SUPREME COURT OF QUEENSLAND

CITATION:	*The HMW Accounting & Financial Group v McPherson and Ors* [2020] QSC 3
PARTIES:	**THE HMW ACCOUNTING & FINANCIAL GROUP PTY LTD** ACN 078 923 216 (plaintiff) **v** **CRAIG McPHERSON** (first defendant) **JAMES HOEFT** (second defendant) **MH PRIVATE PTY LTD** ACN 617 190 066 (third defendant)
FILE NO:	3261 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	29 January 2020
DELIVERED AT:	Brisbane
HEARING DATE:	23 September 2019
JUDGE:	Ryan J
ORDERS:	**1. The application for strike out is dismissed.** **2. Costs reserved.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – DISCLOSING NO REASONABLE CAUSE OF ACTION OR DEFENCE – where the plaintiff has commenced proceedings seeking to enforce the restraint and confidentiality provisions of their employment contracts – where the plaintiff applies to strike out the defence argument as disclosing no reasonable ground of defence – whether it is clear that there can be no reasonable (or tenable) defence based on a term that the plaintiff was not to act unlawfully, or contrary to the professional code of ethics - where the plaintiff relied on the decision of *Commonwealth Bank of*

Australia v Barker (2014) 253 CLR 169 in support of proposition that a term not to conduct business unlawfully is not to be implied into employment contracts, in law or in fact – where it cannot be said that a case based on the implication of a term not to conduct business unlawfully is untenable because of the decision in *Barker* – where the pleadings raise a reasonably arguable defence that a term not to conduct business unlawfully is to be implied in fact into the employment contracts – where it would not be unreasonable to argue that a clause requiring the defendants (as professional employees) to abide by all policies, including a code of ethics, obliged the plaintiff (through its principals) to abide by the code of ethics as well - where that is not to say that the defendants' arguments will ultimately succeed but it is not considered unarguable or something which should not be placed before a court in the ordinary way.

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – IMPLIED TERMS – GENERALLY – whether there is an implied term in the employment contract that business not be conducted unlawfully or contrary to the professional code of ethics – whether the implication of a term not to conduct business unlawfully is necessary to give business efficacy to the employment contracts – where the contracts fall within the class of contracts for the employment *of professionals by professionals* who are bound by professional obligations - whether a clause within the employment contracts requiring the defendants to abide by all policies of the business, including a code of ethics, imposed mutual obligations on the parties to the contract, all of whom were professionals, to conduct themselves in accordance with the professional code of ethics.

Aurizon Network Pty Ltd v Glencore Coal Queensland Pty Ltd & Ors [2019] QSC 163
Bonney v Hartmann [1924] St R Qd 232
BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266
Commonwealth Bank of Australia v Barker (2013) 214 FCR 450
Commonwealth Bank of Australia v Barker (2014) CLR 169
Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640
General Steel Industries Inc v Commissioner for Railways (NSW) & Ors (1964) 112 CLR 125
Goldman Sachs JBWere Services Pty Ltd v Nikolich [2007] FCAFC 120
Gramotnev v Queensland University of Technology (2015) 251 IR 448

Gramotnev v Queensland University of Technology (No 2) [2019] QCA 108
Gramotnev v Queensland University of Technology [2013] QSC 158
Gramotnev v Queensland University of Technology [2015] QCA 127
Hawkins v Clayton (1988) 164 CLR 538
Heimann v Commonwealth (1938) 38 SR (NSW) 691
Hospital Products Ltd v United States Surgical Corp (1984) 156 CLR 41
Malik v Bank of Credit and Commerce International SA (in liq) [1998] AC 20
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104
Riverwood International Australia Pty Ltd v McCormick (2000) 177 ALR 193
Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596
Yousif v Commonwealth Bank of Australia (2010) 193 IR 212

COUNSEL: D Pyle for the plaintiff
G Handran with G Dietz for the defendants

SOLICITORS: Dowd & Co for the plaintiff
Taylor David Lawyers for the defendants

Table of Contents

Introduction 6
The relevant paragraphs of the defence 7
Paragraphs 25A(g) and 25G 8
Relevant principles and primary question 10
Overview of the decisions of the House of Lords in *Malik,* and the High Court in *Barker* 10
Malik v Bank of Credit and Commerce International SA (in liq) [1998] AC 20 10
The plaintiff's "Barker" argument 12
Commonwealth Bank of Australia v Barker (2014) 253 CLR 169 13
The plurality's reasons 15
Kiefel J's reasons 18
Gageler J's reasons 23
The way in which the parties framed their arguments 24
The No Unlawfulness Term – whether reasonably arguable that it ought to be implied in law 25
Plaintiff's submissions 25
Defendants' submissions 26
Discussion and conclusion 28
The No Unlawfulness Term – whether reasonably arguable that it ought to be implied in fact 32
Plaintiff's submissions 34
Defendants' submissions 36
Discussion and conclusion 37
Charter Term 40
Code Term 42
Plaintiff's submissions 42
Defendants' submissions 43
Discussion and conclusion 44
Good Faith Term 49
Plaintiff's submissions 49
Defendants' submissions & consideration 49
Summary 50

Introduction

[1] The plaintiff, HMW Accounting and Financial Group Pty Ltd ('HMW'), is an accounting firm. It is controlled by Mr Catalano, Mr Whitelaw and Mr Wallace.

[2] Mr McPherson and Mr Hoeft, the first and second defendants, are HMW's former employees. The third defendant, MH Private Pty Ltd, is their new accounting firm.

[3] The plaintiff has commenced proceedings against the defendants, seeking to enforce the restraint and confidentiality provisions of their employment contracts.

[4] The defendants' primary position is that no enforceable employment contracts were made between HMW and the first and second defendants.

