HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, GAGELER AND KEANE JJ

COMMONWEALTH BANK OF AUSTRALIA APPELLANT

AND

STEPHEN JOHN BARKER RESPONDENT

Commonwealth Bank of Australia v Barker
[2014] HCA 32
10 September 2014
A1/2014

ORDER

1. *Appeal allowed.*

2. *Set aside paragraphs 1 (save as to costs) and 2 of the order of the Full Court of the Federal Court of Australia made on 6 August 2013 and, in their place, order that:*

   (a) the appeal be allowed; and

   (b) paragraphs 1 and 2 of the order of the Federal Court of Australia made on 3 September 2012 be set aside and, in lieu thereof, order that:

      (i) judgment be entered for the applicant against the respondent in the sum of $11,692.31; and

      (ii) the respondent pay the applicant interest in an amount to be determined by a judge of the Federal Court of Australia if not otherwise agreed.

3. *Appellant to pay the respondent's costs of the appeal and of the application for special leave to appeal.*

On appeal from the Federal Court of Australia

Representation

B W Walker SC with C D Bleby SC for the appellant (instructed by Minter Ellison Lawyers)

R C Kenzie QC with P A Heywood-Smith QC, S J Mitchell and M A Irving for the respondent (instructed by Pace Lawyers)

CATCHWORDS

Commonwealth Bank of Australia v Barker

Contract – Employment contract – Implied terms – Employee's position made redundant – Employer's conduct denied employee opportunity of redeployment – Whether term of mutual trust and confidence should be implied by law in employment contracts.

Words and phrases – "duty of cooperation", "employment contract", "employment relationship", "necessity", "relational contract", "term of mutual trust and confidence", "terms implied by law", "terms implied in fact".

FRENCH CJ, BELL AND KEANE JJ.

Introduction

1 The employment relationship, in Australia, operates within a legal framework defined by statute and by common law principles, informing the construction and content of the contract of employment. This appeal raises the question whether, under the common law of Australia, there is a term of mutual trust and confidence to be implied by law in all employment contracts. For the reasons that follow, that implication is a step beyond the legitimate law-making function of the courts. It should not be taken. This appeal, against a decision of the Full Court of the Federal Court of Australia[1], which made the implication, should be allowed.

Factual history

2 The respondent, Mr Stephen Barker, commenced employment with the appellant, the Commonwealth Bank of Australia ("the Bank"), in November 1981. He continued with the Bank until his employment was terminated by reason of redundancy on 9 April 2009. At the time of his dismissal, Mr Barker occupied the position of Executive Manager Adelaide Corporate Banking, Institutional and Business Services, South Australia. His employment at the time was governed by a written agreement ("the Agreement"), which came into effect on and from 1 July 2004[2].

3 Clause 6 of the Agreement provided for termination at any time by written agreement between the parties or, except in circumstances of misconduct, by four weeks' written notice by either party (or by the Bank paying four weeks' salary in lieu of notice). Clause 8 provided for compensation payable on termination in the event that the employee's position became redundant and the employee could not be redeployed:

> "This Clause applies only where the Employee was already employed by the Bank immediately preceding the date of this Agreement. In the case where the position occupied by the Employee becomes redundant and the Bank is unable to place the Employee in an alternative position with the

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1 *Commonwealth Bank of Australia v Barker* (2013) 214 FCR 450.

2 This appeal turned upon the Agreement. No question of the content of any anterior contract was raised — cf *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312; 176 ALR 693; [2000] HCA 64; *Federal Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520; [2000] HCA 35.

> Bank or one of its related bodies, in keeping with the Employee's skills and experience, the compensation payment for the Employee will be calculated on the basis of the greater of —
>
> > the amount of $107815.67 (in addition to payments made under Clause 15); or
> >
> > an amount equivalent to 0.25 times *Base Remuneration* as set out in the Annexure.
>
> Clause 7 does not apply in any case where a payment is made under this Clause."[3]

This appeal is concerned with the Agreement. There is a distinction, relevant in cases of wrongful dismissal, between the employment relationship and the contract of employment, such that the contract may persist when the relationship is at an end[4]. That distinction is not relevant in the present case, which is concerned with the contractual question of the existence of an implied term in law.

4 In February 2009, the Bank decided to make Mr Barker's position redundant as part of a nationwide restructuring of the Corporate Financial Services ("CFS") teams within the Bank. On 2 March 2009, Mr Joe Formichella, the General Manager of CFS South Australia/Northern Territory, and Mr Glen Davis, the Bank's Executive Manager — Strategic Human Resources, so informed Mr Barker. They told him that the decision was not related to his performance, but that if he was not redeployed within the Bank, which was the Bank's preference, his employment would be terminated approximately four weeks thereafter. He was required to work out the day, clear out his desk, hand in the keys and the mobile phone which the Bank had issued to him and not return to work. His access to his Bank email account, voicemail and the intranet was terminated.

5 Mr Davis sent an email to Mr Barker's Bank email address on 20 March 2009 urging him to take steps, in conjunction with Ms Helen Breccia in the Career Support team, to seek out redeployment opportunities. In the event that a

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3 Clause 15 provided for payment upon termination in lieu of accrued annual and long service leave. Clause 7 provided for additional compensation where the Bank terminated employment other than for misconduct or unsatisfactory performance.

4 *Visscher v Giudice* (2009) 239 CLR 361 at 379–381 [53]–[55] per Heydon, Crennan, Kiefel and Bell JJ; [2009] HCA 34.

redeployment opportunity could not be found and the decision was made to retrench him, his effective exit day would be 30 March 2009. Mr Barker, having been deprived of access to his Bank email address, did not see that message until it was received at his personal email address on or about 23 March 2009.

6 On 26 March 2009, Mr Barker received an email from Ms Breccia advising that she had been trying to contact him for several weeks with respect to redeployment support. She included a position description for the position of "Executive Manager — Service Excellence", one for each region of CFS, which was to be circulated within the Bank the following day. Until advised by Mr Barker's solicitor that he had had no access to his Bank email account or voicemail since 2 March, Ms Breccia seemed to be unaware of that fact. She did not speak to Mr Barker at any time during the redeployment period. Ms Jade Baines, who was a recruitment consultant for CFS at the time, was involved in facilitating the recruitment process. At no time did she communicate with Mr Barker.

7 It was only on receiving Ms Breccia's email of 26 March 2009 that Mr Barker became aware of the Service Excellence position. The possibility of retraining for the role was never discussed with him. In any event, it was unlikely that an application by him would have been successful. Mr Formichella did not consider him suitable for the position.

8 On 7 April 2009, the Bank wrote to Mr Barker's solicitor advising her that his exit date had been extended to 9 April "to give him every chance to participate in the redeployment process." On 9 April, the Bank wrote to Mr Barker advising him that his employment "will be terminated by reason of redundancy effective from the close of business today." His retrenchment payments amounted to $182,092.16. They were calculated on the basis that he had received four weeks' notice of termination of his employment and "one extra week's notice due to [his] being over the age of 45."

The proceedings in the Federal Court

9 Mr Barker commenced proceedings against the Bank in the Federal Court on 17 November 2010. He alleged that the terms of the Agreement incorporated the Bank's "Redundancy, Redeployment, Retrenchment and Outplacement Policy" ("the Redeployment Policy") and its Equal Employment Opportunity Policy ("the EEO Policy"). He also alleged in par 14 of his amended statement of claim that:

> "The following further terms were implied into the Contract to give the same business efficacy and arising from the mutual intentions of the parties namely that:

14.1. The Bank would maintain trust and confidence with the Applicant; and

14.2. The Bank would not do anything likely to destroy or seriously damage the relationship of trust and confidence without proper cause for so doing."

10 Under the heading "Breach of Implied Terms", Mr Barker claimed that the Bank had failed to conduct the termination or redundancy process in a bona fide and/or proper manner, thereby breaching, inter alia, the Redeployment Policy and the EEO Policy, and, on that account, breaching the Agreement. He alleged in par 56:

> "The Applicant ... asserts that the conduct of the Bank was in breach of the implied term of mutual trust and confidence and resulted in the Applicant being denied the opportunity of redeployment and the opportunity to thereby retain his employment with the Bank. The Applicant thereby lost a chance."

11 The primary judge, Besanko J, held that there was a term of mutual trust and confidence implied in the Agreement which would be breached if a party, without reasonable and proper cause, engaged in conduct likely to destroy or seriously damage the relationship of trust and confidence between employer and employee[5]. He held that the Bank's failure, after 2 March 2009, to take meaningful steps with respect to Mr Barker's redeployment, within a reasonable period, was a serious breach of the Redeployment Policy and thereby a breach of the implied term[6]. Mr Barker's damages were assessed at $317,500, based upon discounted past and future economic loss[7].

12 The Full Court of the Federal Court, by majority (Jacobson and Lander JJ, Jessup J dissenting), also held that a term of mutual trust and confidence was implied by law into the Agreement[8]. The majority adopted the language of the House of Lords in *Malik v Bank of Credit and Commerce International SA (In*

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5 *Barker v Commonwealth Bank of Australia* (2012) 296 ALR 706 at 757–758 [330].

6 (2012) 296 ALR 706 at 758 [331], 761 [351]–[352]. Besanko J rejected the contention that the Redeployment Policy was incorporated in the Agreement: at 755–756 [315]–[320].

7 (2012) 296 ALR 706 at 764–765 [370]–[372], 768 [388].

8 (2013) 214 FCR 450 at 456 [13], 464 [94]–[95].

Compulsory Liquidation)[9], holding that the implied term required that "the employer will not, without reasonable cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee"[10]. Their Honours did not accept the reasoning of Besanko J that a serious failure to act in accordance with the Redeployment Policy amounted to a breach of the implied term[11]. In the circumstances of the case, however, the implied term required that the Bank take positive steps to consult with Mr Barker about alternative positions within the Bank and give him the opportunity to apply for them[12]. It failed to make contact with him for a period which the primary judge had found to be unreasonable[13]. The Bank could not do what was required of it because it had withdrawn Mr Barker's email and mobile phone facilities without telling the person charged with the responsibility of contacting him of those facts[14]. That was sufficient to constitute a breach of the implied term[15].

13 Jessup J, dissenting, found no basis for the premise that, under a contract of employment, the employer owes a duty of trust and confidence to the employee beyond those duties which are conventionally associated with contracts of that class[16]. The implied term could not be justified as a mutualisation of the employee's duty of fidelity to the employer, nor could it be justified as a principled development of the implied duty of cooperation as between parties to the contract[17]. It would enable defined limits in existing common law and equitable remedies to be sidestepped and would overlap a number of legislated

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9 [1998] AC 20 at 34 per Lord Nicholls of Birkenhead.

10 (2013) 214 FCR 450 at 464 [98].

11 (2013) 214 FCR 450 at 466 [113]–[114].

12 (2013) 214 FCR 450 at 467–468 [130]–[131].

13 (2013) 214 FCR 450 at 468 [131].

14 (2013) 214 FCR 450 at 468 [131].

15 (2013) 214 FCR 450 at 468 [132].

16 (2013) 214 FCR 450 at 531 [340].

17 (2013) 214 FCR 450 at 531 [340].

prohibitions and requirements affecting particular dimensions of the employment relationship[18].

