrine of good faith in several Australian jurisdictions. In *Renard Constructions (ME) Pty Ltd v Minister of Public Works* where Priestley JA stated:

> *"People generally, including judges and other lawyers, from all strands of the community, 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 on the parties of good faith and fair dealing in its performance. In my view this is in these days the expected standard, and anything less is contrary to prevailing community expectations."*[67]

In *Far Horizons Pty Ltd v McDonalds Australia Ltd*, Byrne J commented:

> *"I do not see myself at liberty to depart from the considerable body of authority in this country which has followed decisions of the New South Wales Court of Appeal in Renard Constructions (ME) Pty Ltd v Minister for Public Works. I proceed, therefore, on the basis that there is to be implied into a franchise agreement a term of good faith and fair dealing which obliges each party to exercise the powers conferred on it by the agreement in good faith and reasonably, and not capriciously or for some extraneous purpose. Such a term is a legal incident of such a contract."*[68]

Finkelstein J expressed similar sentiments in *Garry Rogers Motors Aust Pty Ltd v Subaru (Australia) Pty Ltd*:

> *"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 presumed intention of the parties) but as a legal incident of the relationship ... If such a term is implied it will require a contracting party to act in good faith and fairly, not only in relation to the performance of a contractual obligation, but also in the exercise of a power conferred by the contract."*[69]

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[67] Renard Constructions (ME) Pty Ltd v Minister of Public Works (1992) 26 NSWLR 234 at 268.
[68] Far Horizons Pty Ltd v McDonalds Australia Ltd [2000] VSC 310 at [120].
[69] Garry Rogers Motors Aust Pty Ltd v Subaru (Australia) Pty Ltd (1999) ATPR 41-703 at 43,014.

What is "good faith"?

There are three generally accepted strands to the obligation of "good faith" with some overlap between these strands. In *Vodafone Pacific v Mobile Innovations Ltd*[70] Giles J observed that:

> *"There is a regrettable lack of uniformity in the cases. Reasonableness can be seen as part of good faith, and acting in bad faith is hardly reasonable. The difficulty in arriving at the content of an obligation of good faith, in particular, has often been noted ..."*
>
> *"Good faith meaning honesty and good faith meaning doing what is necessary to enable the party to have the benefit of the contract were two elements of the implied obligation taken by the (trial) judge. They are really different. Perhaps different again is good faith meaning reasonableness."*

We will consider in turn each of the possible meanings of good faith espoused by Giles J:

- Honesty;
- Reasonableness;
- Doing that which allows the other party to have the benefit of the contract.[71]

The obligation of honesty

"Honesty" in the context of *Meehan v Jones* required that the holder of the discretion in relation to a "subject to finance" clause take an honest view as to whether available finance suited his or her needs.[72] Whilst honesty in respect of good faith incorporates the same obligation as that in *Meehan v Jones* it is arguable that honesty in respect of good faith in sporting selections will operate more extensively to include the absence of personal bias and the avoidance of ulterior purposes.

Honesty and purpose

Subjective honesty in sports selection requires merely that the selector give an honest appraisal to the relative worth of contending athletes with respect to the

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[70] Vodafone Pacific Ltd v Mobile Innovations Ltd [2004] NSWCA 15 at [193].
[71] The argument has been made that the obligation of reasonableness and allowing the other party to benefit from the contract, may be nothing more than sub-sets of honesty. See *Burger King Corp v Hungry Jacks* [2001] NSWCA 187 at [169-170].
[72] See above.

needs of the team. This obligation, of course, extends to avoiding personal and ulterior motives or bias.

The obligation also extends to the avoidance of specious justifications for selections that are not otherwise warranted. As Barrett J stated in *Overlook v Foxtel*:

> *"A party is precluded from cynical resort to black letter."*[73]

Similarly, Windeyer J in Mangrove Mountain Quarries v Barlow commented that the plaintiff could not pretend:

> *"…to rely upon breaches of no importance to him or her to achieve a collateral result …"*[74]

In this sense a selector who, in seeking to achieve a collateral purpose promotes matters that are of no true relevance to the selection, will breach the obligation to select honestly.

In *Far Horizons v McDonalds* Byrne J stated:

> *"… good faith and fair dealing … 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. Such a term is a legal incident of such a contract."*[75]

As Byrne J stated, a decision made to achieve an extraneous purpose is not made in good faith. It is suggested that the purpose to be achieved in making selections is a fundamental guide as to whether the selection is made honestly. For example, a selection that seeks to achieve an extraneous purpose cannot be made honestly - an extraneous purpose, by definition, furthers a different purpose from that of the term of selection.