[5] In the alternative, if enforceable employment contracts were made, the defendants assert that the plaintiff breached certain implied terms of those contracts, with the consequence that their restraint and confidentiality provisions ought not to be enforced because to do so would be (among other things) unconscionable or contrary to public policy.

[6] The implied terms of the contract which the defendants allege the plaintiff breached are –

1. The implied term that HMW would not operate its business *unlawfully* and further, or in the alternative, *contrary to* the Charter, By-Laws or Regulations of the Institute of Chartered Accountants Australia and New Zealand; and
2. A term implied by clause 17 of the contracts, which required the plaintiff to *conduct its practice in accordance with the Code of Ethics of the Institute*, including paragraphs 150.1 and 200.2 of the Code; and
3. The implied term that HMW would conduct itself in *good faith*.

[7] The plaintiff applies to strike out the paragraphs of the amended defence which rely upon the implied terms in 1 and 2 above. The plaintiff submits that no such terms are implied terms of the employment contracts, nor are they the subject of any recognised duty. Therefore the paragraphs of the amended defence which assert those terms (and other paragraphs relevant to the assertion of those terms) should be struck out as disclosing no reasonable ground of defence.

[8] For the purposes of this application, the plaintiff accepts that the good faith term is arguable. However, it seeks the striking out of matters pleaded in the defence which, it submits, cannot constitute breaches of that term, or any like duty.

[9] Generally, the defendants submit that the law concerning the implication of the terms in 1 and 2 above is not clear enough to warrant the striking out of the relevant parts of their pleadings. Further, the defendants submit, striking out the relevant paragraphs would not reduce delay or costs (if the reduction in delay or costs was a relevant

consideration). Nor would striking out the relevant paragraphs serve the interests of justice.

The relevant paragraphs of the defence

[10] The plaintiff seeks an order striking out –

- paragraphs 1(e), 25(b), 25(d) and 25A(e) of the amended defence, which concern terms which the plaintiff says are not implied terms of the employment contracts nor the subject of any recognised duty; and
- paragraphs 25A(g) and 25G of the amended defence, which the plaintiff says concern matters which cannot constitute a breach of the good faith term.

Paragraphs 1(e), 25(b), 25(d) and 25A(e)

[11] Paragraph 1(e) asserts that each of Catalano, Wallace and Whitelaw were obliged to carry on the conduct of their accounting practice in compliance with the ICAA Supplemental Charter, ICAA By Laws and ICAA Regulations, which included compliance with the Code of Ethics of the Australian Accounting Standards Board and the Auditing and Assurance Standards Board.

[12] Paragraphs 1(e)(3)(B) and (C) assert that they were obliged to avoid any act or omission which may discredit the accounting profession; and not knowingly engage in any business, occupation or activity that might impair the integrity, objectivity or good reputation of the profession.

[13] Paragraph 25 of the amended defence responds to paragraph 25 of the statement of claim which states –

> Mr McPherson and Mr Hoeft owed the following duties to HMW which were implied in the Employment Contracts as a matter of law including by reason of the *Corporations Act* 2001 (Cth):
>
> (a) A duty of good faith and fidelity for the duration of their employment by HMW (the **Duty of Good Faith**);
>
> (b) A duty not to retain, without the approval of HMW, any profit or property the opportunity for the acquisition of which was furnished by Mr McPherson and Mr Hoeft's employment with HMW (the **Profit Duty**);
>
> (c) A duty not to compete with HMW's business during the course of Mr McPherson and Mr Hoeft's employment by HMW without the consent of HMW upon full disclosure of the proposed competition (the **Competition Duty**);
>
> (d) A duty not to divulge HMW's confidential information or to use it in a way that could be detrimental to HMW (the **Confidentiality Duty**).

[14] Under the heading "Unenforceable employment agreements", the relevant parts of paragraph 25 of the defence state –

> 25. As to paragraph 25:
>
> (a) Do not plead as the allegations are questions of law;
>
> (b) Further or in the alternative to the conclusions of law, say it was an implied term of their employment with HMW that HMW (as employer) would not, or alternatively HMW owed them a duty not to, operate its business and carry on practice ~~in a corrupt or dishonest way~~ unlawfully, and further or alternatively contrary to the Charter, By-Laws or Regulations.
>
> **Particulars**
>
> Such term or duty was implied:
>
> (i) Due to the particular class of contract, namely employment;
>
> (ii) Alternatively, in fact, to give business efficacy to the contracts of employment.
>
> …
>
> (d) Further or in the alternative, say clause 17 of the Employment Contracts provided to the effect that HMW, by its professional team members, would conduct the practice in accordance with the Code of Ethics and, thereby, in compliance with parts 150.1 and 200.2 thereof.
>
> **Particulars**
>
> The term is:
>
> (a) contained in a document described as "Office Policies and Procedures" (the **Policy**);
>
> (b) constituted by the terms of "Ethical Requirements", in dot point 2 thereunder;
>
> (c) expressly incorporated by reference in clause 17.

[15] The amendment of paragraph 25(b) of the amended defence, by way of deleting "in a corrupt or dishonest way" and substituting, in lieu thereof, "unlawfully, and further or alternatively contrary to the Charter, By-Laws or Regulations", is significant to the plaintiff's argument.