14 His Honour further held that even if the term were implied, it had not been breached in this case[19].

The question on the appeal

15 The primary question raised by the appeal is whether, under the common law of Australia, employment contracts contain a term that neither party will, without reasonable cause, conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between them. The answer to that question, being in the negative, is dispositive of the appeal.

The employment relationship and the employment contract

16 The history of the employment relationship is considerably longer than the history of the employment contract. The master–servant relationship, as it was once called, attracted incidental obligations before it began to be treated as contractual[20]. The evolution of its treatment by the common law has been described as "a classic illustration of the shift from status (that of master and servant) to that of contract (between employer and employee)"[21]. That shift began in the United Kingdom in the nineteenth century with higher level occupations and had encompassed employees generally by the early twentieth century[22]. Associated with it were what Dixon J called "the fluctuating changes over the centuries in the extent to which the terms and conditions of the employment are left to free contract."[23] Today, it would be unusual to find an

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18 (2013) 214 FCR 450 at 531 [340].

19 (2013) 214 FCR 450 at 533–534 [349].

20 *Attorney-General for NSW v Perpetual Trustee Co Ltd* (1952) 85 CLR 237 at 245–246 per Dixon J, 256 per McTiernan J; [1952] HCA 2.

21 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 436 per McHugh and Gummow JJ; [1995] HCA 24.

22 Deakin and Morris, *Labour Law*, 4th ed (2005) at 22 [1.16], 25–26 [1.19]; Peden, "Contract Development Through the Looking-Glass of Implied Terms", in Gleeson, Watson and Peden (eds), *Historical Foundations of Australian Law, Volume II: Commercial Common Law*, (2013) 201 at 204.

23 *Attorney-General for NSW v Perpetual Trustee Co Ltd* (1952) 85 CLR 237 at 248.

employment relationship defined purely by contract[24]. Large categories of employment relationships are governed, at least in part, by statutory obligations expressed in industrial awards and agreements. There are laws dealing with unfair dismissal and the conditions of employment in relation to occupational health and safety. Anti-discrimination statutes of general application affect the conduct of the employment relationship. The relationship also has a fiduciary aspect[25].

17 While the emerging contractual aspect of the employment relationship attracted the application of principles concerning the implication of terms in contracts generally, their application to employment contracts was also informed by the evolving statutory environment. That interaction reflected the "symbiotic relationship" of legislation and the common law[26], which is of significance when it comes to considering the relevance of decisions of the courts of the United Kingdom for the implication of a term of mutual trust and confidence in employment contracts in Australia. The point is illustrated by Lord Hoffmann's discussion in *Johnson v Unisys Ltd*[27] of the transformation in the United Kingdom of the nature of the contract of employment. The law had changed to recognise the reality that employment gives "not only a livelihood but an occupation, an identity and a sense of self-esteem."[28] Lord Hoffmann said[29]:

> "Most of the changes have been made by Parliament. ... European Community law has made a substantial contribution. And the common law has adapted itself to the new attitudes, proceeding sometimes by analogy with statutory rights."

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24 *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312 at 315 [17] per Gleeson CJ, Gaudron and Gummow JJ; 176 ALR 693 at 697.

25 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96–97 per Mason J; [1984] HCA 64.

26 *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 532 [31] per Gleeson CJ; [2001] HCA 29.

27 [2003] 1 AC 518 at 539 [35].

28 [2003] 1 AC 518 at 539 [35].

29 [2003] 1 AC 518 at 539 [35].

His Lordship described the implied term of trust and confidence as "[t]he most far reaching" contribution of the common law to the "employment revolution"[30]. Lord Steyn, who had written the leading judgment in *Malik*, writing separately in *Johnson*, referred to greater pressures on employees due to "the progressive deregulation of the labour market, the privatisation of public services, and the globalisation of product and financial markets"[31]. His Lordship concluded, on the basis of those and other considerations, that[32]:

> "The need for protection of employees through their contractual rights, express and implied by law, is markedly greater than in the past."

His observations were linked to the suggestion that the contract of employment could be described in modern terms as a "relational contract"[33]. The breadth of the statements made by Lord Hoffmann and Lord Steyn points to a specific societal context for the development of the common law in the United Kingdom and considerations which, to the extent that they exist in Australia, would ordinarily be directed to legislatures. In so saying, it should be acknowledged that in *South Australia v McDonald*[34], the Full Court of the Supreme Court of South Australia, in similar vein but not quite as expansively, saw the development of the implied term "as consistent with the contemporary view of the employment relationship as involving elements of common interest and partnership, rather than of conflict and subordination."[35]

18 The regulatory history of the employment relationship and of industrial relations generally in Australia differs from that of the United Kingdom. Levels of statutory protection for employees and employers have ebbed and flowed.

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30 [2003] 1 AC 518 at 539 [36].

31 [2003] 1 AC 518 at 532 [19].

32 [2003] 1 AC 518 at 532 [19].

33 [2003] 1 AC 518 at 532 [20] — a concept attributed originally to IR Macneil and S Macaulay, eg Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations*, (1980) and Macaulay, "Non-Contractual Relations in Business: A Preliminary Study", (1963) 28 *American Sociological Review* 55 and discussed in Brodie, "How Relational Is the Employment Contract?", (2011) 40 *Industrial Law Journal* 232.

34 (2009) 104 SASR 344.

35 (2009) 104 SASR 344 at 389 [231].

The statutory framework from time to time is not uniform across Australia because it comprises not only Commonwealth laws[36] but also diverse State and Territory laws[37]. Judicial decisions about employment contracts in other common law jurisdictions, including the United Kingdom, attract the cautionary observation that Australian judges must "subject [foreign rules] to inspection at the border to determine their adaptability to native soil"[38]. That is not an injunction to legal protectionism. It is simply a statement about the sensible use of comparative law.

The implication of terms

19 The common law in Australia must evolve within the limits of judicial power and not trespass into the province of legislative action. This Court and, to a lesser extent, intermediate appeal courts have a law-making function. That function can only be exercised as an incident of the adjudication of particular disputes. The first point of reference in its exercise is "the web of established legal principle"[39]. As Brennan J said in *Dietrich v The Queen*[40]:

> "There must be constraints on the exercise of the power, else the courts would cross 'the Rubicon that divides the judicial and the legislative powers'".

20 A judicial announcement of an obligation of mutual trust and confidence, to be applied as an incident of employment contracts and applicable to employers and employees alike, involves the assumption by courts of a regulatory function defined by reference to a broadly framed normative standard. Broadly framed

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36 See eg *Racial Discrimination Act* 1975 (Cth); *Sex Discrimination Act* 1984 (Cth); *Australian Human Rights Commission Act* 1986 (Cth); *Disability Discrimination Act* 1992 (Cth); *Age Discrimination Act* 2004 (Cth); *Fair Work Act* 2009 (Cth); *Work Health and Safety Act* 2011 (Cth).

37 See eg *Industrial Relations Act* 1979 (WA); *Industrial Relations Act* 1984 (Tas); *Fair Work Act* 1994 (SA); *Industrial Relations Act* 1996 (NSW); *Industrial Relations Act* 1999 (Q).

38 Finn, "Statutes and the Common Law", (1992) 22 *University of Western Australia Law Review* 7 at 13 quoting Traynor, "Statutes Revolving in Common-Law Orbits", (1968) 17 *Catholic University Law Review* 401 at 409.

39 McHugh, "The Judicial Method", (1999) 73 *Australian Law Journal* 37 at 48.

40 (1992) 177 CLR 292 at 320; [1992] HCA 57.

normative standards are familiar to courts required to apply, in common law or statutory settings, criteria such as "reasonableness", "good faith" and "unconscionability". However, the creation of a new standard of that kind is not a step to be taken lightly. Where the standard is embodied in a new contractual term implied in law, the bases for the implication in law of contractual terms must be considered as the first point of reference.

21 Courts have implied terms in contracts in a number of ways:

- in fact or ad hoc to give business efficacy to a contract[41];
- by custom in particular classes of contract[42];
- in law in particular classes of contract; or
- in law in all classes of contract.

Contractual terms implied in law may be effected by the common law or by statute. If effected by the common law they may be displaced by the express terms of the contract or by statute.

22 Implication of a term in fact in a contract, by reference to what is necessary to give it business efficacy, was described in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* as raising issues "as to the meaning and effect of the contract"[43]. Implication is not "an orthodox exercise in the interpretation

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41 Such implications are made when the conditions set out in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283 per Lord Simon of Glaisdale, Viscount Dilhorne and Lord Keith of Kinkel are satisfied. These were conditions adopted by this Court in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 605–606 per Mason J, Gibbs and Stephen JJ agreeing at 599, Aickin J agreeing at 615; [1979] HCA 51; see also *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 347 per Mason J, Stephen J agreeing at 344, Wilson J agreeing at 392, 404 per Brennan J; [1982] HCA 24.

42 The custom or usage must be notorious, certain, legal and reasonable. See *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226 at 236–237; [1986] HCA 14; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 423–424 per Brennan CJ, Dawson and Toohey JJ, 440 per McHugh and Gummow JJ.

43 (1982) 149 CLR 337 at 345 per Mason J, Stephen J agreeing at 344, Wilson J agreeing at 392.

of the language of a contract, that is, assigning a meaning to a particular provision."[44] It is nevertheless an "exercise in interpretation, though not an orthodox instance."[45] The implication of terms in fact was also characterised in *Attorney General of Belize v Belize Telecom Ltd*[46] as an exercise in construction. Lord Hoffmann, delivering the judgment of the Privy Council, said[47]:

> "it is not enough for a court to consider that the implied term expresses what it would have been reasonable for the parties to agree to. It must be satisfied that it is what the contract actually means."

The distinction thus drawn is appropriate even though the scope of the constructional approach adopted by Lord Hoffmann has been debated[48].

23 In *Codelfa*, the implication of a term in law was said to be based upon "more general considerations" than those covered by the concept of business efficacy[49]. That distinction attracted authoritative support in *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd*[50].

24 It has also been argued that some "terms" said to be implied in law are in fact rules of construction and that all implied "terms" of universal application fall into that category[51]. The application of that proposition to what has been treated

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44 (1982) 149 CLR 337 at 345 per Mason J, Stephen J agreeing at 344, Wilson J agreeing at 392.

45 (1982) 149 CLR 337 at 345 per Mason J, Stephen J agreeing at 344, Wilson J agreeing at 392.

46 [2009] 1 WLR 1988; [2009] 2 All ER 1127.

47 [2009] 1 WLR 1988 at 1994 [22]; [2009] 2 All ER 1127 at 1134.

48 Hooley, "Implied Terms After *Belize Telecom*", (2014) 73 *Cambridge Law Journal* 315; Courtney and Carter, "Implied Terms: What *Is* the Role of Construction?", (2014) 31 *Journal of Contract Law* 151 at 160–163.

49 (1982) 149 CLR 337 at 345–346 per Mason J citing *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 at 576 per Viscount Simonds and *Liverpool City Council v Irwin* [1977] AC 239 at 255 per Lord Wilberforce.

50 (1986) 160 CLR 226 at 237.