The "purpose" behind a selection process was discussed previously in the cases of *Farrell v Royal King's Park Tennis Club,*[76] and *Zusman v Royal Western Australian Bowling Association.*[77] Such cases may also illustrate the notion of "good faith" honesty. Where the intended purpose of the contract is to provide social enjoyment there can be no breach of the honesty strand of good faith should the selectors ignore the relative merit of the contending athletes.

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[73] *Overlook v Foxtel* [2002] NSWSC 17at [67].
[74] Mangrove Mountain Quarries Pty Ltd v Barlow [2007] SCNSW 492 at [28].
[75] Far Horizons Pty Ltd v McDonald's Australia Ltd [2000] VSC 310 at [159]; see also Burger King Corp v Hungry Jacks [2001] NSWCA 187.
[76] Farrell v Royal King's Park Tennis Club (Inc) [2006] WASC 51.
[77] Zusman v Royal Western Australian Bowling Association (Inc) [1999] WASC 86.

Conversely, as in *Zusman*, where selection is made to field a State team that selection must, to meet the implied purpose of winning, be based on relative merit and, where done so, there can be no dishonesty.

Athlete selections, however, are not always made for the primary purpose of winning. Where winning is not the prime objective of selection, a different analysis logically applies.

For example, in *Daley v NSW Rugby League Ltd* witness evidence was put before the court that:

> *"The Australian Selectors do select teams primarily on the basis of current form. However, there are a number of other considerations. For example, I recall that in 1994 the in form hooker in the State of Origin Series was Benny Elias and, on form he was recognised by the selectors to be entitled to be the shadow hooker for the 1994 Kangaroo Tour behind Steve Walters. The selectors decided that, as Elias was to retire at the end of the season, a younger player with promise should be given the opportunity and commence obtaining the experience required at international levels."*[78]

Where such a policy applies, the appraisal, nonetheless, of who should be excluded and who should be promoted must be done honestly and with a view to achieving the intended purpose of the selection.

Honesty may also require selectors to give a true weighting to the various criteria governing selection or, to paraphrase the comment of Windeyer J in *Mangrove Mountain Quarries v Barlow*, not "to rely upon 'weightings' of no importance to him or her to achieve a collateral result …".[79] In *Zusman v Royal Western Australian Bowling Association*[80] State selectors were required to take into account a range of criteria, some of which did not focus on athletic performance, including a "player's personal image, compatibility as well as what he portrays as a member of a pennant side or state side, concentration, temperament, behaviour, ambition and team spirit". How for example, should a player's "personal image" be weighted alongside sporting prowess? It may be suggested that should "image" be disproportionately applied, the selection is in breach of contract notwithstanding that "image" is an express criteria.

Even where the purpose of selection necessitates a merit appraisal there nevertheless remains significant scope for selectors to take a personal view as to criteria indicative of merit. Again, the selector engaged in a subjective selection

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[78] *Daley v NSW Rugby League Ltd* [1995] NSWIRC 183 affidavit of Don Furner.
[79] Mangrove Mountain Quarries Pty Ltd v Barlow [2007] SCNSW 492 at [28].
[80] Zusman v Royal Western Australian Bowling Association (Inc) [1999] WASC 86.

is permitted as a matter of contract to apply his or her opinion to the selection process. It may be suggested that provided the selection, for better or worse, is made with the purpose of benefiting the team there is no contractual dishonesty. For an athlete aggrieved at non-selection there remains a practical difficulty of proving that a selection was not made honestly - in most instances an extraneous purpose will not be known to a complainant athlete. Nevertheless, where dishonesty can be discerned the matter is actionable in breach of contract. Although referring to a matter of misrepresentation consider the dictum of Bowen LJ in *Edgington v Fitzmaurice*:

> *"…a state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained, it is as much a fact as anything else. A misrepresentation as to the state of a man's mind at a particular time, if it can be ascertained, is as much a fact as anything else. A misrepresentation as to the state of man's mind is a misstatement of fact"*[81].

A selection made dishonestly, with ulterior purpose or with bias is a matter of fact. Ascertaining this fact, in the words of Bowen LJ is "difficult", nevertheless where provable an action in breach of contract is available.

