

LEGALUPDATE

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CASE UPDATE**SCA EXAMINES RELATIONSHIP BETWEEN "ENTIRE AGREEMENT" CLAUSES AND IMPLIED TERMS; NO IMPLIED DUTY OF GOOD FAITH IN SINGAPORE*****Ng Giap Hon v Westcomb Securities Pte Ltd & Ors* [2009] SGCA 19****Executive Summary**

The Singapore Court of Appeal has provided valuable guidance on the relationship between "entire agreement" clauses and implied terms in contracts. An "entire agreement" clause would arguably not, as a matter of principle, exclude the implication of terms into a contract. In order for an "entire agreement" clause to exclude implied terms, such effect must be spelled out clearly and unambiguously in the clause itself.

The Court of Appeal also held that a general duty of good faith could not be implied in law into contracts.

Background

A remisier and a stockbroking company (the "**Company**") were parties to an agency agreement (the "**Agency Agreement**") by which the Company authorised the remisier to trade and deal in securities and agreed to pay the remisier commission on transactions dealt through him.

The remisier sued the Company in the High Court for commission due in respect of placement shares in various initial public offerings allocated to two clients of the Company. The remisier alleged that those clients were in fact his clients. They would have opened their accounts with the Company through him but for the "*interception*" by a director of the Company of the account opening forms sent by the remisier to the clients.

The remisier argued, among other things, that the Company had breached a "*duty of good faith*" which was implied into the Agency Agreement. He also argued that the "entire agreement" clause in the Agency Agreement did not preclude the implication of terms into that agreement. The "entire agreement" clause in the Agency Agreement read as follows:

"This Agreement embodies the entire understanding of the parties and there are no provisions, terms, conditions or obligations, oral or written, expressed or implied, other than those contained herein. All obligations of the parties to each other under previous agreements ([if] any) are hereby released, but without prejudice to any rights which have already accrued to either party." (emphasis added)

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The High Court declined to imply a term of good faith into the Agency Agreement. It took the view that the Agency Agreement “*embodied the entire agreement between the parties*”, in light of the “entire agreement” clause.

The remiser appealed against the High Court’s decision.

Issues before the Court of Appeal

The issues before the Court of Appeal included the following:

- whether the “entire agreement” clause in the Agency Agreement precluded the implication of terms (such as the implied duty of good faith) into the Agency Agreement; and
- if not, whether a duty of good faith could be implied in law into the Agency Agreement.

The Court of Appeal’s Decision

1st Issue: Did the “entire agreement” clause preclude the implication of terms into the contract?

The Court of Appeal observed that the effect of an “entire agreement” clause on the implication of terms into the contract depends on the precise language of the “entire agreement” clause in question as well as the nature of the implied terms relied upon.

On the facts of the case, the “entire agreement” clause in the Agency Agreement *itself* contemplated the existence of implied terms in the contract.

However, even if the “entire agreement” clause does not deal with the issue of implied terms, it is arguable that such a clause would not, as a matter of general principle, exclude the implication of terms into the contract, for the following reasons:

- (a) first, an implied term, by its very nature, would not have been in the parties’ contemplation when they entered into the contract;
- (b) secondly, if a term is implied on a “broader” basis “in law” (as opposed to on a “narrower” basis “in fact”), such a term would not have been in the parties’ contemplation given that a term implied “in law” (unlike a term which is implied “in fact”) is not premised on the presumed intention of the contracting parties;
- (c) thirdly, a term cannot be implied if it is inconsistent with an express term of the contract; and

- (d) finally, where it is necessary to imply a term to make the express terms work, the implied term may not be excluded by an “entire agreement” clause because it could be said that the implied term is to be found in the document(s) forming part of the contract.

That said, it is still possible for an “entire agreement” clause to exclude implied terms. However, to do so, the “entire agreement” clause would have to express such effect in clear and unambiguous language. Further, if the effect of the language used renders the “entire agreement” clause, in substance, an exception clause, the “entire agreement” clause would be subject to both the relevant common law constraints on exclusion clauses as well as the Unfair Contract Terms Act.

2nd Issue: Could a duty of good faith be implied in law into the contract?

The Court of Appeal declined to imply a duty of good faith into the Agency Agreement.

The court did not endorse an implied duty of good faith in Singapore principally because the theoretical foundations and structure of the doctrine of good faith are not yet settled. There are differing views as to what it means and how it is to be applied. The doctrine of good faith continues to be a fledgling one in the Commonwealth and until it matures, it would be *“inadvisable (to say the least) to even attempt to apply it in the practical sphere”*.

Comment

This decision preserves and underscores the important role that implied terms play in contract law. However, the Court of Appeal has kept such terms within the confines of established common law tests. The rejection of a general duty of good faith is consistent with this approach. To do otherwise would greatly increase the scope for “unwritten terms” to re-define what parties to a written contract have agreed upon. The Court of Appeal’s stance leaves contracting parties free to delineate their contractual rights and obligations and, if they so wish, circumscribe them by the use of explicit and unequivocal language.

If you would like more information about this case or wish to discuss how it may potentially affect you or your business, please feel free to contact the dispute resolution lawyers in Drew & Napier LLC (please refer to the Directors’ Profiles on our [website](#)), or:

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