51 Peden, "'Cooperation' in English Contract Law — to Construe or Imply?", (2000) 16 *Journal of Contract Law* 56 at 66–67.

as a contractual duty to cooperate is considered below. Debates about characterisation have attracted persuasive protagonists on both sides[52]. They involve taxonomical distinctions which do not necessarily yield practical differences. Those debates are not concerned with the distinct question whether, and when, implication of a term is to be regarded as an exercise in the construction of a contract or class of contract.

25 It has been accepted in this Court that some rules treated as implications of terms in law in particular classes of contract, or contracts generally, can also be characterised as rules of construction. Mason J, in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd*[53], so characterised the principle enunciated by Lord Blackburn in *Mackay v Dick*[54]:

> "where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually 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 done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances."

The language of Lord Blackburn was indicative of a rule of construction rather than of implication. Nevertheless, Mason J also referred to the rule as defining an implied "duty to co-operate"[55].

26 The majority in the Full Court of the Federal Court referred to the implied duty of cooperation as providing an "alternative approach" to the application of

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52 Carter, *Contract Law in Australia*, 6th ed (2013) at 32–33 [2–19]; Seddon and Bigwood, *Cheshire and Fifoot Law of Contract*, 10th Aust ed (2012) at 461 [10.41]; Tolhurst, "Contractual Confusion and Industrial Illusion: A Contract Law Perspective on Awards, Collective Agreements and the Contract of Employment", (1992) 66 *Australian Law Journal* 705 at 716; and in relation to good faith see Allsop, "Good faith and Australian contract law: A practical issue and a question of theory and principle", (2011) 85 *Australian Law Journal* 341 at 361.

53 (1979) 144 CLR 596 at 607.

54 (1881) 6 App Cas 251 at 263 — a characterisation evidently endorsed in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 448–449 per McHugh and Gummow JJ.

55 (1979) 144 CLR 596 at 607.

the implied duty of mutual trust and confidence[56]. Their Honours relied upon its formulation in *Secured Income* as one which "requires a party to a contract to do all things necessary to enable the other party to have the benefit of the contract."[57] That obligation of cooperation required the Bank to take the positive steps necessary to enable Mr Barker to have the benefit of cl 8, which contemplated the possibility of redeployment within the Bank as an alternative to termination[58]. In opening that alternative approach, their Honours adverted to the suggestion by Lord Steyn in *Malik*[59] that the implied duty of mutual trust and confidence propounded in that case "probably has its origin in the duty of co-operation between contracting parties."[60] As appears below, whatever the historical basis in the United Kingdom for the implied duty of mutual trust and confidence, it cannot be supported in this country as an expression or development of the implied duty of cooperation.

27 As to the direct application of the implied duty of cooperation, the Bank submitted in this Court, as Jessup J had reasoned in his dissent, that there was no relevant contractual benefit with which the implied term could engage. Clause 8 conferred a benefit by way of a termination payment but did not confer a contractual entitlement to the benefit of the Redeployment Policy. The submission made on behalf of Mr Barker that "the prospect of ... redeployment was a benefit in the relevant sense" should not be accepted.

28 An implication in law may have evolved from repeated implications in fact. As Gaudron and McHugh JJ observed in *Breen v Williams*[61], some implications in law derive from the implication of terms in specific contracts of particular descriptions, which become "so much a part of the common understanding as to be imported into all transactions of the particular description."[62] The two kinds of implied terms tend in practice to "merge

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56 (2013) 214 FCR 450 at 466.

57 (2013) 214 FCR 450 at 467 [121].

58 (2013) 214 FCR 450 at 467 [126]–[128].

59 [1998] AC 20 at 45.

60 (2013) 214 FCR 450 at 461 [67].

61 (1996) 186 CLR 71; [1996] HCA 57.

62 (1996) 186 CLR 71 at 103 quoting *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 449 per McHugh and Gummow JJ.

imperceptibly into each other"[63]. That connection suggests, as is the case, that the "more general considerations" informing implications in law are not so remote from those considerations which support implications in fact as to be at large. They fall within the limiting criterion of "necessity", which was acknowledged by both parties to this appeal. The requirement that a term implied in fact be necessary "to give business efficacy" to the contract in which it is implied can be regarded as a specific application of the criterion of necessity. The present case concerns an implied term in law where broad considerations are in play, which are not at large but are not constrained by a search for what "the contract actually means."

29 In *Byrne v Australian Airlines Ltd*, McHugh and Gummow JJ emphasised that the "necessity" which will support an implied term in law is demonstrated where, absent the implication, "the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless, or, perhaps, be seriously undermined"[64] or the contract would be "deprived of its substance, seriously undermined or drastically devalued"[65]. The criterion of "necessity" in this context has been described as "elusive"[66] and the suggestion made that "there is much to be said for abandoning"[67] the concept. Necessity does, however, remind courts that implications in law must be kept within the limits of the judicial function. They are a species of judicial law-making and are not to be made lightly. It is a necessary condition that they are justified functionally by reference to the effective performance of the class of contract to which they apply, or of contracts generally in cases of universal implications, such as the duty to cooperate. Implications which might be thought reasonable are not, on that account only, necessary[68]. The same constraints apply whether or not such implications are characterised as rules of construction.

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63 (1996) 186 CLR 71 at 103 quoting Glanville Williams, "Language and the Law — IV", (1945) 61 *Law Quarterly Review* 384 at 401.

64 (1995) 185 CLR 410 at 450.

65 (1995) 185 CLR 410 at 453. See also *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 68 [78] per McHugh, Gummow and Hayne JJ; [2005] HCA 50.

66 *Crossley v Faithful & Gould Holdings Ltd* [2004] ICR 1615 at 1627 [36].

67 Peel, *Treitel: The Law of Contract*, 13th ed (2011) at 231 [6-043].

68 *University of Western Australia v Gray* (2009) 179 FCR 346 at 376–377 [139]–[142].

The implied term of mutual trust and confidence in the United Kingdom

30 Employment contracts have attracted a number of implied terms in the course of the evolution of the employment relationship. All such terms are subject to the express provisions of the particular contracts and any applicable statutes. They include an implied duty imposed on the employer to provide the employee with a safe system of work[69] and to give reasonable notice of the termination of the contract other than for breach[70]. An employee has an implied duty of fidelity to the employer not to engage in conduct which "impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee"[71]. That duty may derive from the fiduciary obligations which employees owe to their employers, albeit those obligations have "different conceptual origins" from the contractual obligations[72]. Relevantly, the employment contract, in common with contracts generally, attracts the duty to cooperate enunciated by Lord Blackburn in *Mackay v Dick*[73]. It may also be noted that in the employment law of the United States there has been recognised an implied obligation which, though it "does not lend itself to precise definition ... requires at a minimum that an employer not impair the right of an employee to receive the benefits of the employment agreement."[74]

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69 *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at 53 [19] per McHugh, Gummow, Hayne and Heydon JJ; [2005] HCA 15.

70 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 423, 429 per Brennan CJ, Dawson and Toohey JJ.

71 *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66 at 81 per Dixon and McTiernan JJ; [1933] HCA 8.

72 *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312 at 317–318 [25]–[26] per Gleeson CJ, Gaudron and Gummow JJ; 176 ALR 693 at 700–701.

73 (1881) 6 App Cas 251 at 263, recognised in *Butt v M'Donald* (1896) 7 QLJ 68 at 70–71 per Griffith CJ, although expressed expansively as encompassing all things that are necessary to enable the other party to have the benefit of the contract. See also *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 607 per Mason J.

74 *Jones v Central Peninsula General Hospital* 779 P 2d 783 at 789 (1989). See also *Metcalf v Intermountain Gas Co* 778 P 2d 744 at 749 (1989); *Wieder v Skala* 609 NE 2d 105 at 109 (1992).

31 The submissions to the Court in this case focussed upon the question whether the proposed implied term of mutual trust and confidence was "necessary" in the sense that without it, the rights conferred by the Agreement could or would be rendered nugatory or worthless, or seriously undermined. Mr Barker relied substantially upon the decision of the House of Lords in *Malik*.

32 The implied term of mutual trust and confidence in employment contracts in the United Kingdom arose out of what Professor Mark Freedland has described as "a highly context-specific and instrumental body of case law."[75] Its development may be traced back to the enactment of a constructive dismissal provision in labour relations legislation in 1974[76]. In a seminal decision for that development, the Court of Appeal in *Western Excavating (ECC) Ltd v Sharp*[77] held that whether an employee was entitled to terminate employment by reason of the employer's conduct, and be treated as having been dismissed, was to be determined in accordance with the law of contract[78]. It was not to be determined merely by reference to the unreasonableness of the employer's conduct. The contractual test for constructive dismissal, as accepted by the Court of Appeal, required the employer to be guilty of conduct constituting a significant breach going to the root of the contract of employment, or which showed that the employer no longer intended to be bound by one or more of the essential terms of the contract[79]. After the decision in *Western Excavating*, the Employment Appeal Tribunal implied the term of mutual trust and confidence to meet the contractual test. In the leading decision, *Courtaulds Northern Textiles Ltd v Andrew*[80], the implication, apart from one aspect of its wording, was not in dispute[81].

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75 Freedland, *The Personal Employment Contract*, (2003) at 155.

76 *Trade Union and Labour Relations Act* 1974 (UK), Sched 1, par 5(2)(c), now s 95(1)(c) of the *Employment Rights Act* 1996 (UK).

77 [1978] QB 761.

78 [1978] QB 761 at 770 per Lord Denning MR, Eveleigh LJ agreeing at 773.

79 [1978] QB 761 at 769–770 per Lord Denning MR, Eveleigh LJ agreeing at 773. Lawton LJ, conscious of the involvement of lay tribunals, said at 772 "[s]ensible persons have no difficulty in recognising such conduct when they hear about it."

80 [1979] IRLR 84.

81 [1979] IRLR 84 at 85.

33 Professor Freedland described what happened after *Western Excavating* as[82]:

> "a process of formulation of implied terms, which were in effect back-formations, in the sense that they were terms the breach of which would amount to expulsive or repudiatory conduct sufficient to constitute constructive dismissal by the employer. It was in this particular crucible that the implied term as to mutual trust and confidence was formed."

It was the case, however, that before the decision of the Court of Appeal, tribunals and courts in the United Kingdom had begun to formulate the test of constructive dismissal in terms of conduct by an employer rupturing the employee's trust or confidence in the employment relationship, a test applied by those who envisaged it as contractual or as a broader based test[83]. In the event, the implied term became, by the mid-1980s, "an orthodox tenet of the law of constructive unfair dismissal."[84] That was the position in courts, other than the House of Lords, when *Malik* was decided.

34 In *Malik*, the employer bank had carried on its business "dishonestly and corruptly."[85] Former employees of the bank sued its provisional liquidators for damages for the stigma attaching to them by reason of their prior employment association with it. Lord Nicholls held that the bank was under an implied obligation to its employees not to conduct a dishonest or corrupt business[86]. That obligation was said to be a particular aspect of the general obligation imposed by the implied term[87]:

> "not to engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue in the manner the employment contract implicitly envisages."

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82 Freedland, *The Personal Employment Contract*, (2003) at 155.

83 Freedland, *The Personal Employment Contract*, (2003) at 155.

84 Freedland, *The Personal Employment Contract*, (2003) at 156.

85 [1998] AC 20 at 34 per Lord Nicholls.

