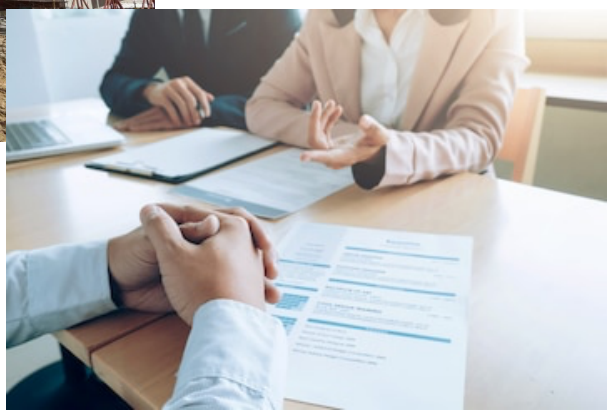
Beware of “hidden duties”: the Implied Duty to Cooperate



In this Newsletter, we discuss the duty to co-operate which has been widely adopted in Australian case law. This long-established principle emphasises that a failure to cooperate amounts to a breach of the contract, wherein appropriate contractual remedies may apply. We will discuss the general principles and recent applications of when this duty operates.

CRISPIN LAW

Introduction

The duty to cooperate has famously been defined as a "general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract." [1]The implied duty to cooperate emphasises the importance of both following contractual terms but also imports the obligation to take "all necessary" or reasonable steps to fulfil the contract, forming part of the fundamental obligation.

Early days: the emergence of the implied duty to cooperate

The implied duty to cooperate stemmed from the 1881 case of *Mackay v Dick.* This case involved an engineering company (Dick Stevenson) contracting Mackay for the construction of a railway branch. In the Contract, there had been a term that required Mackay to test the machine. MacKay had failed to test the machine; a flaw was discovered, and the issue arose as to whether the contract was complete.

Blackburn emphasised that in written contracts where both parties agree to do something which cannot effectively be achieved unless both parties concur to doing it, the construction of the contract is that each party agrees to do all that is necessary on their part for the carrying out of that thing.

Multiple cases have followed, confirming Lord Blackburn's findings. In the Australian jurisdiction, the case of *Perini Corp v Commonwealth (1969)* was of fundamental importance. Involving a building contract between Perini Corporation and the Commonwealth for the construction of the Redfern Mail Exchange, Perini asserted that the Director of Works was not acting in a cooperative manner by denying their repeated applications for an extension of time. The Director of Works cited departmental policies as his reasons for doing so. The Court here, drew on the principles of *Mackay v Dick,* finding that as a certifier, there were implied duties such as the obligation to act fairly, justly and with a required level of skill. What was paramount, was the consideration of the parties' rights and the Contract itself. This was aptly summarised by MacFarlan J and upholding the power of the implied duty to cooperate: "The parties bound by this agreement, are bound to do all co-operative acts necessary to bring about the contractual result."

However, issues also emerge if the implied duty to co-operate becomes too burdensome.

Limiting the Scope

Contract as King

As case law develop and new facts emerge, so did the application of the implied duty to cooperate. Courts were increasingly faced with scenarios where parties alleged that the other did not co-operate adequately. In response, the Court began to limit the scope of the duty to co-operate, to not burden a party with excessive obligations. One such case was *NSW v Banabelle Electrical Pty Ltd (2002),* where the Court found that implied terms arose when they were related to an obligation or benefit that was so fundamental that a party would not have entered the contract but for some assurance of strict or substantial performance. In considering whether the parties had to agree on an expert and whether they were bound by a duty to co-operate in doing so, the Court emphasised the importance of analysing the contract itself. Given that the Contract had offered an alternative, "the expert need be a person agreed between the parties... or if they fail to agree... [then a person] be prescribed in the Annexure," the Court found that there was no duty to co-operate.