Paragraphs 25A(g) and 25G

[16] Under the heading "The corrupt and dishonest business of HMW", the relevant paragraphs state –

25A. During the Employment Contracts, HMW operated its business ~~in a corrupt or dishonest way in that~~ and carried on the practice as follows:

…

(e) Catalano held ~~his~~ an investments through his parents' self managed superannuation fund, which he controlled, for the purpose of avoiding and/or minimising tax, and thereby, contrary to 150.1, and further or alternatively, 200.2 of the Code of Ethics;

Such matters are inferred from the following: [the defence recited alleged conversations between Hoeft and Catalano and other facts said to provide the basis for the allegation in (e)]

…

(g) In relation to a client or referrer of work to HMW:

(i) Before in or about July 2016, he was employed by a law firm in Brisbane (the **Brisbane Firm**);

(ii) In or about July 2016, he formed his own law firm (the **New Firm**);

(iii) He had a restraint of trade;

(iv) There was, (or had been) an employee (the **Employee**) of the Brisbane Firm;

(v) Whitelaw and Catalano established "Wallace HMW Legal" in or about July 2016 to employ the Employee;

(vi) All costs associated with the Employee were, or were to be, met by the New Firm;

(vii) The Employee subsequently worked from the office of the New Firm;

Particulars

Particulars dated 27 April 2018 delivered with this defence.

…

25G. As to the matters in 25A(g):

(a) they are evinced by or are to be inferred from the following:

[the defence recited the facts of certain conversations and other facts said to provide the basis for the allegation.]

Relevant principles and primary question

[17] The principles governing this application are those stated in *General Steel Industries Inc v Commissioner for Railways (NSW) & Ors*,[1] summarised by the plaintiff in its outline as follows –

- The jurisdiction to summarily terminate an action is to be sparingly employed and is not to be used except in a clear case when the lack of a cause of action is clearly demonstrated; and
- The exercise of the jurisdiction should not however be reserved for those cases where argument is unnecessary to evoke the futility of the allegations made. Argument, even if extensive, may be necessary to demonstrate that the allegation is so clearly untenable that it could not possibly succeed.

[18] The primary question in this case is whether it is clear that there can be no reasonable (or tenable) defence based on a term that the plaintiff was not to act unlawfully, or contrary to the Charter, said to be implied by law or in fact into the defendants' HMW employment contracts. A reasonable defence is one with some chance of success on the basis of the allegations pleaded.

Overview of the decisions of the House of Lords in *Malik,* and the High Court in *Barker*

[19] Paragraph 25(b) of the defence originally asserted that it was an implied term of the employment contracts that the plaintiff would not, or alternatively, owed the defendants a duty not to, operate its business in a corrupt or dishonest way.

[20] An employer's obligation not to operate business in a corrupt or dishonest way was considered by the House of Lords in *Malik v Bank of Credit and Commerce International SA (in liq)*.[2] My acceptance or rejection of the plaintiff's arguments about the way in which *Malik* and the decision of the High Court which did not follow it (*Barker*) ought to be understood is critical to the outcome of the present application.

Malik v Bank of Credit and Commerce International SA (in liq) [1998] AC 20

[21] In the summer of 1991, the Bank of Credit and Commerce International collapsed. Mr Malik and another employee, Mr Mahmud, were summarily dismissed by the bank's liquidators on the ground of redundancy. In the winding up of the bank, Mr Malik and Mr Mahmud provided proofs of debt, claiming damages for breach of contract by way

---

1 (1964) 112 CLR 125.
2 [1998] AC 20.

of compensation for the alleged stigma attaching to them as former employees of the (corrupt and dishonest) bank.

[22] The liquidator rejected their proofs of debt.

[23] They appealed to the court against the liquidator's decision. A trial on a preliminary issue was directed – namely, whether the evidence of Mr Malik and Mr Mahmud disclosed a reasonable cause of action or sustainable claim in damages.

[24] The parties agreed at first instance, and in the Court of Appeal, that the employees' contracts of employment contained an implied term to the effect that the bank would not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee (the implied term of trust and confidence).

[25] At first instance, and in the Court of Appeal, the employees were unsuccessful. They were successful in the House of Lords.

[26] On appeal to the House of Lords, their Lordships were asked to assume that the bank operated in a corrupt and dishonest manner; its corruption and dishonesty became widely known; Mr Malik and Mr Mahmud were at a disadvantage in the labour market because of the stigma of their association with the bank; and they suffered loss as a consequence of that stigma.

[27] The House of Lords was required to consider whether, if there was a breach of the implied term of trust and confidence, damages were recoverable for it. The House of Lords was not required to consider whether such a term was implied in contracts of employment.

[28] In Lord Nicholls' view, the question whether damages were recoverable for breach was "best approached"[3] by focusing on the conduct about which there was complaint – namely, that the bank operated its business dishonestly and corruptly.

[29] Lord Nicholls considered that, intuitively, an innocent employee could not be expected to have to continue to work in a corrupt and dishonest business. It went without saying that, in any ordinary contract of employment, an employee cannot be taken to have agreed to work in furtherance of a dishonest business.

[30] As a matter of legal analysis, the innocent employee's entitlement to leave derived from the bank's being in breach of a term of the contract which the employee was entitled to treat as a repudiation by the bank of its contractual obligations. His Lordship continued (my emphasis) –[4]

> In other words, and this is the necessary corollary of the employee's right to leave at once, the bank was under an implied obligation to its employees **not**

---

3 [1998] AC 20, per Lord Nicholls of Birkenhead, at 34.
4 At 34 - 35.

> **to conduct a dishonest or corrupt business**. This implied obligation is **no more than one particular aspect of the portmanteau, general obligation** 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.

[31] Lord Steyn characterised the assertion that the bank had been operated in a corrupt and dishonest manner as "the foundation" of the claim for damages for breach of "the implied contractual obligation of mutual trust and confidence".[5]

[32] The House of Lords concluded that a breach of the implied term occurred when the proscribed conduct took place. In *Malik*, the breach was by way of the bank's operating a corrupt and dishonest business. The employee was entitled to treat that conduct as a repudiatory breach and leave the employment.[6] That remedy was not available to an employee who did not learn of the proscribed conduct until after his or her employment had ceased but in the ordinary course, the breach entitled the innocent employee to damages.