86 [1998] AC 20 at 34–35.

87 [1998] AC 20 at 35.

Although *Malik* was the first occasion on which the implied term was considered by the House of Lords, it appears to have been treated by their Lordships as a *fait accompli*. Lord Nicholls described it as a useful tool, well established in employment law[88]. Lord Steyn, who wrote the leading judgment, proceeded, like Lord Nicholls, upon the basis that the implied term was established as a standard term implied by law as an incident of all contracts of employment, albeit he described it as "a comparatively recent development" which probably had its origin "in the general duty of co-operation between contracting parties"[89]. His Lordship said[90]:

> "The evolution of the implied term of trust and confidence is a fact. It has not yet been endorsed by your Lordships' House. It has proved a workable principle in practice. It has not been the subject of adverse criticism in any decided cases and it has been welcomed in academic writings. I regard the emergence of the implied obligation of mutual trust and confidence as a sound development."

The implication in Australia

35 The conclusion reached by the House of Lords in *Malik* must be understood in the context of the existing body of decisions made by the courts and tribunals of the United Kingdom, reflecting a consensus as to the implication which predated *Malik*[91]. The history of the development of the term in the United Kingdom is not applicable to Australia. There is a background of approving references to the implied term in decisions of Australian State and federal courts[92]. The strength of those approving references, however, depends

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88 [1998] AC 20 at 39.

89 [1998] AC 20 at 45.

90 [1998] AC 20 at 46.

91 See eg *Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84; *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666; *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 WLR 589; [1991] 2 All ER 597. See generally Lindsay, "The Implied Term of Trust and Confidence", (2001) 30 *Industrial Law Journal* 1.

92 See eg *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144; *Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186; *Irving v Kleinman* [2005] NSWCA 116; *Delooze v Healey* [2007] WASCA 157; *Shaw v New South Wales* (2012) 219 IR 87.

upon the analysis underpinning them. In *South Australia v McDonald*, decided in 2009, the Full Court of the Supreme Court of South Australia observed that, with the exception of two first instance decisions, none of the Australian authorities to that date had "addressed in any detail the basis for the implication of the implied term."[93] In that case, the Full Court concluded that the extensive statutory and regulatory context in which the contract in question operated rendered the implied term unnecessary[94]. In an obiter statement, their Honours acknowledged that it had long been recognised in Australia that contracts of employment involve "elements of mutual confidence."[95] They related the development of the implied term to a contemporary view of the employment relationship as one of common interests and partnership[96].

36 There have been passing references to the duty in two decisions of this Court, neither of which constituted a determination that the duty should be implied[97]. In the end, while taking appropriate note of the decisions of State and federal courts, this Court must determine the existence of the implied duty by reference to the principles governing implications of terms in law in a class of contract. That requires this Court to determine whether the proposed implication is "necessary" in the sense that would justify the exercise of the judicial power in a way that may have a significant impact upon employment relationships and the law of the contract of employment in this country. The broad concept of "necessity" discussed earlier in these reasons may be defined by reference to what "the nature of the contract itself implicitly requires"[98]. It may be

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93 (2009) 104 SASR 344 at 388 [227].

94 (2009) 104 SASR 344 at 398 [270].

95 (2009) 104 SASR 344 at 385 [215].

96 (2009) 104 SASR 344 at 389 [231].

97 *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312 at 322 [51] per Kirby J; 176 ALR 693 at 706; *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at 55 [24] per McHugh, Gummow, Hayne and Heydon JJ.

98 *Liverpool City Council v Irwin* [1977] AC 239 at 254 per Lord Wilberforce.

demonstrated by the futility of the transaction absent the implication[99]. It is not satisfied by demonstrating the reasonableness of the implied term[100].

37 The duty to cooperate satisfies the criterion of necessity explained in *Byrne*. The implied term of mutual trust and confidence, however, imposes mutual obligations wider than those which are "necessary", even allowing for the broad considerations which may inform implications in law. It goes to the maintenance of a relationship. It appears, at least in part, to be informed by a view of the employment contract as "relational", a characteristic of uncertain application in this context and not one which was advanced on behalf of Mr Barker. The implied term cannot be treated as a particular application to employment contracts of the duty to cooperate, which applies to contracts generally. That duty is directly related to contractual performance, which explains to some degree why it can arguably be characterised as a rule of construction.

38 The duty of mutual trust and confidence is proposed in this appeal as an implication apposite to the disposition of a particular dispute in which an employee complains of an employer's conduct. Yet it is an implication which would impose obligations not only on employers but also on employees, whose voices about that consequence of the implication are not heard in this appeal. Neither party had a direct interest in putting submissions to the Court about the burden the implication might place on employees. While the mutuality of an obligation and its effect upon a range of interests is not a bar to its implication, it locates the propounded implication close to the boundary between judicial law-making and that which is within the province of the legislature.

39 The need for a cautious approach to the implication is underlined by the observation in the fourth edition of Deakin and Morris's *Labour Law*, that "[i]n its most far-reaching form [the development of the implied term] could be said to mark an extension of the duty of co-operation 'from the restricted obligation not to prevent or hinder the occurrence of an express condition upon which performance of the contract depends to a positive obligation to take all those steps which are necessary to achieve the purposes of the employment relationship

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99 *Liverpool City Council v Irwin* [1977] AC 239 at 255 per Lord Wilberforce citing *Miller v Hancock* [1893] 2 QB 177 at 181 per Bowen LJ.

100 *University of Western Australia v Gray* (2009) 179 FCR 346 at 376 [139] and authorities there cited.

...'."[101] That extension was said to reflect a broader functional view, essentially a tribunal's view, of good industrial relations practice, embracing not only the material conditions of employment such as pay and safety, but also the psychological conditions which are essential to the performance by an employee of his or her part of the bargain[102].

40 The complex policy considerations encompassed by those views of the implication mark it, in the Australian context, as a matter more appropriate for the legislature than for the courts to determine. It may, of course, be open to legislatures to enshrine the implied term in statutory form and leave it to the courts, according to the processes of the common law, to construe and apply it. It is a different thing for the courts to assume that responsibility for themselves. The mutual aspect of the obligation cannot be put to one side by characterising its operation with respect to employees as merely a restatement of the existing duty of fidelity. It is more broadly worded than that obligation. As Jessup J observed in his dissenting judgment in the Full Court, the proposed implied duty of mutual trust and confidence might apply to conduct by employees which was neither intentional nor negligent and did not breach their implied duty of fidelity, but objectively caused serious disruption to the conduct of their employer's business[103].

41 Importantly, the implied duty of trust and confidence as propounded in *Malik* is directed, in broad terms, to the relationship between employer and employee rather than to performance of the contract. It depends upon a view of social conditions and desirable social policy that informs a transformative approach to the contract of employment in law. It should not be accepted as applicable, by the judicial branch of government, to employment contracts in Australia.

42 The above conclusion should not be taken as reflecting upon the question whether there is a general obligation to act in good faith in the performance of contracts. Nor does it reflect upon the related question whether contractual powers and discretions may be limited by good faith and rationality requirements

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101 Deakin and Morris, *Labour Law*, 4th ed (2005) at 335 [4.91] quoting Hepple, *Hepple & O'Higgins: Employment Law*, 4th ed (1981) at 135.

102 Deakin and Morris, *Labour Law*, 4th ed (2005) at 335 [4.91] quoting Hepple, *Hepple & O'Higgins: Employment Law*, 4th ed (1981) at 135.

103 (2013) 214 FCR 450 at 518 [304].

analogous to those applicable in the sphere of public law[104]. Those questions were not before the Court in this appeal.

43 Mr Barker also sought to support the decision of the Full Court by way of a notice of contention and the submission that the term of mutual trust and confidence should be implied as a matter of fact in the Agreement. For the reasons already given, the term did not answer the criterion of necessity required to support its implication in law in employment contracts generally. Mr Barker's counsel was unable to point to any particular feature of the Agreement that would support its implication in fact, albeit he referred to Mr Barker's seniority, his long and distinguished career with the Bank, and the silence of the contract on matters of trust and confidence. The submission in support of an implication in fact must be rejected.

Conclusion

44 There was a conceded entitlement to damages in favour of Mr Barker of $11,692.31 together with interest based upon a breach of cl 6 of the Agreement found by the primary judge. The Bank gave an undertaking at the special leave hearing that it would pay Mr Barker's costs of the application for special leave and the appeal and not seek costs against him if successful in the appeal, nor would it seek to disturb costs orders made below which were favourable to him. In light of the concession and the undertaking, the following orders should be made:

1. Appeal allowed.

2. Set aside paragraphs 1 (save as to costs) and 2 of the order of the Full Court of the Federal Court of Australia made on 6 August 2013 and, in their place, order that:

   (a) the appeal be allowed; and

   (b) paragraphs 1 and 2 of the order of the Federal Court of Australia made on 3 September 2012 be set aside and, in lieu thereof, order that:

      (i) judgment be entered for the applicant against the respondent in the sum of $11,692.31; and

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104 See eg Paterson, "Implied Fetters on the Exercise of Discretionary Contractual Powers", (2009) 35 *Monash University Law Review* 45 at 59, 73.

(ii) the respondent pay the applicant interest in an amount to be determined by a judge of the Federal Court of Australia if not otherwise agreed.

3. Appellant to pay the respondent's costs of the appeal and of the application for special leave to appeal.

45 KIEFEL J. The question in this case is whether the appellant, the former employer of the respondent, is liable to the respondent for damages in connection with the termination of the respondent's employment.

46 The respondent worked for the appellant from 1981 in various positions. From July 2004, he held the position of Executive Manager, Level Three Corporate Banking, Institutional and Business Services in Adelaide. His position was subsequently changed to Regional Manager and to Regional Executive. Despite some variations to reflect the changes in his role, the terms of the Employment Agreement between the respondent and the appellant dated 10 August 2004 remained the same in relevant respects.

47 Clause 6 of the Employment Agreement provided that it could be terminated by agreement or by four weeks' written notice by either party to the other, except in circumstances of misconduct. As an alternative, the appellant could make a payment of an amount equivalent to four weeks' pay in lieu of notice. No reason for termination was required to be given in either circumstance. Clause 7 provided that, where the appellant initiated termination of employment other than for misconduct or unsatisfactory performance, the appellant would pay the respondent compensation.

48 Clause 7 did not apply in a case where payment was made under cl 8. Clause 8 applied where an employee was already employed by the appellant before the date of the Employment Agreement and where the position occupied by the employee became redundant. Both conditions were met in the case of the respondent. Clause 8 provided that, where these circumstances arose "and the Bank is unable to place the Employee in an alternative position with the Bank or one of its related bodies, in keeping with the Employee's skills and experience", compensation would be payable.

49 Clauses 7 and 8 provided for the assessment of compensation in somewhat different terms. The quantum of compensation under them is not relevant for present purposes.

50 It will be observed that cll 6 and 7, on the one hand, and cl 8, on the other, dealt with different subjects – respectively, termination and redundancy. If an employee was made redundant, cl 8 contemplated that the appellant would attempt to find another, suitable position for the employee. If it could not, impliedly within a reasonable time, the employment would come to an end and the compensation for which cl 8 provided would be payable. If a position was found, it is to be inferred that the employment would continue. If the employee was dissatisfied with the alternative position, he or she could terminate the employment under cl 6; but in that circumstance, no compensation would be payable.

