

**OVERLOOK V FOXTEL [2002] NSWSC 17**

Supreme Court of New South Wales – 31 January 2002

**FACTS**

Overlook Management BV (“Overlook”) entered into a contract with Foxtel Management Pty Limited (“Foxtel”) whereby Foxtel would purchase non-English television program content from Overlook for its pay television system. Foxtel agreed initially that the price to be charged for Overlook’s channels would be \$19.95 per month. This price was subsequently reduced to \$9.95 which severely impacted on Overlook’s financial return from the contract, unless and until offset by a significant increase in subscriber numbers.

**ISSUES**

Overlook claimed that Foxtel had breached an implied term that Foxtel would act in good faith that the price would not be varied except by agreement to preserve Overlook’s revenue base. Whether Foxtel had acted in good faith.

**FINDINGS**

The Court proceeded on the basis that an obligation of good faith is implied into all commercial contracts and found that Foxtel did not breach its obligation of good faith. Its action was not capricious because it acted on the basis to seek to enhance penetration of the product. Foxtel’s action did not cause Overlook’s rights to become “nugatory, worthless or undermined”.

**QUOTE**

Barrett J stated at paragraph 62:

*“An additional term implied by law into commercial contracts is a term requiring the exercise of good faith in the performance of the contract. This is now in this State a legal incident of every such contract...”*

*“[67] ... the implied obligation of good faith underwrites the spirit of the contract and supports the integrity of its character. A party is precluded from cynical resort to the black letter. But no party is fixed with the duty to subordinate self-interest entirely... 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.*

*[68] In many ways, the implied obligation of good faith is best regarded as an obligation to eschew bad faith. This is borne out by the following succinct statement by Lord Scott of Foscote in Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd [2001] 2 WLR 170, a case concerning the duty of good faith in the insurance context: “Unless the assured has acted in bad faith, he cannot, in my opinion, be in breach of a duty of good faith, utmost or otherwise.”*

*[73] A prohibitory or negative spirit precluding capriciousness will readily be accepted as attending the parties' contracts. The exclusion of capriciousness as an acceptable form of behaviour in the performance of the contract will prohibit conduct which has no rational basis or objective explanation.*

*[74] A point to be noted is that, in Burger King and in most, if not all, of the earlier Australian cases in which an obligation of good faith or reasonable conduct in contract performance has been found to be implied by law, the question in issue has involved exercise of a right or power arising from the terms of the contract.*

*[75] In the present case, ... Foxtel was not exercising a contractual power or performing a contractual obligation when it reduced the subscriber price of the RAI and Antenna channels. There is nevertheless scope for the operation of an implied obligation of good faith. In Burger King, ... the defendant deliberately pursued a course to "thwart" the plaintiff's rights under the contract in that the actions it took were not justified by any of the factual matters upon which it sought to justify them."*

## **IMPACT**

This case stands for the proposition that the duty of good faith is best regarded as an obligation not to act in bad faith.

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