[33] Whether those damages *could* include damages for the financial loss suffered by the employees because they were "handicapped in the labour market in consequence of [the bank's] corruption" would depend on whether damage of that kind was reasonably foreseeable[7] (as well as considerations of remoteness and mitigation). Even though there were "formidable" obstacles to the success of a claim for "stigma compensation",[8] the assumed facts disclosed a good cause of action.

[34] Thus, *Malik* established the potential for a claim in damages (in the United Kingdom) for breach of the mutual obligation, implied in employment contracts, that employers and employees must not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy the relationship of trust and confidence between them.

The plaintiff's "Barker" argument

[35] Mr Barker, an Australian, attempted to rely upon that implied mutual obligation in his claim against the Commonwealth Bank for damages for breach of his employment contract. He successfully did so at first instance and on appeal. However, the bank succeeded in the High Court. After considering *Malik*, the High Court held that a term of mutual trust and confidence should not be implied, in law or in fact, in Mr Barker's employment contract: *Commonwealth Bank of Australia v Barker*.[9] That case is considered in more detail below.

[36] The plaintiff argues that *Barker* provides the answer to the primary question in this case. The plaintiff argues, in effect, that –

---

5 Per Lord Steyn at 43.
6 Although he or she was not obliged to leave.
7 Lord Nicholls at 37.
8 Lord Steyn at 53.
9 (2014) 253 CLR 169.

- the amendment to paragraph 25(b) of the defence did not change the character of the term originally asserted (in other words, asserting that the contracts contained a term that the plaintiff was not to conduct its business unlawfully was the equivalent of asserting that the contracts contained a term that the plaintiff not conduct business in a corrupt or dishonest way);
- as per *Malik*, the obligation not to conduct business in a corrupt or dishonest way is an aspect of the general obligation of mutual trust and confidence;
- the equivalent term now asserted – not to conduct business unlawfully – is (equivalently) an aspect of the general obligation of mutual trust and confidence;
- as per *Barker*, the general term is not to be implied into employment contracts in Australia;
- it follows that *no aspect* of the general term is to be implied into employment contracts; and thus
- a term not to conduct business unlawfully is not to be implied into employment contracts, in law or in fact.

[37] The defendants submit that *Barker* does not decide the point.

Commonwealth Bank of Australia v Barker (2014) 253 CLR 169

[38] Mr Barker was an employee of the Commonwealth Bank. On 2 March 2009, he was told that his position was to be made redundant and, if he were not redeployed within the bank within four weeks, his employment would be terminated.

[39] In respect of Mr Barker, the bank did not comply with its Redeployment Policy. Mr Barker was not told about an alternative position within the bank until 26 March 2009. He was not contacted by the recruitment consultant engaged to recruit for that position and the possibility of his retraining for that position was not mentioned to him.

[40] The bank's Redeployment Policy was contained in its HR Reference Manual, which stated that its terms did not form any part of an employee's contract of employment. Mr Barker's employment contract contained clause 8, which stated that if his position became redundant, and the bank was unable to place him into an alternative position in keeping with his skills and abilities, then he would be paid certain compensation.

[41] Mr Barker's employment was terminated for redundancy on 9 April 2009. He was paid his retrenchment entitlements as per his employment contract.

[42] Relying upon *Malik*, Mr Barker sued the Commonwealth Bank, alleging breaches of his employment contract including a breach of the implied term that the bank would not do anything likely to destroy or seriously damage their relationship of mutual trust and confidence (as employer and employee) without proper cause. He argued that the bank breached that term by failing to conduct the termination or redundancy process in a bona fide or proper manner. He thereby lost a chance of redeployment, and was entitled to damages for his loss.

[43] He was successful at first instance. Besanko J held that there was in the employment contract an implied term of mutual trust and confidence and found that the bank had breached it. He awarded Mr Barker damages in excess of $300,000 based upon Mr Barker's discounted past and future economic loss.[10] The bank appealed to the Full Court of the Federal Court.[11]

[44] On appeal, a majority of the Full Court of the Federal Court agreed that a term of mutual trust and confidence was implied by law into the employment agreement. The majority adopted the language of the House of Lords in *Malik*, 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".

[45] The majority did not consider that a failure to act in accordance with the Redeployment Policy amounted to a breach of the implied term. However, the majority held that the implied term imposed other requirements upon the bank, which the bank had not met, and which amounted to breaches of it. Those other requirements included the bank taking positive steps to consult with Mr Barker about alternative positions within the bank, and giving him the opportunity to apply for them.

[46] Jessup J dissented. His Honour found no basis for the premise that, under a contract of employment, the employer owed a duty of trust and confidence to an employee beyond those duties which were "conventionally associated with contracts of that class". Nor, in his Honour's view, could the implied term be justified as a mutualisation of the employee's duty of fidelity to the employer; nor as a principled development of the implied duty of co-operation as between parties to an employment contract. Further, his Honour held, even if the implied term existed, the bank's failure to comply with its policies did not amount to a breach of it.

[47] On appeal, the High Court unanimously decided that such a term should not be implied in an employee's contract of employment in law or in fact. It overturned the damages award and reduced it to approximately $11,600 – the amount for four weeks' notice under the employment contract.

[48] There were three separate judgments in the High Court (the plurality's, Kiefel J's and Gageler J's).

[49] As the plurality (French CJ, Keane and Bell JJ) explained, the question for the High Court was whether, under the common law of Australia, there was to be implied by law into employment contracts a term of mutual trust and confidence; or (expressed a little differently in the context of the appeal) 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.

---

[10] Mr Barker's retrenchment entitlements were approximately $180,000.

[11] Mr Barker cross-appealed against the award of damages.

The plurality's reasons

[50] The plurality concluded that no such term was to be implied into employment contracts. Such an implication would be a step beyond the legitimate law making function of the courts which should not be taken.

