Implied Terms: Central Exchange Ltd v Anaconda Nickel Ltd

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THE Western Australian case decided last year of *Central Exchange Ltd v Anaconda Nickel Ltd*[1] examined the controversial issue of when a term of good faith will be implied into a contract.

The case was heard by Malcolm CJ, Wallwork and Steytler JJ of the Western Australian Supreme Court, on appeal from the decision of Parker J. At first instance, Parker J dismissed the plaintiff's claim for declaratory relief. His Honour also refused the plaintiff's claim for pre-action discovery.

The Full Court upheld the judgment of Parker J and dismissed the appeal. While some consideration is given in the judgments of Parker J and Steytler J to the question whether there is a duty of good faith in all commercial contracts, and what the content of that duty might be, like the High Court in *Royal Botanic Gardens and Domain Trust v South Sydney City Council*,[2] their Honours do not finally decide the question. There is some indication, however, that their Honours are not ultimately persuaded that the authorities in Australia support the implication in law of a general duty of good faith, nor that it is a necessary development in contract jurisprudence.

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1. (2002) 26 WAR 33.
2. [2002] 186 ALR 289.

In the writers' view, the facts of the case lend weight to the argument advanced by some judges and commentators that a general duty of good faith implied in law is unwarranted.

THE FACTS

Central Exchange Ltd ('CE') commenced proceedings against Anaconda Nickel Ltd ('AN') relating to the Murrin Murrin Nickel Project. These proceedings were settled upon terms contained in a deed of settlement. The terms of this deed obliged AN to pay CE $US16 250 000, subject to escalation from 30 September 1996, according to movements in the United States consumer price index.

This amount was only payable if 'at any Review Date the Average LME Nickel Settlement Price (as determined in the manner set out in Clause 4.2 for the 12 month period ending on the Review Date) exceeds the Trigger Price'.[3] The Review Date was the earlier of several dates dependent upon certain events occurring.

Clause 4.4 of the deed of settlement provided that, if there was a dispute as to whether any of the events referred to in the definition of 'Review Date' had occurred, either party could refer the dispute to an independent expert for determination. If such referral took place, clauses 4.2(c) and 4.4 required AN to give the expert reasonable access to its records, provided the expert first gave a written undertaking as to confidentiality.[4]

CE sought a declaration from the court that a term should be implied into the settlement deed that AN would deal with CE in good faith, or, in the alternative, a term that AN should comply with CE's reasonable requests so as to enable CE to have the benefit of the settlement deed; and a further declaration that, in consequence of these implied terms, AN was required to supply CE with an extensive range of information and documents to allow CE to determine for itself whether any of the events referred to in the definition of 'Review Date' had occurred.

In the alternative, CE sought an order for pre-action discovery from AN, pursuant to Order 26A rule 4 of the Rules of the Supreme Court 1971 (WA) in relation to these same documents. CE claimed that it required these documents to decide whether to commence proceedings against AN for payment of the $US16 250 000. It claimed not to have enough information to determine whether the Review Date had yet passed.[5]

In effect, CE contended that, as a consequence of the implied duty of good faith, AN was under specific obligations: in the ongoing working out of the contract,

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3. See *Central Exchange v Anaconda* above n 1, 40.
4. Ibid, 40-41.
5. Ibid, 43.

AN was obliged to keep CE informed of events and developments which gave rise to the contractual entitlement in CE. AN was also obliged to provide CE with full access to AN's records and information, as and when required by CE. This was to enable CE to fully assess for itself whether any possible entitlement had in fact arisen or might potentially do so.

THE ISSUES

The central issues in the case were, first, whether a term should be implied by law into the contract, either on the basis of good faith or on the basis of a duty to do all such things as are necessary to enable the plaintiff to have the benefit of the contract, and, if so, what the content of such a term should be.