Subjective selections and objective unreasonableness

There is some doubt as to the meaning of "reasonableness" in respect of good faith, a doubt which apparently prompted Meagher JA in *Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church* for the Archdiocese of Sydney to state in respect of the word, "whatever that means".[82] There is also debate as to whether "reasonableness" is an independent obligation or is a subset of honesty[83] and further, whether good faith is implied as a matter of law or of fact.[84] The words, "reasonable" "arbitrary" and "capricious" are often used to describe breaches of the implied contractual obligation of reasonableness. Such descriptors, however, are somewhat problematic when used in respect of good faith in sporting selections. It is difficult to conceive of such words being applied other than objectively - the words themselves suggest, to some extent, a variation from an objective norm. In fact, subjective sporting selections are very likely to be at variance with objective standards. This is especially the case where the selector-

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[81] *Edgington v Fitzmaurice* (1885) 29 Ch D 481 at 483.
[82] Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church for the Archdiocese of Sydney (1993) 31 NSWLR 91 at 91; see also Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234 at 236-37.
[83] Burger King Corp v Hungry Jacks [2001] NSWCA 187 see [141]-[142], [158], [169]; Francis v South Sydney District Rugby League Football Club Ltd [2002] FCA 1306 at [203]; Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd (1999) ATPR 41-703.
[84] Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234 at 236; Burger King Corp v Hungry Jacks [2001] NSWCA 187 at [164].

coach, in a "creative" or "inspired" moment, believes a particular player or combination of players is likely to benefit the team. Selections by their very nature are sometimes made whimsically, on a hunch or as a gamble. These "inspired" selections are not the product of mathematical certainty and, as is well known, do not always achieve the desired result - but are nonetheless contractually permissible under a subjective methodology. Indeed, in the absence of stated criteria, an objectively certain standard by which to gauge the reasonableness of a selection is illusory; everyone has their opinion and, particularly in sport, there are varying degrees of unreasonableness.

Where a selection is, on an objective standard, unreasonable, an aggrieved athlete will, it may be suggested, have little recourse to contract law. The application of a contractual term is a matter of the parties' intention discerned from the contract and surrounding circumstances such that, where the intention of the parties is to permit objectively unreasonable conduct on the part of selectors, there can be no complaint. In *Far Horizons Pty Ltd v McDonald's Australia Ltd* it was said: "... that whether a party is at liberty to do an act whose consequence is to disentitle the other party from a contractual benefit, must be determined from the intention of the parties as manifested by the contract itself."[85]

The parties to such contractual terms must be taken to have intended the words "subjective selection" to permit selectors to draw upon their personal view to, perhaps, select team members that the objectively reasonable person would not. Again, it is not the arbitrariness or unreasonableness of the selection that the athlete contractually questions – it is whether the arbitrary or unreasonable selection is made honestly for the perceived benefit of the team.

Although a subjective selection may, in an objective sense, be legitimately unreasonable there are, nonetheless, good faith limits imposed on the power to exercise such a discretion "unreasonably". It may be suggested that as a matter of contract, a selector must turn his or her mind to the relative capacities of the athletes vying for selection. Once this is done the selection, provided it is honest, is unassailable. The case of *Renard Constructions (ME) Pty Ltd v Minister for Public Works* [86] arguably illustrates the point that, whilst a selector may be entitled to select "unreasonably", he or she is obliged to at least consider the merits of contenders. In the context of a construction contract the plaintiff agreed to build part of a sewerage plant. The Minister for Public works was permitted, under the contract, to take over the project and terminate the contract if Renard defaulted in performance. However, prior to exercising this right, the Minister was required to allow Renard to "show cause" why the right to terminate should

[85] Far Horizons Pty Ltd v McDonald's Australia Ltd [2000] VSC 310 at [128] quoting directly: Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596 at 607-8 per Mason J.
[86] Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234.

not be so exercised. As it transpired Renard fell behind and was called upon to "show cause".