51 On 2 March 2009, the respondent was called to a meeting and handed a letter which advised him that his position as Regional Executive was to be made redundant. The letter said that it was the appellant's preference to redeploy the respondent to a suitable position within the appellant and that it would explore, in consultation with the respondent, appropriate options. The letter also said that "the redeployment process" was supposed to commence that day. However, the appellant accepts that this redeployment process miscarried. The upshot was that the respondent's employment was terminated by the appellant by letter on 9 April 2009[105]. He received retrenchment payments totalling $182,092.16.

52 Following a trial in the Federal Court of Australia, the primary judge (Besanko J) found that the appellant had repudiated the contract of employment on 9 April 2009, when it purported to terminate the contract without giving the requisite notice under cl 6[106]. It followed that the respondent would have been entitled to damages amounting to four weeks' pay.

53 However, the respondent claimed more than that amount. The respondent pleaded a breach of the Employment Agreement, anterior to its termination, which resulted in him losing the opportunity to be redeployed. This claim was not based upon cl 8 of the Employment Agreement, but upon a term to be implied in the Employment Agreement to the effect that the appellant, as an employer, must not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between employer and employee ("the term of trust and confidence"). A term to this effect, referable to all contracts of employment, was recognised by the House of Lords in *Malik v Bank of Credit and Commerce International SA (In Compulsory Liquidation)*[107].

54 The primary judge applied the term of trust and confidence[108] and held that the appellant breached it by failing to take steps to comply with its own redeployment policy[109], as the respondent had alleged. Although accepting that the redeployment policy did not form part of the Employment Agreement, his

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105 *Barker v Commonwealth Bank of Australia* (2012) 296 ALR 706 at 739 [215].

106 *Barker v Commonwealth Bank of Australia* (2012) 296 ALR 706 at 748 [278]-[279].

107 [1998] AC 20. The decision is also referred to by the name of the second action joined, *Mahmud v Bank of Credit and Commerce International SA (In Compulsory Liquidation).*

108 *Barker v Commonwealth Bank of Australia* (2012) 296 ALR 706 at 757 [330].

109 *Barker v Commonwealth Bank of Australia* (2012) 296 ALR 706 at 761 [352].

Honour held that a serious breach of the policy would amount to a breach of the term of trust and confidence[110]. His Honour awarded damages assessed by reference to the respondent's loss of opportunity to be redeployed[111].

55 The Full Court held that his Honour was in error in treating the term of trust and confidence as co-extensive with an obligation to observe the redeployment policy[112]. There is no appeal from that finding. Nevertheless, the Full Court, by a majority (Jacobson and Lander JJ, Jessup J dissenting), upheld the primary judge's award of damages on the basis that the term of trust and confidence required the appellant to take steps to consult with the respondent and inform him of suitable employment options, and that term had been breached[113].

The implication of terms

56 The term of trust and confidence recognised in *Malik* is one implied by law[114]. It is intended to apply to all contracts of a particular class or description, namely contracts of employment. It may be distinguished from a term that it is necessary to imply to give business efficacy to a particular contract[115], which focuses on the form of a contract and its express and unique terms[116]. Implication of a term by law involves "a search, based on wider considerations, for such a term as the nature of the contract might call for, or as a legal incident

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110 *Barker v Commonwealth Bank of Australia* (2012) 296 ALR 706 at 758 [331]-[332].

111 *Barker v Commonwealth Bank of Australia* (2012) 296 ALR 706 at 764-765 [369]-[372].

112 *Commonwealth Bank of Australia v Barker* (2013) 214 FCR 450 at 466 [113]-[114].

113 *Commonwealth Bank of Australia v Barker* (2013) 214 FCR 450 at 466 [117], 467-468 [131].

114 *Malik v Bank of Credit and Commerce International SA (In Compulsory Liquidation)* [1998] AC 20 at 45.

115 *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 at 576 per Viscount Simonds; *Liverpool City Council v Irwin* [1977] AC 239 at 255 per Lord Wilberforce; *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 345-346 per Mason J; [1982] HCA 24; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 448 per McHugh and Gummow JJ; [1995] HCA 24.

116 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 448.

of this kind of contract."[117] In either case, a requirement for the implication of a term is that it be necessary in the respective senses which will shortly be discussed. A test of necessity does not appear to have been applied in *Malik*.

57 A covenant for quiet enjoyment furnishes a good example of a term which will be implied in contracts between landlord and tenant, because it is a necessary incident of the relationship between landlord and tenant. *Liverpool City Council v Irwin*[118] furnishes another. At issue in that case was whether there should be implied a covenant, on the part of a local authority (which was the landlord of a multi-occupied building), to keep in repair common parts of the building (such as lifts, staircases, rubbish chutes and passages), over which it retained control. Lord Wilberforce considered that no novel approach was involved in implying such a covenant[119]. The use of the parts of the building in question was essential to the tenancy.

58 A similar approach had been taken in *Miller v Hancock*[120], to which Lord Wilberforce referred. In that case, Bowen LJ held that, without the implication of a term requiring a landlord to maintain a staircase in leased premises, the whole transaction would be futile. It would be rendered "inefficacious and absurd". In *Irwin*, Lord Wilberforce regarded this reasoning as "common sense"[121].

59 *Scally v Southern Health and Social Services Board*[122] involved obligations arising from the relationship of employer and employee. It was referred to by Lord Steyn in both *Malik*[123] and *Johnson v Unisys Ltd*[124] as being illustrative of developments in the law relating to employers' obligations. On another view, *Scally* may be seen to adopt an approach similar to that in *Irwin*. In *Scally*, a change to the regulations governing a statutory superannuation scheme permitted employees who had joined the scheme late to purchase "added

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117 *Liverpool City Council v Irwin* [1977] AC 239 at 255.

118 [1977] AC 239.

119 *Liverpool City Council v Irwin* [1977] AC 239 at 254.

120 [1893] 2 QB 177 at 180-181.

121 *Liverpool City Council v Irwin* [1977] AC 239 at 255.

122 [1992] 1 AC 294.

123 [1998] AC 20 at 46.

124 [2003] 1 AC 518 at 531 [18].

years" of pension entitlements, but the right could be exercised only within a limited time of the regulations coming into force and thereafter on less favourable terms. The question identified by Lord Bridge of Harwich was whether the law would imply a contractual obligation, on the part of the employer, to take reasonable steps to bring the existence of the contingent right to the notice of employees[125]. His Lordship considered that the implication could not be justified for the sake of giving business efficacy to the contract of employment as a whole. However, since the employee's entitlement to enhance the pension would be of no contractual effect unless the employee was made aware of it, it was necessary to imply an obligation on the part of the employer "to render efficacious the very benefit which the contractual right to purchase added years was intended to confer."[126] His Lordship stressed that the criterion for the implication was necessity, not just reasonableness[127].

60 In *Byrne v Australian Airlines Ltd*[128], McHugh and Gummow JJ observed that both *Irwin* and *Scally* had adopted the test of "necessity". Their Honours observed that, in *Scally*, the term implied was a necessary incident of a definable category of contractual relationship. Their Honours explained that many of the terms now said to be implied by law in various categories of cases reflect the concern of the courts that, without the term, the enjoyment of the rights conferred would be "rendered nugatory, worthless, or … seriously undermined"[129]. It is in this sense that the word "necessity" is used. In their Honours' view, the notion of necessity has been crucial in modern cases when the law has implied a term as a matter of law for the first time. In *Breen v Williams*[130], Gaudron and McHugh JJ observed that the notion of necessity is central to the rationale for an implication

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125 *Scally v Southern Health and Social Services Board* [1992] 1 AC 294 at 304.

126 *Scally v Southern Health and Social Services Board* [1992] 1 AC 294 at 306.

127 *Scally v Southern Health and Social Services Board* [1992] 1 AC 294 at 307; see also *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 346, discussing terms implied into a particular contract.

128 (1995) 185 CLR 410 at 451-452.

129 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 450, referring to *Nullagine Investments Pty Ltd v Western Australian Club Inc* (1993) 177 CLR 635 at 647-648, 659; [1993] HCA 45.

130 (1996) 186 CLR 71 at 103; [1996] HCA 57.

of this kind. The requirement of necessity has been confirmed by a number of decisions of this Court since *Byrne* and *Breen*[131].

61 The courts will also imply an obligation on the part of each party to a contract to co-operate in the doing of acts necessary to performance, or to enable the other party to secure a benefit provided by the contract[132]. Such an obligation may be traced to *Mackay v Dick*[133].

62 In the sphere of terms implied to render efficacious a particular contract, necessity is also required. In *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*[134], it was said that no term will be implied if the contract is effective without it and that any implied term must be so obvious that it "goes without saying".

The term of trust and confidence

63 It is necessary in the first place to distinguish between an employee's duty of trust and confidence, which the law has for a long time implied in contracts of employment, and the term recognised in *Malik*. The former is not concerned with obligations on the part of an employer, but with obligations of fidelity on the part of an employee to his or her employer, breach of which may justify dismissal. The term of trust and confidence recognised in *Malik*, on the other hand, imposes obligations on an employer not to engage in "trust-destroying conduct"[135] which may sound in damages if breached.

64 As to the duty of trust and confidence that the law earlier applied to the conduct of an employee, in *Pearce v Foster*[136], Lord Esher MR said that it was a

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131 *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 68 [78]; [2005] HCA 50; *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577 at 596 [59]; [2006] HCA 55; *Copyright Agency Ltd v New South Wales* (2008) 233 CLR 279 at 305-306 [92]; [2008] HCA 35.

132 *Butt v M'Donald* (1896) 7 QLJ 68 at 70-71; *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 607; [1979] HCA 51; *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577 at 584 [14], 628 [156].

133 (1881) 6 App Cas 251 at 263.

134 (1977) 180 CLR 266 at 283.

135 *Malik v Bank of Credit and Commerce International SA (In Compulsory Liquidation)* [1998] AC 20 at 34.

136 (1886) 17 QBD 536 at 539.

rule of law that, "where a person has entered into the position of servant, if he does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him."[137] In *English and Australian Copper Co Ltd v Johnson*[138], Griffith CJ cited *Pearce v Foster* and noted that the conduct of the employee in question would have created a serious loss of confidence in his employer.

65 In *Shepherd v Felt and Textiles of Australia Ltd*[139], the employer discovered, subsequent to its termination of Shepherd's services as a sales representative, that he had attempted to persuade a customer to deal directly with him and not the employer. It was observed that the employee was obliged to render faithful and loyal service. If that service was not rendered, the employer had the right to determine the contract[140]. In *Blyth Chemicals Ltd v Bushnell*[141], the Court reiterated what had been said in *Shepherd*[142] concerning the maintenance of confidence between employer and employee. Dixon and McTiernan JJ said that any conduct on the part of the employee which is incompatible with his duty, involves conflict between his interests and that duty or "is destructive of the necessary confidence between employer and employee" is a ground of dismissal[143].