In this decision Einstein J also points to other factors to support his conclusion that the duty to co-operate should not be implied. These factors were business efficacy, reasonableness, and the clarity of the contractual provision. He found that because the term as it was, was workable, effective, and made commercial sense, as it was, it would be unreasonable to imply a term. Einstein J also emphasised the need for implied terms to be consistent with express contractual provisions. In this case, because the express contractual provisions already mentioned an alternative where parties need not agree, there was no need to include the implied term to co-operate when the provision had adequately covered the alternative. Thus, the case of *Banabelle* ensured that the scope of the implied duty to co-operate was "regulated by the requirement that the specified co-operation be reasonable."

Reasonableness

The case of *Banabelle* also emphasised the importance of "reasonableness" to limit the bounds of this duty. Per Einstein J, a duty is only implied where cooperative acts are reasonable. He emphasised that the duty to co-operate likely does not demand one party to "assume a risk extraneous to the risk inherently contained in the transaction," or "to assume burdens excessive about the benefits it could reasonably contemplate under the contract." The 2015 case of *Famestock Pty Ltd v The Body Corporate for No 9 Port Douglas Road Community Title Scheme 24368* echoes this. In this case, there was a leasing agreement between the appellant and defendant. The appellant's real estate license had lapsed, and they needed the defendant's written support to obtain a renewal. However, the respondent refused to assist and terminated the leasing agreement. Subsequently, the appellant submitted that there was a duty to co-operate to bring about the mutual benefits of the contract.

However, given that it was the fault of the appellant in not renewing their license (as was agreed in their contract), the Court found that it was unreasonable to expect that the defendant take on a "positive obligation" to assist the appellant in obtaining a license as they were not responsible for the appellant's breach of the Contract. Thus, what this case emphasised, was that parties to a contract need only co-operate when the act reasonably relates to the enabling of contractual obligations.

Developments to the Duty: Recent cases

As case law develops relating to the implied duty to cooperate develops, new considerations are added to again, narrow the scope of this duty. The 2019 case of *New Standard Energy & Anor v Outback Energy Hunter Pty Ltd* suggests the additional hurdle that the duty to co-operate must relate to a "direct and clear benefit."

The case involved a joint venture relating to petroleum exploration between NSE and Outback. These were subsidiary companies owned by Sundance and Santos Queensland respectively. Sundance had wanted to sell NSE to the Quintanilla Group, however this potentially clashed with a clause in the Contract between NSE and Outback that stated that there was to be no "change in control of that party" without the prior consent of the other party and that the consent required under this clause would not be unreasonably held (if the party changing control still had the financial and technical capabilities to perform the Contract's obligations."

Santos did not agree with the change in ownership. In response to this, Sundance alleged that Santos had breached the clause which stated that consent was not to be "unreasonably withheld," and that there was an implied term of cooperation that applied to the giving of consent in the Contract.

The Court of Appeal found that as "experienced commercial operatives," both parties should have considered that circumstances could change during the venture, which might lead to one party changing control or reassigning their interest. Thus, the Court found that the primary purpose of the clause that required consent, was to allow the other party to examine whether the new controlling party had adequate means to carry out the obligations of the joint venture. In the commercial context, it allowed for the other party to investigate and remove any form of disadvantage stemming from the alteration of the "original contractually agreed position." Further, the Court found that the clause should be construed as non-promissory because it would "leave the proponent party at the mercy of the consenting party, for no good commercial or other reason."

Further, in consideration of this case, the Courts also turned to the established test for determining whether a term should be implied by Mason J in *Codelfa Construction Pty Ltd v State Authority.* The test states the conditions necessary for a term to be implied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that it "goes without saying" (4) It must be capable of clear expression; (5) it must not contradict any express term of the contract.

The Court found that that the implied term prescribing the duty to cooperate in giving consent was not so obvious that it went without saying. Further, it did not give business efficacy to the contract and the contract, even without this term, remained operative. Therefore, there was no implied duty of cooperation.

Takeaways

When questioning whether you should co-operate with the other party, consider the following:

- Is my co-operation necessary to give the contract business efficacy? Are my acts of co-operation reasonable?
- Consider the five-pronged test by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority*
- Is my co-operation linked directly to an obvious benefit for the other party?
- Is what the other party is asking for (with my co-operation), inconsistent with express contractual provisions?