[51] The plurality observed that the common law in Australia must evolve within the limits of judicial power and not trespass into the province of legislative action. At [20], the plurality said (my emphasis) –

> **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 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.

[52] The plurality discussed the ways in which courts have implied terms in contracts, namely –

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

[53] The plurality discussed the implication of a term designed to give business efficacy to a contract observing that it was not enough, to imply the term, for the court to consider it reasonable.

[54] The majority in the Full Court of the Federal Court referred to the implied duty of co-operation as providing an "alternative approach" to the application of the implied duty of mutual trust and confidence. They relied upon the formulation of the implied duty to co-operate in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd*[12] 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". The majority considered that the obligation of co-operation required the bank to take the positive steps necessary to

---

[12] (1979) 144 CLR 596.

enable Mr Barker to have the benefit of clause 8 of his employment contract, which contemplated the possibility of redeployment, rather than termination.

[55] That alternative approach reflected the suggestion by Lord Steyn in *Malik* that the implied duty of mutual trust and co-operation probably had its origins in the duty of co-operation between contracting parties. Of that, the plurality said (at [26]) –

> … 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 co-operation.

[56] As to the direct application of the implied duty to co-operate, the plurality explained that there was no relevant contractual benefit with which the duty could engage. Clause 8 conferred a benefit by way of a termination payment, but it did not confer an entitlement to the benefit of the Redeployment Policy.

[57] The plurality observed that an implication in law may evolve from repeated implications in fact; emphasising the need for "necessity" to imply such a term. The plurality continued (most footnotes omitted, my emphasis) –

> [317] In *Bryne v Australian Airlines Ltd* [(1995) 185 CLR 410 at 450] 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" or the contract would be "deprived of its substance, seriously undermined or drastically devalued". The criterion of "necessity" in this context has been described as "elusive" and the suggestion made that "there is much to be said for abandoning" 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 co-operate. Implications which might be thought reasonable are not, on that account only, necessary …

[58] The submissions in the High Court focused on the question whether the implied term of mutual trust and confidence was "necessary" in the sense that without it the rights conferred by the employment contract could or would be rendered nugatory or worthless, or seriously undermined.

[59] Their Honours considered the circumstances in which the term of mutual trust and confidence was implied in employment contracts in the United Kingdom. Its development there was traceable to the enactment of a constructive dismissal provision in labour relations legislation in 1974. In that context, it was held (in *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761) that whether an employee was entitled to terminate employment by reason of the employer's conduct, and to be treated as

having been dismissed, was to be determined in accordance with the law of contract. It was not to be determined by reference to the unreasonableness of the employer's conduct. The contractual test for constructive dismissal required the employer to be guilty of conduct constituting a significant breach, going to the root of the contract of employment, or showing that the employer no longer intended to be bound by one or more of the essential terms of the contract. After the decision in *Western Excavating*, the Employment Appeal Tribunal implied the term of mutual trust and confidence to meet the contractual test. By the mid-1980s, the term was "an orthodox tenet" of the law of constructive unfair dismissal. That was the position when *Malik* was decided.

[60] The plurality went on to discuss *Malik* (footnotes omitted) –

> [34] In *Malik*, the employer bank had carried on its business "dishonestly and corruptly". 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. That obligation was said to be a particular aspect of the general obligation imposed by the implied term:
>
> > "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."
>
> [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 …

[61] The plurality stated that the history of the development of the term in the United Kingdom was not applicable to Australia. The Court had to determine the existence of the implied duty by reference to the principles governing implications of terms in law in a class of contract. That required the Court to determine whether the proposed implication was "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 plurality continued (at [36], footnotes omitted) –

> … The broad concept of "necessity" … may be defined by reference to what "the nature of the contract implicitly requires". It may be demonstrated by the futility of the transaction absent the implication. It is not satisfied by demonstrating the reasonableness of the implied term.

[62] Their Honours considered that the implied term of mutual trust and confidence imposed obligations wider than those which were "necessary"; it went to the maintenance of a relationship. Their Honours noted that the implication of the duty would impose obligations on employers *and* employees yet neither party made submissions about the burden such an implication would place on employees (because they had no direct interest in doing so).

[63] Their Honours said (at [38]), "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". There was a need for a cautious approach to the implication and policy considerations marked the implication as a matter more appropriate for the legislature than for the courts to determine. Their Honours continued (at [40], footnote omitted, my emphasis) –

> … 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.**

[64] Their Honours concluded (footnote omitted, my emphasis) –

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

[65] As to whether the term ought to be implied as a matter of fact, the plurality observed that it did not answer the criterion of necessity required to support its implication in law and that Mr Barker's counsel was unable to point to any particular feature of the contract which would support its implication in fact. Counsel had referred to Mr Barker's seniority, his long and distinguished career with the bank, and the contract's silence on matters of trust and confidence.

Kiefel J's reasons

[66] Kiefel J (as the Chief Justice then was) observed that the term which Mr Barker submitted was to be implied in his employment contract, that 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, had been recognised by the House of Lords in *Malik* as referable to all contracts of employment and implied by law.

[67] Implication of a term by law, involved, her Honour said (quoting *Liverpool City Council v Irwin* [1977] AC 2439 at 255), "a search, based on wider considerations, for such a term as the nature of the contract might call for, or as a legal incident of this kind of contract". In either case, to be implied, the term must be necessary. As to the meaning of "necessary" her Honour said (most footnotes omitted)–

> [60] In *Byrne v Australian Airlines Ltd* [(1995) 185 CLR 410 at 451 – 452], McHugh and Gummow JJ … 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". 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* [(1996) 186 CLR 71 at 103], Gaudron and McHugh JJ observed that the notion of necessity is central to the rationale for an implication of this kind. The requirement of necessity has been confirmed by a number of decisions of this Court since *Byrne* and *Breen*.
>
> [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 …
>
> [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* [(1977) 180 CLR 266 at 283], 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".