66 The duty of trust and confidence of which these cases speak is not some abstract concept. It refers to conduct, on the part of an employee, which is contrary to the interests of the employer and serious enough to have the effect that the employer could not reasonably be expected to have confidence in the employee. The duty reflects an essential aspect of the relationship between employer and employee. Whilst trust and confidence is maintained, the relationship endures. In that sense, the employee's duty may be said to be directed to the maintenance of the relationship. Yet the law recognises that, where a point of no confidence is reached, it would be intolerable for the

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137 See also *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch D 339; *Robb v Green* [1895] 2 QB 315; *Wessex Dairies Ltd v Smith* [1935] 2 KB 80; *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169.

138 (1911) 13 CLR 490 at 497, 500; [1911] HCA 65.

139 (1931) 45 CLR 359; [1931] HCA 21.

140 *Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 CLR 359 at 370, 372, 378.

141 (1933) 49 CLR 66 at 72-73, 81-82; [1933] HCA 8.

142 (1931) 45 CLR 359.

143 *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66 at 81-82; see also at 72-74.

employer to continue with the relationship. In such a circumstance, termination of the employment is justified.

67 No decision of this Court has dealt with the question whether the term of trust and confidence recognised in *Malik* should be implied in employment contracts in Australia. Contrary to the view expressed by the primary judge[144], on which the respondent relies, the application of the term has not been assumed by members of this Court. The decision in *Concut Pty Ltd v Worrell*[145] concerned the misconduct of an employee and the above-mentioned duty of confidence to his employer. The joint reasons referred[146] to *Pearce v Foster*[147] and included, in a footnote, a reference to *Malik*[148]. The latter reference did no more than draw attention to what was then recent authority in England. In *Koehler v Cerebos (Australia) Ltd*[149], there was a parenthetical reference to "the implied duty of trust and confidence" between parties to an employment contract. However, that case concerned a claim in negligence and there was no discussion of whether the term of trust and confidence recognised in *Malik* should apply in Australia.

68 The words adopted in *Malik* as the formulation of the term of trust and confidence, to be applied in connection with the duties of employers, did not have their origin in decisions of the ordinary courts, but rather those of employment tribunals exercising statutory powers with respect to unfair dismissals. The *Trade Union and Labour Relations Act* 1974 (UK) contained a provision to the effect that an employee was to be taken to be dismissed if the employee terminated the contract on account of the employer's conduct (which some call "constructive dismissal")[150]. In *Western Excavating (ECC) Ltd v Sharp*[151], the Court of Appeal held that, for the provision to apply, the employer

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144 *Barker v Commonwealth Bank of Australia* (2012) 296 ALR 706 at 757 [324], [330].

145 (2000) 75 ALJR 312; 176 ALR 693; [2000] HCA 64.

146 *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312 at 317 [25]; 176 ALR 693 at 700.

147 (1886) 17 QBD 536 at 539.

148 [1998] AC 20 at 34-35, 45-46.

149 (2005) 222 CLR 44 at 55 [24]; [2005] HCA 15.

150 *Trade Union and Labour Relations Act* 1974 (UK), Sched 1, par 5(2)(c).

151 [1978] QB 761 at 769-770.

must be guilty of conduct which amounted to a significant breach going to the root of the contract of employment.

69 The question for the employment tribunals was what conduct on the part of an employer, which caused the employee to resign, qualified as a breach of this kind. In *Courtaulds Northern Textiles Ltd v Andrew*[152], the Employment Appeal Tribunal accepted that "it was an implied term of the contract that the employers would not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties." The purpose and importance of the term of trust and confidence was explained in *Woods v WM Car Services (Peterborough) Ltd*[153]. Without it, it was said, an employee had no remedy even if his or her employer had behaved unfairly, and so employers could "squeeze out" employees and still avoid a statutory claim for unfair dismissal.

70 The claim in *Malik*, however, did not concern dismissal. The liquidators of the employer, a bank, had already terminated the employment of the two appellants on the ground of redundancy. The employees lodged proofs of debt in the winding up, claiming compensation on the basis that they were unable to secure further employment because of the stigma that attached to them as former employees of a bank which had, for a number of years, carried on its business fraudulently. The matter proceeded upon the basis that the employees were innocent of misconduct.

71 The crucial point in *Malik*, Lord Nicholls of Birkenhead observed[154], concerned whether damages were recoverable. The decision in *Addis v Gramophone Co Ltd*[155] was understood to preclude the recovery of damages by an employee for the manner in which a wrongful dismissal took place, for injured feelings or for any loss sustained because the fact of dismissal itself might make it more difficult for the employee to obtain alternative employment[156]. The decision in *Addis v Gramophone Co Ltd* was not followed in *Malik*, on the basis that the term of trust and confidence had since been developed and was to be implied in all contracts of employment. Lord Steyn said that "[t]he evolution of the implied term of trust and confidence is a fact … It has proved a workable

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152 [1979] IRLR 84 at 85 [10].

153 [1981] ICR 666 at 671-672.

154 *Malik v Bank of Credit and Commerce International SA (In Compulsory Liquidation)* [1998] AC 20 at 37.

155 [1909] AC 488.

156 *Malik v Bank of Credit and Commerce International SA (In Compulsory Liquidation)* [1998] AC 20 at 38.

principle in practice. It has not been the subject of adverse criticism in any decided cases and it has been welcomed in academic writings. I regard the emergence of the implied obligation of mutual trust and confidence as a sound development."[157]

72 The question whether the term of trust and confidence should be recognised was not argued in *Malik*. Its application to contracts of employment was assumed, although it had been applied and developed by the employment tribunals for a very different purpose. As applied by the employment tribunals, in connection with constructive dismissals, the term referred to conduct, on the part of an employer, which caused a breakdown in the relationship between employer and employee such that the employee had no real alternative but to resign. An analogy with the duty that applies to employees is evident. An employer may be placed in a position by the conduct of an employee where dismissal is the only option.

73 Although the term of trust and confidence necessarily referred to conduct occurring prior to the employment relationship coming to an end, the context for its development was a claim, provided by statute, for compensation in the event of termination of the employment. The duty of trust and confidence owed by employees also generally assumes relevance only after dismissal; the conduct in breach of the duty causes the employment relationship to come to an end.

74 The term of trust and confidence was not applied in *Malik* in this way. The term was said to be breached by "trust-destroying conduct"[158], which need not be connected to a termination of employment. The conduct which breached the term in *Malik* was held to be the employer engaging in a corrupt and dishonest business. Lord Nicholls reasoned that, since that conduct would, hypothetically, have entitled the employees to leave their employment had they known of the employer's practices, it constituted a repudiation by the employer of the contract of employment[159].

75 The real question arising from the employees' claims in *Malik* was whether the employer ought reasonably to have foreseen that damage to the employees' prospects of future employment, referred to as "continuing financial loss", was a serious possibility, given the employer's conduct in breach of the

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157 *Malik v Bank of Credit and Commerce International SA (In Compulsory Liquidation)* [1998] AC 20 at 46.

158 *Malik v Bank of Credit and Commerce International SA (In Compulsory Liquidation)* [1998] AC 20 at 34.

159 *Malik v Bank of Credit and Commerce International SA (In Compulsory Liquidation)* [1998] AC 20 at 34-35.

term[160]. However, it was not necessary for the House of Lords to determine the question of recoverability. The proceedings were analogous to strike out applications and questions such as remoteness had not been raised in answer to the claims[161]. It was held that, in principle, there was nothing unreasonable in holding an employer liable for such a loss[162].

76 As has been discussed, the term recognised in *Malik* was of broad application. Later, in *Johnson v Unisys*, the House of Lords identified some difficulties in the application of the term of trust and confidence to claims for wrongful dismissal at common law. In relation to the employment contract itself, Lord Hoffmann observed[163] that any express term permitting termination by an employer on notice without any reason makes it difficult to imply a term, such as the term of trust and confidence, providing for dismissal only for good cause. The problem identified is inconsistency, which has long been understood to preclude implication. His Lordship ventured the opinion that a requirement of fairness and good faith on the part of the employer in the manner of the dismissal might overcome such an obstacle[164], but it was not necessary to resolve that question.

77 The insurmountable difficulty for the application of the term of trust and confidence was the system which had been set up by the legislature to deal with unfair dismissal. Lord Hoffmann observed[165] that the *Industrial Relations Act* 1971 (UK) had introduced a new concept of unfair dismissal, with new remedies, in respect of which exclusive jurisdiction had been given to courts and tribunals other than the ordinary courts. These unfair dismissal provisions were later consolidated in Pt X of the *Employment Rights Act* 1996 (UK), which contained elaborate measures dealing with what constitutes dismissal and the concept of unfairness. The employment tribunal that had jurisdiction under the legislation had power to order reinstatement or compensation.

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160 *Malik v Bank of Credit and Commerce International SA (In Compulsory Liquidation)* [1998] AC 20 at 37.

161 *Malik v Bank of Credit and Commerce International SA (In Compulsory Liquidation)* [1998] AC 20 at 49.

162 *Malik v Bank of Credit and Commerce International SA (In Compulsory Liquidation)* [1998] AC 20 at 36-38.

163 *Johnson v Unisys Ltd* [2003] 1 AC 518 at 540 [42].

164 *Johnson v Unisys Ltd* [2003] 1 AC 518 at 540-541 [43]-[44].

165 *Johnson v Unisys Ltd* [2003] 1 AC 518 at 542-544 [50]-[56].

78 These provisions were in existence when *Malik* was determined; indeed, Lord Nicholls made some reference to them in drawing an analogy with the way in which courts might approach an award of damages[166]. The only relevant difference in the provisions would appear to be that, by the time *Johnson v Unisys* was decided, the limit on the amount of compensation which might be awarded by an employment tribunal for unfair dismissal had been substantially increased[167].

79 In *Johnson v Unisys*, the appellant had been summarily dismissed and had received compensation for unfair dismissal from the employment tribunal. He also brought a common law claim for damages arising from the manner of dismissal, which, he alleged, had caused him to suffer a mental breakdown. Lord Hoffmann observed[168] that an employment tribunal could award such compensation under the statute as it considered to be just and equitable (up to a prescribed limit)[169], which could include compensation for damage to reputation and distress. The statute therefore provided the very remedy which the appellant sought. The courts, in the face of the evident intention of the legislature to provide a remedy, but limit its application and extent, could not construct a general common law remedy arising from unfair circumstances attending dismissal.

80 Although *Malik* did not itself concern a breach of the term of trust and confidence in connection with dismissal, the discussion[170] relating to *Addis v Gramophone Co Ltd* suggests that it was assumed that the term could apply in such circumstances. The decision in *Johnson v Unisys*, however, held that it did not apply in those circumstances, and so denies a substantial area for the operation of the *Malik* term. The only area left for its operation would appear to be claims for damages respecting conduct antecedent to, but unconnected with, termination.

81 The conduct in breach of the term of trust and confidence to which *Malik* refers need not be destructive of the employment relationship in fact, so long as it is conduct of a "trust-destroying" kind. Since *Malik*, the courts have indicated

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166 *Malik v Bank of Credit and Commerce International SA (In Compulsory Liquidation)* [1998] AC 20 at 39.

167 *Johnson v Unisys Ltd* [2003] 1 AC 518 at 543 [53].

168 *Johnson v Unisys Ltd* [2003] 1 AC 518 at 544 [55]-[56], [58].

169 *Employment Rights Act* 1996 (UK), s 123(1).