Renard offered a number of reasons why the contract should not be terminated, including the Minister's failure to supply to Renard parts required to complete certain stages of the work, the fact that Renard had increased its workforce to catch up, that longer hours were being worked and that a new and more experienced foreman had been appointed. This information was not passed to the official empowered to terminate contracts on the Minister's behalf. Upon termination Renard claimed the Minister had wrongfully repudiated the contract. Priestley JA observed:

> *"It seems to me that an objective outsider on reading (the show cause clause) would assume that the principal would have to give reasonable consideration to whether the contractor had failed to show cause and to whether any power should be exercised ..."*[87]

Priestley JA found the Minister was obliged to give bona fide, proper and due consideration to the Renard's submissions. Handley JA commented:

> *"The power is exercisable for "cause" and after the contractor has been given an opportunity to be heard. The notion of showing cause seems inconsistent with the view that the principle will be entitled to act, within the limits of honesty, on his own idiosyncratic opinion."*[88]

The Minister was required to give reasonable consideration to the merits of Renard's argument. After doing so the Minister was required to base any decision to terminate on the inadequacy of those arguments rather than on "his own idiosyncratic opinion". A selector on the other hand is permitted to apply his or her "idiosyncratic opinion" to any selection - provided that opinion is honestly held. Nevertheless, a common obligation remains –selectors must bring their minds to bear upon the matter in question and in so doing allow the other party to avail itself of the contractual right to have its "case" considered. To draw the obvious conclusion in respect of sports selections, the contract pre-supposes, intends, that the selector will *consider* the athlete for a position within the team vis-a-vis other athletes. Where this is done, the selector is then free to make any decision he or she honestly believes to be in the interests of the sport.

It may be suggested that, rather than seeking to impugn the reasonableness of a selection, complaining athletes would be better served to propose that an unreasonable selection was so perverse that the selectors had not brought their minds to bear upon the task at all. That is, the implied obligation to consider and

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[87] Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234 at 257.
[88] Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234 at 279

weigh the merits of contending athletes was completely abandoned. In *Paton v Sydney Press Club* Jordan CJ noted in respect of the decision of a domestic tribunal:

> *"…unreasonable becomes relevant only where the reason which it states for its opinion can be regarded as so obviously absurd that it may be inferred that it was not really an opinion at all."*[89]

Again, of course, access to the reasons for a particular selection may be difficult to come by. Nevertheless where these can be ascertained or where a selection bypasses all rationality the athlete may have an arguable case.

Allowing the other party to have the benefit of the contract

This third strand of contractual good faith is concerned with situations where one party obstructs the other party in accessing, in whole or in part, the benefits it is entitled to under the contract. Often the denying party must perform some act or service before the other party is able to access a contractual benefit or fails to turn its mind to a matter it is contractually obliged to consider. In *Overlook v Foxtel* Barrett J summarised this implied obligation in these terms:

> *"... no party is fixed with the duty to subordinate self-interest entirely which is the lot of the fiduciary. 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 legitimate interests of both the parties in the enjoyment of the fruits of the contract as delineated by its terms."*[90]

Finkelstein J in *Garry Rogers Motors v Subaru* put the obligation as one where the court would not permit a term to "operate so as to restrict actions designed to promote the legitimate interests of that (other) party".[91]

The High Court in *Peters (WA) Ltd v Petersville Ltd* more forcefully stated in respect of the related obligation of co-oporation:

> *"The law already implies an obligation by the respondents to do all things as are necessary on their part to enable (the appellants) to have the benefit (of the contract). ... The law also implies a negative covenant not to hinder or prevent the fulfilment of the purpose of ... express promises made in (the contract)."*[92]

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[90] *Overlook v Foxtel* [2002] NSWSC 17at [67].
[91] Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd (1999) ATPR 41-703 at [182].
[92] Peters (WA) Ltd v Petersville Ltd (2001) 205 CLR 126 at 142.

In matters of selection, the contractual right of an athlete to be selected, or indeed to be considered for selection, depends on the organisation or selectors acting in good faith and not unfairly depriving the athlete of that right. Where selectors do not take the athlete into consideration, make determinations for ulterior purposes or actively prevent the athlete from gaining a benefit he or she is otherwise entitled to, the "obligation of access" is breached. Take, for example, the contractual terms faced by rugby league player Kirk Reynoldson discussed in the introduction. Reynoldson was entitled to a further league playing contract when he played his 15th game for the Newcastle Club. His access to this benefit depended upon the actions of the Club – he could do nothing other than play to the best of his ability and rely on the selectors performing their contractual obligations in good faith. Where a club in such a position determines, for any reason other than merit,[93] it will not select the player, it denies the player a legitimate interest and is in breach of the contract.