[68] Her Honour then considered the term of trust and confidence which imposed obligations on an employer not to engage in trust-destroying conduct. Her Honour distinguished it from the employee's duty of trust and confidence, which was concerned with obligations of fidelity on the part of an employee towards his or her employer.

[69] The duty of trust and confidence imposed upon employees was not some abstract concept. It referred to conduct of an employee which was 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. It was an essential aspect of the employer/employee relationship.

[70] Her Honour noted that the origins of the *Malik* term of trust and confidence were in the decisions of employment tribunals exercising statutory powers with respect to unfair dismissals. The question for the tribunals was what conduct, on the part of an employer, which caused an employee to resign, qualified as a significant breach going to the root

of the employment contract. The claim in *Malik* did not concern dismissal. Her Honour explained (footnotes omitted, my emphasis) –

> [71] The crucial point in *Malik* … concerned whether damages were recoverable. The decision in *Addis v Gramophone Co Ltd* 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. 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 …
>
> [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 …**
>
> [73] … [T]he 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" 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.**
>
> [75] The real question … in *Malik* was whether the employer ought reasonably to have foreseen that damage to the employees' prospects of future employment … was a serious possibility, given the employer's conduct in breach of the term … It was held that, in principle, there was nothing unreasonable in holding an employer liable for such a loss.
>
> [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 ...
>
> [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 …
>
> …

> [80] Although *Malik* did not concern a breach of the term of trust and confidence in connection with dismissal, the discussion 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 that the following may be examples of such conduct: a wrongful suspension; a "capricious" failure on the part of an employer to offer the same, beneficial terms of redundancy; and the improper conduct of a disciplinary process.

[71] Her Honour then considered the decision of the Full Court and observed that only Jessup J applied the test of necessity in determining whether the term of trust and confidence ought to 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.

[72] Her Honour discussed the approach of the majority in the Full Court and the difficulties with it. Her Honour noted that the majority considered necessity an "elusive" concept and approved of a statement in *South Australia v McDonald*[13] that the development of the term of trust and confidence in England was consistent with the contemporary view of the employment relationship. The majority concluded that the term of trust and confidence required the bank to take positive steps to consult with Mr Barker about redeployment. Of that approach, her Honour said (my emphasis) –

> [85] … 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 …
>
> [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* … 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.

---

[13] (2009) 104 SASR 344.

> [88] An alternative approach adopted by the majority was based on the implied duty of co-operation … [T]he 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. 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 that the damages sought, but that is not a matter to which the requirement of necessity is addressed.

[73] Her Honour turned then to consider whether the term of trust and confidence should apply generally to contracts of employment in Australia.

[74] Her Honour stated that the term of trust and confidence could have no application to claims for common law damages arising out of dismissals, in essence because of the operation of relevant employment legislation. Her Honour explained –

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

[75] Mr Barker was not able to make a statutory claim for unfair dismissal because his wages exceeded a certain amount. Her Honour stated that that fact did not create a gap for the common law to fill. The Australian Parliament had determined what remedies were to be provided for unfair dismissal and who may seek them. The area left for the operation of the term recognised in *Malik* was with respect to "trust-destroying conduct" on the part of an employer which did not have the effect of ending the employment

relationship. Her Honour considered the implication of the term from a policy perspective and noted that (in certain circumstances) its implication would be likely to terminate, rather than maintain, the employment relationship, or work against employers. The potential for the term to create anomalies suggested that it was inappropriate to base its application on policy considerations.

[76] The respondent in *Barker* argued that the implication of the term achieved mutuality with the obligation of fidelity imposed upon employees. Her Honour did not agree. Her Honour explained (my emphasis) –

> [100] … 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.**
>
> …
>
> [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 **relationship** between employer and employee. **Contracts of employment are not rendered futile because of an 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.**

Gageler J's reasons

[77] Gageler J discussed the circumstances in which a court would imply a contractual term (footnotes omitted) –

> [113] 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". The former are founded on what is "necessary" to give "efficacy" to the particular contract. The latter are founded on "more general considerations", which take into account "the inherent nature of [the] contract and of the relationship thereby established".
>
> [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". The requisite inquiry is informed by a consideration of what is needed for the effective working of contracts of that class. But the inquiry is not exhausted by that consideration; it does not exclude considerations of justice and policy. 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.

[78] His Honour emphasised the critical points in the reasons for judgment of Jessup J, which demonstrated why the term of mutual trust and confidence ought not to be imported into the common law of Australia, namely –

- the emergence of the implied term, and its confinement (as per *Johnson v Unisys Ltd* [2003] 1 AC 518), were the product of particular statutory circumstances in the United Kingdom;
- the implied term describes the overall nature of the employment relationship: it does not have prescriptive content. It may act as "a Trojan horse" in the sense of revealing, after the event, the specific prohibitions which it imports into the contract; and
- 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. Common law obligations in contract ought not to be developed by courts other than in a manner that is sensitive to their interaction with legislation.

[79] As to whether a term of mutual trust and confidence could be implied in fact, and as to whether there had been a breach, his Honour agreed with the reasons of the plurality.

[80] The appeal was allowed.

[81] Against that analysis of *Malik* and *Barker* I will now consider the plaintiff's arguments that the implied terms in 1 and 2 above are not the subject of any recognised duty and that the paragraphs asserting them should be struck out as disclosing no reasonable ground of defence.

The way in which the parties framed their arguments

[82] At the hearing, the plaintiff complained that paragraph 25(b) was pleaded in such a way as to make it difficult for the plaintiff to understand the case it had to meet at a pleading level. The plaintiff treated paragraph 25(b) as pleading as alternatives the implied terms of (a) not acting unlawfully and (b) not acting contrary to the Charter.

