

**ROYAL BOTANIC GARDENS & DOMAIN TRUST v SOUTH SYDNEY CITY COUNCIL
[2002] HCA 5****High Court of Australia – 14 February 2002****FACTS**

The Royal Botanic Gardens and Domain Trust (“the Trustees”) entered into a lease with the Council of the City of Sydney (“the Council”) in relation to an area of land called the Domain, which included a parking station and footway. The term of the lease was 50 years. Clause 1 of the lease provided that the yearly rent for the first three years was \$2000. Clause 4(b) provided that the yearly rent payable subsequent to the first three years was to be determined by the Trustees having regard to “additional costs and expenses” arising out of construction, operation and maintenance of the parking station. The Council instituted proceedings claiming that the Trustees had regard to other additional costs and expenses not contained with clause 4(b). The Trustees contended that it was implied in the lease that the rent payable must be fair and reasonable.

ISSUE

Whether there was an implied term of good faith and reasonableness in the lease.

FINDING

The High Court of Australia declined to take the opportunity to consider the boundaries of the duty of good faith and to lay down a framework which may have contributed to the formulation of the scope and operation of that duty.

QUOTE

Glesson CJ, Gaudron, McHugh, Gummow and Hayne JJ at 17 and 18 said:

The second matter ... concerns the debate in various Australian authorities concerning the existence and content of an implied obligation or duty of good faith and fair dealing in the contractual performance and the exercise of contractual rights and powers. ... It emerged in argument in this Court that both sides accepted the existence of such an obligation... The result is that, whilst the issues respecting the existence and scope of a “good faith” doctrine are important, this is an inappropriate occasion to consider them.

Kirby J at 32 and 33 said:

The Court was taken to case law both in this country... and overseas... as well as to academic commentary... to demonstrate a growing tendency to imply into private contractual dealings a covenant of good faith and fair dealing... As expressed in some United States decisions, this is a principle that is not confined to an obligation to exercise express contractual powers fairly and reasonably. In some parts of the United States, the obligation has been accepted as a general implied contractual term in its own right. However, in Australia, such an implied term appears to conflict with fundamental notions of *caveat emptor* that are inherent (statute and equitable intervention apart) in common law conceptions of economic freedom. It also appears to be inconsistent with the law as it has developed in this country in respect of the introduction of implied terms into written contracts which the parties have omitted to include. In the present appeal, it is unnecessary to explore this question further.

Callinhan J at 52 said:

In view of the conclusion I have reached, it is unnecessary to answer the questions raised by the rather far-reaching contentions of the appellant, and for which, it says, *Alcatel Australia v Scarcella* (1998) 44 NSWLR 349; 9 BPR 16,385 and *Burger King Corp v Hungry Jack’s Pty Ltd* [2001] NSWCA 187 stand as authorities: whether both in performing obligations and exercising rights under a contract, all parties owe to one another a duty of good faith; and, the extent to which, if such were to be the law, a duty of good faith might deny a party an opportunistic or commercial exercise of an otherwise lawful commercial right.

IMPACT

The boundaries of the duty of good faith have yet to be fully determined but the Courts expect fairness and reasonableness from the parties.

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