Consider the illustrative case of *Burger King Corp v Hungry Jack's*.[94] In the 1970s Hungry Jack's (HJPL) entered a franchise agreement with Burger King Corporation (BKC), the second largest fast food business in the world behind McDonalds. By 1990 HJPL operated 148 restaurants in Australia, trading under the name of Hungry Jack's. Disputation arose between the firms in the 1990s and ultimately resulted in BKC contracting with Shell to use Shell service stations as BKC outlets. It became clear that BKC wanted HJPL out of the franchise. HJPL's right to sell BKC products was governed by a Development Agreement entered into in 1990. This agreement required HJPL to open four new restaurants a year throughout parts of Australia. The procedure to open a restaurant required under the contract that, "Hungry Jack's must apply for and obtain franchise and site approval from BKC for each restaurant to be established pursuant to this agreement through BKC's standard franchise and site approval procedures". In other words HJPL's could not open a restaurant unless BKC gave, at its sole discretion, approval – including financial status approval. In 1995 BKC ceased granting franchise and site approval and in consequence HJPL was unable to open the obligatory four restaurants a year. As a result of this failure BKC terminated the franchise agreement and, in addition, placed a freeze on HJPL establishing third party franchisees – a previously enjoyed entitlement. HJPL claimed damages in breach of contract for the loss of the opportunity to open restaurants.

The Court of Appeal considered good faith in respect of extraneous purpose and prevention of accessing a contractual benefit against a backdrop of "... seeking

[93] Except of course where other contractual rationales govern selection.
[94] Burger King Corporation v Hungry Jack's Pty Ltd [2001] NSWCA 187.

ways to reduce HJPL's role if it could not remove it from the market altogether".[95] The Court stated:

> *"... BKC's contractual powers under (the relevant clause) are to be exercised in good faith and reasonably. That does not mean that BKC is not entitled to have regards to its own legitimate interests in exercising its discretion. However, it must not do so for a purpose extraneous to the contract – for example, by withholding financial or operational approval where there is no basis to do so, so as to thwart HJPL's rights under the contract."*

The Court noted that all financial criteria necessary for financial approval had been satisfied such that:

> *"BKC's failure to grant financial approval after it has assessed HJPL as having complied with its (criteria) was a breach of the implied term of good faith."*

BKC's conduct in not granting financial approval to HJPL:

> *"... is properly characterised as directed not to furthering its legitimate rights under the Development Agreement but to preventing HJPL from performing its obligations under the development Agreement. As Rolfe J put it: 'it was in pursuance of a deliberate plan to prevent HJPL expanding, and to enable BKC to develop the Australian market unhindered by its contractual arrangements with HJPL.' We agree with this conclusion."*[96]

The Court further noted in respect of operational approval that:

> *"We are also of the opinion the BKC's conduct in disapproving, in the manner and at the time it did, was breach of the implied obligation of co-operation. It was apparent that the Expansion Policy required performance by both parties to achieve its purpose."*[97]

At its discretion BKC possessed an express contractual right to approve or not approve HJPL's new restaurants. Emerging from the judgment is the proposition that the exercise of a discretion is not unfettered and must not be used as a ploy or device to bring about an extraneous purpose. More simply, the intention of the parties was not to permit such a term, a term the purpose of which was to ensure

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[95] Burger King Corporation v Hungry Jack's Pty Ltd [2001] NSWCA 187 at [223].
[96] *Burger King Corporation v Hungry Jack's Pty Ltd* [2001] NSWCA 187 at [309]. Reference to trial judge Rolfe J.
[97] Burger King Corporation v Hungry Jack's Pty Ltd [2001] NSWCA 187 at [369].

franchise standards were maintained, to be used as a mechanism to remove a franchisee who in fact maintains the required standard.

In *Hughes Aircraft Systems International v Airservices Australia*,[98] Hughes tendered unsuccessfully to provide an air traffic control system for the Civil Aviation Authority (CAA). A Tender Evaluation Committee had recommended Hughes to the CAA Board who twice, nonetheless, rejected Hughes. Hughes sued in breach of contract claiming the tender process breached an implied term that the tender would be conducted fairly and according to the defined criteria. Finn J found for Hughes stating:

> *"I have to say I regard the case for implication as overwhelming. Fairness in process and dealing was the a prioi of this business relationship. Without the assurance of fairness, there would have been no contract. Despite the criticisms of nebulous language, it was the actual language of the parties: it was intended to convey meaning and to be relied on. It was definite and capable of precise expression. And, in my view, it was 'so obvious that [the parties] would clearly have agreed to its inclusion in the contract ... had they directed their mind to it at the time'.*
>
> *"Fairness in evaluation was ... clearly perceived by the parties to be of encompassing importance. ... It was intended to be an obligation in its own right."*[99]

Part of his Honour's decision rested upon the nature of what is expected in the tendering process. Finn J found an implied term of the tender process required fair evaluation and that the CAA acted in breach of contract with Hughes in that it failed to evaluate according to the proscribed priorities and methodologies.[100] Good faith required of the CAA that it turn its mind to the relative strengths of the contending parties.