In Australia in recent years, the courts have shown a greater willingness to imply a general term of good faith into commercial contracts.[6] Nevertheless, the issue has been described as 'the most important unresolved issue in Australian contract law today'.[7] Although it was raised recently in the High Court in *Royal Botanic Gardens*,[8] the court ultimately held that whether such a term should be implied (and, if so, the content of such term) did not need to be decided in order to determine the matter before it. Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ acknowledged the importance of the implication of terms of good faith and fair dealing, but claimed this was not an appropriate occasion to consider the issue.[9] Callinan J also considered it unnecessary to answer the question.[10] Kirby J noted the conflict with fundamental notions of caveat emptor inherent in common law concepts of economic freedom.[11]

Although a general duty to co-operate, as opposed to a general duty of good faith, appears to be more accepted by the courts, the scope of the duty is still unclear. It is, however, generally accepted that:

> Where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectively 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

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6. See eg *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151; *Far Horizons Pty Ltd v McDonald's Australia Ltd* [2000] VSC 310. This has been particularly true of the NSW Supreme Court: see eg *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349; *Burger King Corp v Hungry Jack's Pty Ltd* [2001] NSWCA 187.
7. JW Carter & A Stewart 'Interpretation, Good Faith and the "True Meaning" of Contracts: The *Royal Botanic* Decision' (2002) 18 JCL 182, 190.
8. Above n 2.
9. Ibid, Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ 301.
10. Ibid, Callinan J 327.
11. Ibid, Kirby J 312.

> done on his part for the carrying out of that thing, though there may be no express words to that effect.[12]

Professors Greig and Davis have stated that 'the implication of terms is very much a matter of judicial policy and indeed fashion'.[13] They cite, as a 'striking example' of this proposition in recent times, the issue of whether, or the extent to which, in the commercial sphere, the courts are prepared to employ equitable concepts to interfere with the enforcement of strict legal rights. As they have pointed out, however, the difficulty with implication of terms such as a duty of good faith is defining their scope. Mason J in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd*[14] suggested the implication of a duty of good faith is part of a broader principle expressed by Griffith CJ in *Butt v McDonald*[15] that 'each party agrees, by implication, to do all such things as are necessary on his or her part to enable the other party to have the benefit of the contract'.[16] However, Mason J went on to state that ultimately –

> the correct interpretation of the contract depends ... 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.[17]

THE JUDGMENT AT FIRST INSTANCE

The matter was initially heard by Parker J in chambers.[18] With regard to CE's proposition that there is a duty of good faith in all commercial contracts, his Honour was of the view that while a duty of good faith in the performance of obligations and in exercising rights may, by implication, be imposed upon the parties as an incident of the contract, he would not see it to be universally implied in all contracts, regardless of the nature and terms of the particular contract and the circumstances of the parties by which the contract was concluded.[19] As the matter was an interlocutory application, however, and 'hardly suited to the full analysis of a possible major development in the law of contact'[20] in Australia, his Honour turned to what consequence the implication of such a term would have in this case. He concluded

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12. *Mackay v Dick* (1881) 6 App Cas 251, Lord Blackburn 263; cited in *Milne v Sydney Municipal Council* (1912) 14 CLR 54, Barton J 69; *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, Mason J 607.
13. DW Greig & JLR Davis *The Law of Contract* (Sydney: Law Book Co, 1987) 530.
14. *Secured Income* above n 12.
15. (1896) 7 QLJ 68.
16. Ibid, 70-71.
17. *Secured Income* above n 12, 607-608.
18. *Central Exchange v Anaconda Nickel* [2001] WASC 128 (25 May 2001).
19. Ibid, para 22.
20. Ibid, para 23.

that even if a duty of good faith were owed, it would not be an incident of such duty, in circumstances such as the present, particularly in view of clause 4.4, that AN provide documents and information so that CE might constantly monitor, according to its own interpretation and views, the progress of AN's activities and the possibility of the occurrence of any event of the type being considered.[21]

With respect to CE's argument that there was an implied term in the settlement deed that AN would do all such things as are necessary on its part to enable CE to have the benefit of the contract, Parker J concluded that the express agreement of the parties to the dispute resolution procedure, 'a procedure which protects the confidentiality of the defendant's [AN] documents and information',[22] told against the implication of an obligation on AN to make available to CE the documents and information sought. His Honour referred to the following statement of Mason J in *Secured Income*, with whom Barwick CJ, Gibbs, Stephens and Aickin JJ concurred:

> 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.[23]

While it may have been, at most, necessary to entitle the contracting party to a benefit under the contract, it was not essential to the performance of that party's obligations and was not fundamental to the contract. The application for discovery was refused as Parker J was not persuaded that such an order would be in the interests of justice.