170 *Malik v Bank of Credit and Commerce International SA (In Compulsory Liquidation)* [1998] AC 20 at 38-39.

that the following may be examples of such conduct: a wrongful suspension[171]; a "capricious" failure on the part of an employer to offer the same, beneficial terms of redundancy[172]; and the improper conduct of a disciplinary process[173].

The decision of the Full Court

82 In the Full Court, only Jessup J applied the test of necessity in determining whether the term of trust and confidence for which the respondent contended should be implied. His Honour concluded that it was not necessary to imply it to prevent the enjoyment of rights conferred by the contract being rendered nugatory or seriously undermined[174]. The majority appears to have adopted[175] the view expressed in *University of Western Australia v Gray*[176], that necessity is an "elusive concept", as a reason for not applying it. The majority favoured the implication of the term of trust and confidence recognised in *Malik*. Since their Honours were speaking of an implication of the kind recognised in *Malik*, they may be taken to have considered an implication of a term by law, rather than one referable to the particular contract.

83 The majority in the Full Court referred[177], with approval, to the statement by a Full Court of the Supreme Court of South Australia in *South Australia v McDonald*[178] that the development of the term of trust and confidence in England is consistent with the contemporary view of the employment relationship. It is policy considerations referable to the nature of the relationship between employer and employee which explain the need for the implied term, the majority observed. It was suggested that, at this point in its development, the content of

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171 *Gogay v Hertfordshire County Council* [2000] IRLR 703; see also *Bliss v South East Thames Regional Health Authority* [1987] ICR 700.

172 *Transco plc v O'Brien* [2002] ICR 721.

173 *Eastwood v Magnox Electric plc* [2005] 1 AC 503 at 529 [34].

174 *Commonwealth Bank of Australia v Barker* (2013) 214 FCR 450 at 530 [339].

175 *Commonwealth Bank of Australia v Barker* (2013) 214 FCR 450 at 463-464 [93], [95].

176 (2009) 179 FCR 346 at 377-379 [141]-[147].

177 *Commonwealth Bank of Australia v Barker* (2013) 214 FCR 450 at 464 [94]-[95].

178 (2009) 104 SASR 344 at 389 [231].

the implied term should be moulded according to the nature of the particular relationship and the facts of the case[179].

84 Turning to the facts of this case, the majority noted[180] that the respondent was a long-term employee of a large corporate employer. Those facts, together with cl 8 of the Employment Agreement (which contemplated that the respondent's employment might be terminated if the appellant was unable to place him in an alternative position), informed the content of the implied term. The majority concluded that the term of trust and confidence required the appellant to take positive steps to consult with the respondent about redeployment[181].

85 There are a number of difficulties with this approach. The requirement of necessity for the implication of a term in a contract, or a contract of a particular kind, cannot be brushed aside as "elusive". It is fundamental to the basis for implications. It is not uncertain. It has the meaning referred to in *Irwin* and in *Byrne*. It has the advantage of providing objectivity to the test employed by the courts.

86 It is not the particular relationship of the parties to the contract which is in question respecting implications by law. It is the relationship of employer and employee more generally which identifies what is necessary to the operation or fulfilment of employment agreements. The relationship of landlord and tenant, the example earlier referred to, necessarily implies that the landlord will ensure that the tenant has quiet enjoyment of the premises the subject of the tenancy and access to that part of the premises rented.

87 Moreover, the reasoning of the majority in the Full Court does not appear to apply the term of trust and confidence recognised in *Malik*, one requiring the appellant not to engage in "trust-destroying conduct". It identifies a positive obligation, on the part of the appellant, to take steps in connection with the process of redundancy, but it does so by reference to an express term of the contract, cl 8.

88 An alternative approach adopted by the majority was based upon the implied duty of co-operation. In this respect, reliance was placed upon the observation of Lord Steyn in *Malik*[182] that the term of trust and confidence may

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179 *Commonwealth Bank of Australia v Barker* (2013) 214 FCR 450 at 465 [108].

180 *Commonwealth Bank of Australia v Barker* (2013) 214 FCR 450 at 465-466 [111].

181 *Commonwealth Bank of Australia v Barker* (2013) 214 FCR 450 at 466 [112], [117].

182 [1998] AC 20 at 45.

have had its origin in the general duty of co-operation between contracting parties. However, as the majority in the Full Court correctly observed[183], the duty of co-operation "is anchored upon the need for one party to take a positive step without which the other party is unable to enjoy a right or benefit conferred upon it by the contract." Once again, the majority identified cl 8 as relevant to the duty.

89 On either approach, the source of the obligation to attempt to redeploy the respondent that was said to found the breach by the appellant was not the term of trust and confidence; it was cl 8 of the Employment Agreement. It would hardly seem necessary to imply an obligation of co-operation to ensure the respondent had the benefit of what cl 8 offered. The clause says, clearly enough, that steps were to be taken in connection with redeployment. In any event, the respondent's case has never been one for breach of cl 8; the proceedings have never been conducted on that basis and the appeal cannot now be approached as if such a claim had been made.

90 The majority in the Full Court did not answer the question whether the implication of a term requiring the appellant to take steps to redeploy the respondent was necessary to give efficacy to the Employment Agreement. The respondent, by notice of contention, seeks to support the conclusion of the majority on this basis. Clause 8 again provides the answer. A term cannot be said to be necessary in this sense if the contract is effective without it[184]. A contract clearly is effective where it already contains a term to the effect sought. The only difference is that the compensation which the respondent would receive under the clause is more limited than the damages sought, but that is not a matter to which the requirement of necessity is addressed. In the Employment Agreement, the parties provided for the very circumstance now sought to be made the subject of an implication.

An application of the term of trust and confidence?

91 It remains to consider the respondent's broader argument that the term of trust and confidence recognised in *Malik* can, and should, be applied to maintain the decision of the Full Court. This involves the question whether the term should apply generally to contracts of employment in Australia.

92 It may immediately be observed that the term of trust and confidence recognised in *Malik* can have no application to claims for common law damages

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183 *Commonwealth Bank of Australia v Barker* (2013) 214 FCR 450 at 467 [122].

184 *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283; *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 605-606.

arising out of dismissals, for the reasons identified in *Johnson v Unisys*. That decision may be taken to acknowledge what Gleeson CJ referred[185] to as the "symbiotic relationship" of the common law and legislation, and that neither operates alone.

93 Commonwealth legislation has made provision for unfair dismissal since 1994[186]. Prior to this, provision was made by State legislation. The system as it existed at the time of the decision in *State of New South Wales v Paige*[187] was described by Spigelman CJ as a "carefully calibrated balancing of the conflicting interests involved".

94 Claims of unfair dismissal are determined by a tribunal[188] which has the power to grant the remedies provided by statute. The test of unfairness has for some time been whether the dismissal is harsh, unjust or unreasonable. Since 2006[189], the definition of dismissal in Commonwealth legislation has included the circumstance where a person is forced to resign from his or her employment because of conduct engaged in by the employer[190].

95 The current legislation places restrictions on when an employee can bring a claim of unfair dismissal where the termination of the employment was a case of "genuine redundancy"[191]. One of the circumstances in which a claim might nevertheless be made is where the employee could have been reasonably redeployed[192], which is the opportunity which the respondent says that he has lost in this case.

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185 *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 532 [31]; [2001] HCA 29.

186 *Industrial Relations Act* 1988 (Cth), Pt VIA, Div 3, introduced by the *Industrial Relations Reform Act* 1993 (Cth), with effect from 30 March 1994. The relevant provisions are now contained in Pt 3-2 of the *Fair Work Act* 2009 (Cth).

187 (2002) 60 NSWLR 371 at 400 [154].

188 Previously known as the Australian Industrial Relations Commission and Fair Work Australia; now the Fair Work Commission.

189 *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth), Sched 1, item 105A.

190 See now *Fair Work Act* 2009, s 386(1)(b).

191 *Fair Work Act* 2009, s 385(d).

192 *Fair Work Act* 2009, s 389.

96 In any event, the respondent is unable to make a statutory claim for unfair dismissal because, since 1994[193], provisions respecting unfair dismissal have not applied to a termination of employment if an employee's wages exceed a certain amount, which the respondent's did[194]. Contrary to the respondent's contention, this does not create a gap which the common law can fill. In *Johnson v Unisys*, Lord Hoffmann noted[195] that certain classes of employees were excluded from the protection of the legislation there in question. Yet, as his Lordship observed[196], it was the evident intention of the Parliament that the statutory remedy provided be limited in its application. Likewise, the Australian Parliament has determined what remedies are to be provided for unfair dismissal and it has determined who may seek them.

97 The area left for the operation of the term recognised in *Malik* is therefore with respect to "trust-destroying conduct" on the part of an employer which does not have the consequence of ending the employment relationship. The respondent suggests that a term by which damages are awarded for "trust-destroying conduct" would promote the maintenance of the employment relationship. The appellant submits to the contrary and that the effect of implying the term of trust and confidence is not likely to be the maintenance of employment relationships, but the greater likelihood of their termination. For instance, an employer, faced with the possibility of a claim for common law damages for wrongfully suspending an employee, or a claim for unfair dismissal for which compensation would be limited, may be inclined to choose dismissal.

98 The term could also work against employers. In the later case of *Eastwood v Magnox Electric plc*[197], Lord Nicholls observed that, because tribunals could not always provide full compensation for a dismissed employee's financial loss, employees and their legal advisors, understandably, were now seeking to side-step those limitations by identifying elements in the events preceding dismissal that could be used "as pegs on which to hang a common law claim". His Lordship considered that the situation merited legislative intervention.

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193 *Industrial Relations Amendment Act (No 2)* 1994 (Cth), s 6.

194 See now *Fair Work Act* 2009, s 382(b)(iii). The threshold is determined in accordance with the Fair Work Regulations 2009 (Cth), reg 2.13.

195 *Johnson v Unisys Ltd* [2003] 1 AC 518 at 543 [52].

196 *Johnson v Unisys Ltd* [2003] 1 AC 518 at 544 [58].

197 [2005] 1 AC 503 at 529 [33].

99 No doubt because there was no issue in *Malik* about whether the term of trust and confidence was to be implied in the employment contracts there in question, discussions of policy were limited to the topic of damages. It may be accepted that policy initially favoured the use of the term of trust and confidence in the context of unfair dismissal claims where the legislation left a gap. However, the potential for the term to create anomalies suggests that the policy of the law is not an appropriate basis for the application of the term.

100 The respondent places some store on the term achieving mutuality with the obligation of fidelity which the law imposes upon employees. It is pointed out that employers have the right to terminate the employment where an employee has acted dishonestly or against their interests, but an employee has no corresponding right. The analogy is not perfect, for the duty of trust and confidence as it applies to employees does not concern the standard of conduct sought to be applied to employers, which, in reality, involves notions of fairness. In any event, where an employer is dishonest in the conduct of its business, *Malik* confirms that an employee would have the same right to terminate the employment; but that right is based on the doctrine of constructive dismissal and does not depend on a term of trust and confidence.

101 The appellant submits that the term is devoid of content and too uncertain to be applied generally. In support of this contention, it points to the fact that the majority in the Full Court did not explain how the obligation to attempt to redeploy the respondent could arise from the term of trust and confidence; rather, their Honours sourced it in the express terms of the Employment Agreement. It may be added that the majority in the Full Court did not apply the test of necessity in implying the term, for the reasons earlier explained.