[83] In accordance with its understanding of paragraph 25(b), the plaintiff made separate arguments against (a) the implication of a term that HMW would not operate is business and carry on practice unlawfully (which it defined as the "Unlawful Term") and (b) the implication of a term that HMW would not operate its business and carry on practice contrary to the Charter, By-Laws or Regulations (which it defined as the "Charter Term").

[84] However, the defendants said that it was plain that the obligation not to act contrary to the Charter was pleaded as a further instance of the obligation not to act unlawfully, as well as in the alternative.[14] It called the implied term (incorporating the Charter Term) the "Lawfulness Term". This resulted in a disconnect between the arguments made by the plaintiff about 25(b) and the defendants response to them, as the defendants acknowledged.[15]

[85] I have dealt with the Charter Term as an instance of the Unlawful Term (in accordance with the use by the defendants in their pleadings of the phrase "and further"). I have also dealt with the implication of the "Charter Term" as a separate, stand-alone alternative (in accordance with the use by the defendants of the phrase "or alternatively").

[86] It may be noted that the plaintiff referred to the term asserted in paragraph 25(b) as the "Unlawful Term", and the defendants referred to it as the "Lawfulness Term". I will refer to the term incorporating an obligation not to act contrary to the Charter et cetera, as the "No Unlawfulness Term".

The No Unlawfulness Term – whether reasonably arguable that it ought to be implied in law

Plaintiff's submissions

[87] In its written outline, the plaintiff submitted that a term that HMW would not "operate its business and carry on practice unlawfully" was not to be implied into the employment contracts with McPherson and Hoeft *as a matter of law* for each of the following reasons:

(a) it was not a settled class of term implied into contracts of employment;

(b) it was really a restatement of the duty not to conduct the practice in a corrupt and dishonest manner which is not part of the law of Australia. The allegation was a sub-category of the "duty of trust and confidence" rejected by the High Court in *Barker*. On the proper application of *Barker*, such a term would not be implied;

---

[14] Transcript 1 – 13 l 20 – 1 – 14 l15.
[15] Transcript 1 – 20 ll 1 – 3.

(c) the term was not necessary. Employment contracts contain a term to like effect that the employer will not require the employee to engage in unlawful conduct;

(d) without the implication of the term, the rights of the employees, who cannot be made to engage in unlawful conduct, cannot be said to be nugatory or worthless. The employment contracts bestowed many worthwhile benefits without it.

(e) implied terms must be kept within bounds (as per *Barker*) and there was no valid reason to extend the class of terms which the law implied into contracts of employment to encompass what was, in truth, a term forming part of the duty of trust and confidence rejected by the High Court in *Barker*.

[88] *Barker* was referred to in the decision of the Queensland Court of Appeal in *Gramotnev v Queensland University of Technology*.[16] The plaintiff relied in particular on paragraph [158] which stated –

> From [*Barker*] it is clear that under the common law of Australia a term or duty of trust and confidence requiring an employer to take steps in the interests of an employee is not generally a term implied by law into a contract of employment, because it is unnecessary.

Consideration of Gramotnev v Queensland University of Technology

[89] Queensland University of Technology (QUT) terminated Dr Gramotnev's employment. He commenced proceedings against QUT for breach of contract. He alleged (among other allegations) that his termination was in breach of a term implied into his employment contract of trust and confidence. Gramtonev's statement of claim defined the duty of trust and confidence as a duty that QUT would not, without proper and reasonable cause, act in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between them.

[90] The primary judge held that no such term was implied. His Honour was aware of, and referred to, *Barker* at first instance. Gramotnev appealed. The High Court's decision in *Barker* was decided after the primary judge's decision in *Gramotnev* but before the appeal.

[91] Jackson J (with whom McMurdo P and Holmes JA agreed) agreed with the primary judge's analysis of the question whether the duty of trust and confidence ought to be applied.[17] The primary judge considered that such a term may be implied if it was necessary to do so to enable the contract to work effectively.[18] The primary judge took into account the statutory framework which applied to Dr Gramotnev's employment. Under the *Workplace Relations Act* 1996 (Cth), a QUT employee had standing to bring proceedings for alleged breaches of the relevant enterprise bargaining agreement. Also, QUT was subject to the *Whistleblowers Protection Act* 1994 (Qld) and the *Crime and Misconduct Act* 2001 (Qld). An employee had access to a wide range of remedies, enforceable against QUT, without the implication of the term. That reduced the concern that QUT could take unfair advantage of an employee without the implication of the

---

16 [2015] QCA 127.
17 [2013] QSC 158, at [269], [274] – [276], [281] – [282], and [287].
18 At [269].

term.[19] Further, the term was undefined in scope and content in Dr Gramotnev's pleadings but gave rise to claims for damages for breach. The character and effect of the term Dr Gramotnev contended for was so broad in its width that it permitted examination of every management decision made over many years. The primary judge held that the law would not allow it.[20]

Defendants' submissions

[92] The defendants observed that the "relevant actors" in the case – that is, the directors of HMW and the defendant ex-employees – were chartered accountants. That status was bestowed by the Institute of Chartered Accountants. They were bound to comply with the relevant code of conduct, which included a Code of Ethical Conduct.