THE FULL COURT'S DECISION

The central judgment on appeal was given by Steytler J. His Honour observed that the courts have been inclined to the view that, if terms of good faith and reasonableness are to be implied, they are to be implied in law.[24] Steytler J noted that

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21. Ibid, para 39.
22. Ibid, para 43.
23. Ibid, para 41. See *Secured Income* above n 12, 607-608.
24. *Central Exchange v Anaconda* above n 1, 50.

this was due to the difficulties associated with complying with the test laid down in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council*[25] for implication in fact.[26] Such difficulties were also present where implication was argued on the basis of the contract being informal or incomplete, as in *Byrne & Frew v Australian Airlines Ltd*.[27]

Nevertheless, the implication of such a term in law is not unrestricted: his Honour observed that, as Gummow and McHugh JJ had stated in *Byrne & Frew*, many terms now implied in law reflect the courts' concern that, in the absence of those terms, the enjoyment of the contract would or could be rendered 'nugatory, worthless or ... seriously undermined'.[28] Hence, the reference in the decisions to basing implication of terms in 'necessity'.[29] His Honour noted that a similar result has been arrived at by Dr Peden,[30] who argues that the implication of good faith blurs the purposes of implication in law and the rules of construction. Dr Peden thus suggests that if the courts want the notion of good faith to apply in all situations, the better approach would be to construe all contracts on the basis that there is an expectation of good faith in all terms, unless something explicitly says otherwise.[31]

After noting that the recent decision in *Royal Botanic Gardens*[32] left the question of implication of such terms open, his Honour stated that he was prepared to assume that good faith should be implied into the settlement deed without deciding the question.[33] This being the case, the next step was to determine the content of the obligation.

After acknowledging the range of meanings given to 'good faith' in the United States, his Honour turned to the Australian authorities, in particular, noting the overlap identified by Priestly J in *Renard Constructions (ME) Pty Ltd v Minister for Public Works*[34] between unreasonableness, lack of good faith and unconscionability.[35] His Honour concluded that the content of 'good faith' in Australia remained to be worked out.[36] He noted that it is questionable how much an implied term of good faith would add to the well established doctrines referred to by Gummow J in *Service Station Association Ltd v Berg Bennett & Associates Pty*

25. (1977) 180 CLR 266.
26. *Central Exchange v Anaconda* above n 1, 50.
27. (1995) 185 CLR 410; cited in ibid, 50.
28. *Central Exchange v Anaconda* above n 1, para 52.
29. Ibid.
30. E Peden 'Incorporating Terms of Good Faith in Contract Law in Australia' (2001) 23 Syd LR 222, 223.
31. *Central Exchange v Anaconda* above n 1, 50.
32. Above n 2.
33. *Central Exchange v Anaconda* above n 1, 50.
34. Above n 6, 265.
35. *Central Exchange v Anaconda* above n 1, 51.
36. Ibid, 52.

Ltd,[37] particularly when taken with the implied term that each party will do what is necessary on its part to enable the other to have the benefit of the contract.[38]

Steytler J expressed the view that, unlike Gummow J, he considered it a virtue of the implied duty that it expresses, in a generalisation of universal application, the standard of conduct to which all contracting parties are expected to adhere throughout the life of their contract. Nevertheless, his Honour stated that the principles of good faith do not block the use of express terms.[39] In this case, the parties had comprehensively agreed upon their respective rights and obligations; three of the four events mentioned in the deed of settlement were likely to occur with the knowledge of CE. In any case, the circumstance was covered by the contract, and the contract provided a comprehensive dispute mechanism.[40]

In these circumstances, Steytler J concluded that it would be very difficult to contend that CE's contractual benefit under the settlement deed would be withheld, or performance under the deed would be prevented, or CE's contractual entitlements would be rendered illusory, unless CE were to be provided with the documents and information necessary to enable it to determine for itself whether an entitlement to the 'Agreed Amount' had arisen or whether an event had occurred which might in time prove to be relevant to an entitlement to the Agreed Amount.[41]