102 In its original context of unfair dismissal, the term of trust and confidence could be understood to refer to conduct on the part of the employer directed towards, or affecting, the employee, which might be expected to bring about the employee's resignation and therefore the destruction of the employment relationship. Taken out of that context and disconnected from the subsequent action of the employee in terminating the employment, the conduct effectively becomes anything that damages the employment relationship.

103 The English cases referred to above[198], which have applied the term of trust and confidence, have done so by reference to conduct which could be described as unfair towards the employee. It will be recalled that the conduct in question in those cases involved the wrongful suspension of an employee, an employer's improper conduct of disciplinary proceedings and discrimination as between employees. The respondent's written outline of submissions

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198 Referred to at [81] above.

acknowledges that unfairness would be a touchstone for breach of the term of trust and confidence.

104 Fairness in dealings as between contracting parties may be understood as an aspect of a duty of good faith, which has been accepted in other legal systems and is wider than that of honesty. It has been observed[199] that in some legal systems good faith is regarded as a vitally important ingredient for a modern general law of contract, and that this raises the question how other legal systems cope without it.

105 Acceptance of a standard of good faith in all contractual relationships is not confined to civilian legal systems. In the United States, §205 of the *Restatement of the Law Second, Contracts* contains an obligation of good faith and fair dealing. Amongst the meanings of good faith identified by the *Restatement* is that of the Uniform Commercial Code as applied to merchant contracts ("honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade"), although it is recognised that its meaning varies somewhat with the context[200]. In any event, it is the view of some that good faith reflects a standard of conduct rather than operating as a fixed rule[201].

106 In 1766, Lord Mansfield considered that good faith was a governing principle applicable to all contracts and dealings[202]. Aspects of it may be evident in the duty of co-operation referred to in *Mackay v Dick*. However, in more recent times, English law has for the most part turned its face against the

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199 Whittaker and Zimmermann, "Good faith in European contract law: surveying the legal landscape", in Zimmermann and Whittaker (eds), *Good Faith in European Contract Law*, (2000) 7 at 13.

200 American Law Institute, *Restatement of the Law Second, Contracts*, (1979), §205, Comment a.

201 Lücke, "Good Faith and Contractual Performance", in Finn (ed), *Essays on Contract*, (1987) 155 at 166.

202 *Carter v Boehm* (1766) 3 Burr 1905 at 1910 [97 ER 1162 at 1164].

imposition of a general duty of good faith[203], preferring the predictability of a legal outcome in a case to "absolute justice"[204].

107 The question whether a standard of good faith should be applied generally to contracts has not been resolved in Australia[205]. Neither that question, nor the questions whether such a standard could apply to particular categories of contract (such as employment contracts) or to the contract here in issue, were raised in argument in these proceedings. It is therefore neither necessary nor appropriate to discuss good faith further, particularly having regard to the wider importance of the topic.

108 It is sufficient for present purposes to observe that the more specific requirement, deriving from notions of fairness, that an employer must attempt to redeploy an employee before terminating his or her employment does not arise from, and is not an incident of, the legal relationship between employer and employee. Contracts of employment are not rendered futile because of the absence of a term to this effect. To the contrary, it would not be possible for all employers to give effect to such a term. This tells against the application of such a requirement as a universal rule. It cannot be said to be "necessary" in the sense described earlier in these reasons.

109 In summary, the Employment Agreement between the appellant and the respondent does not require for its efficacy the implication of the term of trust and confidence for which the respondent contends. That term is not necessary given the provisions of cl 8. More generally, contracts of employment do not require such an implication for their effective operation.

110 It remains to add that, if such a term were sought to be implied into the Employment Agreement, the problem of inconsistency, to which Lord Hoffmann

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203 The recent decision of Leggatt J in *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] 1 All ER (Comm) 1321 at 1350-1353 [131]-[142] considers the possibility of implying a term of good faith, although arguably only in particular contracts and by a process of construction: see *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (trading as Medirest)* [2013] BLR 265 at 287 [150].

204 Goode, "The Concept of 'Good Faith' in English Law", Paper delivered at Centro di studi e ricerche di diritto comparato e straniero, March 1992, referred to in Whittaker and Zimmermann, "Good faith in European contract law: surveying the legal landscape", in Zimmermann and Whittaker (eds), *Good Faith in European Contract Law*, (2000) 7 at 15.

205 *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45 at 63 [40], 94 [156]; [2002] HCA 5.

alluded in *Johnson v Unisys*, would arise. A general obligation of redeployment prior to termination, for breach of which damages would follow, contradicts the terms of cl 6, which permits the appellant to terminate the employment by giving four weeks' notice or payment in lieu of it. The fact that cl 8 contains a similar requirement in the case of redundancy does not prevent this inconsistency arising, although that latter clause does point to what might have been a basis for relief.

Conclusion and orders

111 The appeal should be allowed.

112 The appellant concedes that the respondent is entitled to damages limited to four weeks' pay, following upon the finding by the primary judge of a breach of cl 6 of the Employment Agreement. Accordingly, paragraphs 1 and 2 of the orders of the Full Court of the Federal Court should be set aside (save as to costs), along with paragraphs 1 and 2 of the orders of the primary judge. In lieu of the orders set aside, there should be an order that judgment be entered for the respondent in the sum of $11,692.31 plus interest.

113 GAGELER J. Contractual terms implied in fact are "individualised gap fillers, depending on the terms and circumstances of a particular contract". Contractual terms implied in law, of the kind in issue in the present case, are "in reality incidents attached to standardised contractual relationships" operating as "standardised default rules"[206]. The former are founded on what is "necessary" to give "efficacy" to the particular contract. The latter are founded on "more general considerations"[207], which take into account "the inherent nature of [the] contract and of the relationship thereby established"[208].

114 Determination by a court of whether or not a new term should be implied in law into a particular class of contracts has often itself been described as involving the application of a "test" of "necessity". The sense in which "necessity" is used in this context is that of "something required in accordance with current standards of what ought to be the case, rather than anything more absolute"[209]. The requisite inquiry is informed by a consideration of what is needed for the effective working of contracts of that class[210]. But the inquiry is not exhausted by that consideration[211]; it does not exclude considerations of justice and policy[212]. Couching the ultimate evaluation in terms of necessity serves usefully to emphasise this and no more: that a court should not imply a new term other than by reference to considerations that are compelling.

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206 *University of Western Australia v Gray* (2009) 179 FCR 346 at 375 [135] quoting *Society of Lloyd's v Clementson* [1995] CLC 117 at 131-132.

207 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 345-346; [1982] HCA 24 quoting *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 at 576 as endorsed in *Liverpool City Council v Irwin* [1977] AC 239 at 255.

208 *Liverpool City Council v Irwin* [1977] AC 239 at 254.

209 *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 261; *Devefi Pty Ltd v Mateffy Pearl Nagy Pty Ltd* (1993) 113 ALR 225 at 240.

210 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 450; [1995] HCA 24.

211 *Castlemaine Tooheys Ltd v Carlton & United Breweries Ltd* (1987) 10 NSWLR 468 at 489.

212 *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 at 194-197; *University of Western Australia v Gray* (2009) 179 FCR 346 at 377 [142].

115 The reasons for judgment of Jessup J in dissent in the Full Court of the Federal Court demonstrate that the term of mutual trust and confidence in contracts of employment, now implied in law in the United Kingdom, ought not to be imported into the common law of Australia. Without repeating the detail of his Honour's exhaustive analysis, the critical points highlighted by it can be summarised as follows.

116 First, the emergence of the implied term in the 1970s and 1980s[213], and then its confinement in 2001[214], were the product of particular statutory circumstances in the United Kingdom[215]. Those statutory circumstances have no analogue in Australia[216]. The emergence of the implied term was not capable of being explained in the United Kingdom, and would not be capable of being explained here, merely as the mutualisation of the employee's duty of fidelity to the employer[217] or as a principled development of the implied duty of co-operation between parties to a contract[218].

117 Second, framed as the implied term is in passive language, descriptive of the overall nature of the employment relationship, the prescriptive content of the implied term is not spelt out in its terms[219]. This inherent uncertainty about what the obligation imposed by the implied term actually requires of the employer and of the employee gives the implied term, as Jessup J put it, "the potential to act as a Trojan horse in the sense of revealing only after the event the specific prohibitions which it imports into the contract"[220]. The implied term has the

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213 See *Eastwood v Magnox Electric plc* [2005] 1 AC 503 at 522 [4]-[7].

214 *Johnson v Unisys Ltd* [2003] 1 AC 518.

215 *Industrial Relations Act* 1971 (UK); Pt X of the *Employment Rights Act* 1996 (UK).

216 *Commonwealth Bank of Australia v Barker* (2013) 214 FCR 450 at 484-495 [211]-[235].

217 *Commonwealth Bank of Australia v Barker* (2013) 214 FCR 450 at 515-518 [296]-[305].

218 *Commonwealth Bank of Australia v Barker* (2013) 214 FCR 450 at 518-522 [306]-[315].

219 *Commonwealth Bank of Australia v Barker* (2013) 214 FCR 450 at 522-527 [317]-[330].

220 *Commonwealth Bank of Australia v Barker* (2013) 214 FCR 450 at 531 [340].

potential in some circumstances to circumvent established limits of common law and equitable remedies for breach of more conventional terms[221].

118 Finally, but no less importantly, in its intersection with the law of unfair dismissal, the implied term would intrude a common law policy choice of broad and uncertain scope into an area of frequent, detailed and often contentious legislative activity[222]. Commonwealth and State unfair dismissal legislation has produced, and has over time reproduced and adjusted, "a particular and carefully calibrated balancing of the conflicting interests involved namely, between preserving the expectations of employees on the one hand and enabling employers to create jobs and wealth, on the other hand"[223]. Gleeson CJ observed[224]:

> "Legislation and the common law are not separate and independent sources of law; the one the concern of parliaments, and the other the concern of courts. They exist in a symbiotic relationship."

Common law obligations in contract, like common law obligations in tort, ought not to be developed by courts other than in a manner that is sensitive to their interaction with legislation[225].

119 As to whether a term of mutual trust and confidence can be implied in fact in the circumstances of the present case, and as to whether there was a breach by the employer of the implied duty of co-operation between parties to a contract, I agree with and have nothing to add to the joint reasons for judgment.

120 I agree with the orders proposed in the joint reasons for judgment.

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221 *Commonwealth Bank of Australia v Barker* (2013) 214 FCR 450 at 527 [331]. See also *McDonald v Parnell Laboratories (Aust) Pty Ltd* (2007) 168 IR 375 at 399 [84].

222 *Commonwealth Bank of Australia v Barker* (2013) 214 FCR 450 at 527-529 [332]-[334].

223 *State of New South Wales v Paige* (2002) 60 NSWLR 371 at 400 [154].

224 *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 532 [31]; [2001] HCA 29.

225 *Sullivan v Moody* (2001) 207 CLR 562 at 576 [42], 581 [55]; [2001] HCA 59. See also *State of New South Wales v Paige* (2002) 60 NSWLR 371 at 395 [132]; *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (2008) 72 NSWLR 559 at 574-575 [63]-[64].