

# In the Loop

The Hicks Oakley Chessell Williams Newsletter

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## Implied 'good faith' in employment contracts

A recent decision of the Supreme Court of Western Australia (*Rogan-Gardiner v Woolworths*) confirms that employers usually owe a duty of good faith to their employees.

Ms Rogan-Gardiner had been the state accountant for Woolworths in Western Australia for eight years when in 2002, Woolworths undertook a nationwide restructure. Ms Rogan-Gardiner's position was abolished whilst she was on maternity leave.

Before Ms Rogan-Gardiner returned to work, Woolworths offered her a number of alternative positions with comparable scope to her previous role, however she declined each of them. When Ms Rogan-Gardiner returned to work, Woolworths made further offers, which she also declined. Her employment with Woolworths was eventually terminated summarily.

Ms Rogan-Gardiner alleged Woolworths had breached terms implied in her employment contract requiring Woolworths to:

- act in good faith towards her; and
- give reasonable notice of her termination.

Ms Rogan-Gardiner also claimed damages for stress, depression and anxiety caused by the manner of her dismissal.

### Good faith

The Court accepted that there was an implied term of good faith in Ms Rogan-Gardiner's employment contract, but found that Woolworths had not breached it. The Court held that:

- the purpose of a good faith term was fundamentally inconsistent with the termination of the employment relationship;
- the term could not operate in a manner that would restrict the right of an employer to terminate employment; and
- where an employee claims for loss on the basis of an alleged breach of the good faith term it will be necessary to prove that such loss was caused by conduct of the employer which preceded, and was independent of, any subsequent dismissal.

In finding that Woolworths had not breached the implied term, the Court noted that Woolworths offered Ms Rogan-Gardiner three alternative positions commensurate with her skills and experience. The Court also found that the offers were

genuinely made with a view to retaining her services on reasonable terms.

### Reasonable notice

Ms Rogan-Gardiner's contract was for an indefinite duration. In the absence of any contrary term, a contract of service will contain an implied term that either party can bring the contract to an end by giving reasonable notice. The period required depends on various circumstances, including:

- the position held by the employee;
- the importance of the job, size of the salary and the professional standing of the employee;
- the nature of the employment;
- the length of service, the employee's age, qualifications and experience;
- the degree of job mobility and prospects of future employment for the employee; and
- the time it would take for the dismissed employee to obtain further employment.

The Court considered that the appropriate notice period in Ms Rogan-Gardiner's case was four months, and she was awarded damages on the basis of her salary and benefits for this period.

### What employers should know

- Generally, employment contracts will contain an implied term of good faith. i.e. an unwritten term; that *"an employer will not, without reasonable and proper cause, act in a manner calculated or likely to cause serious damage to a relationship of trust and confidence between it and its employee"*.

However, this term will apply only to conduct *during employment* and not to dismissal or the manner of dismissal.

- Where an employment contract does not contain a contrary term, a period of 'reasonable notice' of termination will be implied. For senior employees, such notice periods can be between four and 12 months.
- Employers should ensure employment contracts deal expressly with notice, particularly those for senior employees.

For further information please contact Matthew Hicks, Harvey Bowlit or Michael Kontoudis.

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## Financial agreements with your (intended) partner

THE division of assets at the end of a relationship can be a stressful time for all concerned. One way to alleviate the stress of financial issues on the breakdown of a relationship is to enter into a Financial Agreement with your (intended) partner.

Below, are three common misconceptions about the nature and purpose of Financial Agreements.

### 1. Financial Agreements are not worth the paper they're written on and are easily set aside by the Courts."

Under the provisions of the *Family Law Act 1975* (Cth) there are only six grounds on which a Financial Agreement can be set aside by a Court:

- i. fraud;
- ii. failure to disclose relevant financial information;
- iii. creditors' petitions;
- iv. unconscionability;
- v. like causes of action;
- vi. impracticality and change in circumstances of the parties will cause hardship to children of the relationship.

Interestingly, applications to the Court for orders to set aside Financial Agreements are very uncommon.

## Is civil litigation changing for the better?

ON 1 January 2011 certain provisions of the *Civil Procedure Act 2010* (Vic) (Act) came into effect. These provisions affect a variety of persons involved in civil litigation in Victoria.

The intended purpose of the Act is to regulate the conduct of civil proceedings in the Supreme Court, County Court and Magistrates' Court to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.

One of the ways in which the Act seeks to achieve this object is by imposing duties and 'overarching obligations' on persons involved in litigation, including parties to litigation and their legal representatives, among others.

Significantly, all parties must personally certify that they have read and understood the 'overarching obligations' set out in sections 16-26 of the Act. Broadly, these obligations include that a party to litigation:

- owes a 'paramount duty' to the Court to further the administration of justice (which trumps your own interests);
- must act honestly at all times and must not engage in conduct in a civil proceeding which misleads or deceives;

### 2. "There are precedents for Financial Agreements available on the internet, why should I pay a solicitor to draft a financial agreement for me?"

Family law is not a "black and white" area of the law. Every person and every relationship is different.

It is advisable to instruct a family lawyer to draft your agreement which intelligently and lawfully takes into account your individual circumstances, needs and goals. In addition a family lawyer will be knowledgeable of recent changes in the law which may affect how a Financial Agreement is drafted.

### 3. "Financial Agreements remove the 'romance' from a relationship and suggest lack of trust in the other partner."

A Financial Agreement is like a motor vehicle insurance policy. When a person insures their car, they do so in a bid to avoid the consequences that arise from having an accident whilst driving an uninsured vehicle. Few people believe insuring their car makes a negative statement about their driving abilities.

Amanda Rajah  
Family Lawyer

"Who needs marriage? Why not cut out the middle man? Find someone you hate and give them a house"

Kenny  
(Shane Jacobson)  
from the film,  
"Kenny"

- must not make a claim (or respond to a claim) in a civil proceeding in a way which is frivolous, vexatious, an abuse of process, or does not have a proper basis;
- must co-operate with other parties and the Court in relation to the conduct of a civil proceeding, and take reasonable steps to act promptly and minimise delay;
- must make reasonable attempts to resolve the dispute by agreement;
- must make reasonable endeavours to ensure that the costs incurred in the course of the litigation are reasonable and proportionate to the complexity of the dispute and the amount in dispute; and
- must disclose the existence of important documents which are critical to the resolution of the dispute as early as reasonably possible.

If a party is found to have breached any of the above obligations, they may be liable for costs orders or other penalties.

However, as this Act is still in its infancy, we are yet to see whether these new obligations will succeed in improving the way civil disputes are resolved.

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