It may have been true that CE's negotiating position was made more difficult by an absence of information, but this could not lead to the consequence that a term must be implied when regard was had to the express terms. His Honour agreed with Parker J that:

> A requirement of the kind contended for would, in the context of this agreement, impose an unwarranted and unreasonable obligation on the respondent and would not demonstrate a want of appropriate co-operation in achieving the contractual objects or a failure to comply with honest standards of conduct or with standards of conduct which are reasonable having regard to the interests of both parties.[42]

His Honour then turned to the second ground of the appeal, that is, that a term should be implied that the respondent do all things necessary to enable the appellant to have the benefit of the contract. This contention was supported by authority, although his Honour was not persuaded that in this case the material sought by CE was necessary to performance by the parties or either of them of fundamental

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37. (1993) 45 FCR 84. Anglo-Australian law on implication of terms has developed differently from that of the US, with a greater emphasis upon specifics, rather than identification of a genus expressed in wide terms.
38. *Central Exchange v Anaconda* above n 1, 52.
39. Ibid.
40. Ibid, 53.
41. Ibid, 54.
42. Ibid.

obligations under the deed of settlement.[43] In this case, the contract, by its express terms, outlined the means by which this could be achieved.

Both Wallwork J[44] and Malcolm CJ[45] agreed with Steytler J. Malcolm CJ emphasised the importance of determining the intentions of the contracting parties. After stating that Parker J was right to assume that there was to be implied into the deed of settlement an obligation of good faith[46] (presumably for the purpose of examining its potential application), the Chief Justice went on to suggest it was a question of construction in each case if the term was to be implied. In this case, even if a term of good faith was implied, this did not mean that AN should supply CE with the requested information.[47] It was not necessary for the performance of a fundamental obligation under the contract – at most it entitled CE to a benefit. Nor did the obligation to do all things necessary give rise to a necessity for AN to supply the documents, for similar reasons.[48]

As to the issue of discovery, Steytler J was of the view, that while the Western Australian rule was less restrictive than its equivalent rules in other jurisdictions this did not mean that discovery would be ordered no matter how speculative or remote a potential cause of action.[49] In the exercise of its discretion the court could take into account a range of factors.[50] In this case, an order of the kind requested would require AN to produce a large quantity of documents; and, once again, the deed of settlement itself provided a remedy should discovery be refused.[51]

THE IMPLICATIONS OF THE DECISION

The Full Court's decision reveals some ambiguity in relation to its acceptance in principle of a general duty of good faith. Although the court was prepared to assume that such a duty existed, its decision reflects the difficulty in determining the scope of the term. Ultimately, the decision does not contribute greatly to our understanding of what may be meant by 'good faith', nor does it clarify the relationship of 'good faith' to such notions as 'unconscionability'.

The case does confirm, however, the supremacy of the express contractual terms. Where a contract is comprehensive as to those rights and obligations and, in particular, where it provides a mechanism for resolving disputes that may arise out

43. Ibid, 55.
44. Ibid, 39.
45. Ibid, 36.
46. Ibid, 37.
47. Ibid, 39.
48. Ibid.
49. Ibid, 56.
50. Ibid, 57.
51. Ibid.

of the contract, there will be no need to imply a term of good faith or a term that one or both parties will do everything necessary to ensure the other has the benefit of the contract. The decision of Steytler J, in particular, confirms that necessity should be the governing factor in implication of terms.[52]

In the writers' view, Steytler J's more restrictive approach to the issue of an implied duty of good faith or co-operation is to be welcomed. It is difficult to understand how a general over-arching duty of good faith can be applied to all contracts, or to all commercial contracts. The better approach, we would argue, is that an implied duty of good faith or an implied duty of co-operation may attach to particular contractual obligations where this is necessary to achieve the aims of the contract or to ensure that one or both parties can have the benefit of the contract.

52. Such an approach falls squarely within what P Heffey, J Paterson & A Robertson *Principles of Contract Law* (Sydney: Law Book Co, 2002) 269-270, term the 'contractual' approach to good faith, that is, that the measure of good faith is to be found in the expectations of the parties themselves, rather than what they term the 'communitarian' approach, that is, that the measure of good faith is to be found in community standards external to the parties.