How, then, does this relate to sporting selection? On almost all imaginable occasions the failure to act in good faith is due to the desire of the organisation (or selector) to achieve an extraneous purpose. This extraneous purpose may extend from nepotism to animosity to cost savings. Essentially the motivation is unimportant - the breach of good faith occurs whenever the organisation does not act in good faith - even if done for no reason whatsoever. Wherever the organisation seeks to achieve an extraneous purpose, *ceteris paribus*, it is in breach of contract.

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[98] Hughes Aircraft Systems International v Airservices Australia (1997) 146 ALR 1.
[99] Hughes Aircraft Systems International v Airservices Australia (1997) 146 ALR 1 at [35].
[100] Hughes Aircraft Systems International v Airservices Australia (1997) 146 ALR 1 at [118].

It is worth, at this point, reflecting upon the proposition that a contractual term promising the benefit of a contract extension, a bonus, or some other advantage upon playing a certain number of games, is a form of consideration. In return for the organisation's implied promise of good faith performance the athlete is motivated to play well and train rigorously in the anticipation that he or she will be selected and attain the necessary number of games. In this sense the organisation receives full benefit from the contractual term – a term obviously intended for purposes of player motivation. By conducting itself *male fide* the organisation denies the athlete the full benefit (or any benefit) of the contract.

Conclusion

This paper argues that an athlete's entitlement to team selection is one based on the agreed terms governing the selection process. These terms may be expressed or implied, or a combination of both. The express terms are criteria determining an objective standard that must be achieved by the athlete to be selected in the team. Generally these criteria require an athlete to run faster, throw further or to defeat an opponent. An athlete wishing to challenge his or her non-selection requires proof that the expressed criteria were not followed.

Where the selection of athletes is left to the judgment of selectors, the process may be described as "subjective". Under subjective regimes there are no express criteria and entry to the team depends on the opinion of selectors as to the relative worth of the contending athlete. Under these regimes an athlete aggrieved at non-selection must prove he or she was not selected despite being the more meritorious athlete.

It is argued that the implied terms governing the processes of subjective selection are amenable to the formulation for implication given in the cases of *BP Refinery (Westernport)* and *Codelfa Constructions v State Rail Authority*. Where an athlete is not selected on merit to successfully challenge the selection he or she must point to a breach of the implied terms where such terms are necessary to give business efficacy to the contract and are so obvious that incorporation goes without saying. It is also argued that a term of "merit selection" is implied through the processes of contract construction. Under this formulation the aggrieved athlete proposes that the word "selection" conveys, through the factual matrix of the sport in question, that selection is merit based and was again not applied.

Regimes of subjective selection involve selectors in the exercise of a discretion. It is argued that this discretion is not unfettered but must, as a matter of contract implication, be exercised with an honest appraisal of the relative worth of contending athletes rather than to secure a collateral purpose. It is further suggested that whilst selectors must be honest in their appraisal there is no contractual obligation to be objectively reasonable.

Subjective selection also requires selectors to abide by the implied obligation of good faith. In this sense selectors are to make determinations with honest regard to the purposes to be achieved through the selection and to avoid restraining athletes from accessing the benefits of the contract. It is suggested, however, that there is no good faith requirement for selectors to be objectively reasonable in making selections; in essence, provided selectors seek to benefit the team they are acting bona fide.

For athletes like Kirk Reynoldson, the rugby league player excluded from the Newcastle club one game short of securing a new contract, non-selection can be expensive and career ending. There is evident difficulty in knowing whether a selection is made bona fide or to secure an extraneous purpose; the more so where reasons for selection are not made public. Nonetheless, where evidence can be adduced to show an objective selection was made without recourse to the written criteria or where, under a subjective regime of selection, the implied terms are abandoned or the athlete is denied full contractual entitlement under the contractual obligation of good faith, that athlete may seek to redress their exclusion as a matter of breach of contract.