

September 2003

GOOD FAITH IN CONTRACTS

Once upon a time, parties to commercial contracts could safely assume that they were obliged, and entitled to act according to the terms of their contract. There was no obligation to act “reasonably” or “fairly”. This traditional approach has been eroded in recent years.

New South Wales judges have increasingly favoured an implied duty of good faith in commercial contracts. That is, the express terms of the contract are exercisable subject to them being carried out in good faith, or reasonably by the party concerned. In the recent Burger King case some judges were willing to take this principle another step. The motives of the parties were considered. This is a far cry from the traditional and simple question of whether or not the party has acted according to the terms of the contract.

The issue has arisen in a case involving a standard form construction contract and also in contracts involving a motor car dealership, cable TV and mobile phones. In all these cases the courts have been willing to imply a duty of good faith even when this is contrary to the terms of a standard form, or the clear language of the contract.

A number of New South Wales judges have cited a growing community expectation of fairness in contracts, one judge commenting that good faith is the expected standard and that “anything less is contrary to prevailing community expectations”.

Against this, a former judge of the New South Wales Supreme Court, now a High Court judge, commented some years ago that he doubted that the law insisted upon or should enforce a regime of fairness in transactions governed by contracts. Another judge, also now sitting in the High Court, has remarked that it was not clear that the standard of good faith did in fact reflect community standards.

Clearly, not all judges see things the same way. It seems likely, however, that fairness and good conscience, as new principles of contract law, may come at the expense of certainty and reliability in commercial contracts.

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