[93] A contract to perform illegal work was not a valid contract. HMW could not have engaged its employees to carry out illegal work, including by way of accounting practices designed to defeat the Commissioner of Taxation. Such a contract would have been void as contrary to public policy: *Fitzgerald v F J Leonhardt Pty Lyd*.[21] The question then was whether the law would imply "a derivative term" into an employment contract to protect an employee from being "drafted into or associated with" unlawful conduct.[22]

[94] It could not be said that the implication of the No Unlawfulness Term was not arguable on the strength of *Barker* for the following reasons –

- It was narrower than the term proposed in *Barker* and not caught by the ratio of that case;
- While the real question in *Barker* was whether the bank was obliged to observe its redeployment policy, the High Court approached the matter at a "high level of generality";[23]
- The facts in the present matter were "radically different"[24] from *Barker*. *Barker* involved unfair dismissal via redundancy. The High Court was not considering the conduct of an employer which was unlawful or contrary to a code of practice.
- Neither *Barker* nor *Malik* answered the real question, which was squarely raised in the present case and which had been identified in the dissenting decision of Jessup J in the Federal Court at *Commonwealth Bank of Australia v Barker* (2013) 214 FCR 450 (at [317] – [319] – see below).
- *Barker* did not otherwise disturb terms which were conventionally associated with employment contracts; nor did it consider an implication of the term *in fact* beyond the contract concerned.

---

19 At [276].
20 At [281] – [282].
21 (1997) 189 CLR 215.
22 Transcript 1 – 15 lines 4 – 6.
23 Transcript 1 – 16 lines 28 – 29.
24 Transcript 1 – 17 line 15.

[95] Relying on the decision of Jessup J, the defendants submitted, in effect, that it was reasonably arguable that –

- a contract of employment was one of service: an employee was required to obey the lawful directions of the employer;
- as a corollary to the employee's duty to obey lawful directions, the common law implied into employment contracts a term that an employer would not require an employee to perform an illegal act;
- within, or as an analogue to, those conventional implied terms was an implied term that the employer would not conduct its business contrary to law or any applicable code of practice.

[96] The defendants submitted that the No Unlawfulness Term was directed to the *performance* of the employment contract. It ensured that an employee could not be bound to continue to provide personal service to an employer that conducted its business contrary to a relevant code of practice. The defendants further submitted that it ensured that an employee was not exposed to a restraint of trade where the employer conducted the business contrary to the relevant code of conduct.

[97] The defendants argued that the obligations were well justified by necessity. They preserved the substance of the employment contract and had an intimate connection to what the contract required.

[98] The plaintiffs had not identified any possible intersection between the No Unlawfulness Term and statute.

[99] As to the plaintiff's argument in (c) above, that the term was not necessary because employment contracts already contained a term to like effect, the defendants argued that the No Unlawfulness Term was not "therefore" foreign and not liable to strike out.

Discussion and conclusion

[100] The paragraphs from the decision of Jessup J relied upon by the defendants to make the point that the question raised in the present case was not decided by *Barker* are as follows and appear under the heading "The content problem" in his Honour's judgment (my emphasis) –

> [317] **A major source of concern … is the high level at which the implied term is expressed**. As such, the term makes no attempt to come to grips with the practical realities of a particular employment relationship. Although the term refers to the "conduct" of the employer, it would extend to omissions. The present case is an example of the latter. **Further, the term would appear to apply to conduct (including omissions) that was (or were) neither wilful nor even, necessarily, intentional.** That derives, of course, from the jurisprudential compartment in which the term operates, namely, that relating to contractual promises. How that circumstance would be

accommodated by the "abuse of power" basis for the term suggested in *McDonald* is unclear.

[318] It is apparent that the Full Court in *McDonald* recognised that the practical impact of the implied term lay in the identification of the "conduct from which an employer should refrain". That subject was, their Honours observed, "still being developed" (at [232]). That circumstance, of which there could be little doubt, derives, in my view, from the high level, almost legislative, way in which the term has been expressed. **The unwary jurist who sees nothing but wholesomeness in the term may find the term operates in practice as a kind of Trojan Horse, wherefrom a miscellany of unforeseen obligations emerge to govern the ex-post disposition of a dispute which has arisen in a concrete setting.** The Full Court did not put the matter in this way, of course, but its understated reference to the way in which the term is expressed makes, in my view, such a metaphor an apt one. **The fact that the identification of the obligations which the implied term would impose is "open-ended", and is still the subject of development, speaks against the proposition that the implication of the term is necessary in all contracts of employment.**

[319] Because of the approach taken by the liquidators, the House of Lords in *Malik* was not required to grapple with problems of this kind. Had the situation been otherwise, **the question would, in my view, almost inevitably been asked whether an employer owes a duty to its employees not to operate its business in a corrupt or dishonest way. An affirmative answer to that question was implicit in the outcome in *Malik*, but the question itself was never confronted. It was sufficient to hold it to be arguable (on a strike-out basis) that the conduct of such a business amounted to a breach of the implied term. By not being limited to the question I have identified, *Malik* became – in the submissions of the respondent and the intervener – the source of a new line of jurisprudence throughout the common law world with application to all manner of situations having nothing to do with the conduct of a corrupt or dishonest business, or the significance of that in the context of the contractual duties owed by the employer to its employees.**

[101] It is also worth considering the next paragraph of Jessup J's judgment (my emphasis) –

[320] Thus in the present case, to take an example, the question whether the appellant owed a duty to its employees to observe its non-contractual redeployment policy lay, or should have lain, at the centre of the respondent's case. As discussed elsewhere in these reasons, **attention might have been given to whether an affirmative answer was required because of the operation of the contractual duty of co-operation**; or it might have been investigated whether the appellant was estopped, as against the respondent, from denying the binding force of the policy. But the matter was not decided – and, I presume, was not advanced – along these lines. Where the central question

> itself was not confronted, the implied term, like a biological enzyme, was utilised to achieve the desired outcome by an indirect, albeit a less problematic, pathway.

[102] Paragraph [317] of his Honour's judgment reflects his Honour's concerns about the high level of generality of the term of trust and confidence proposed in *Barker*. That concern is not inconsistent with the observation of the plurality in the High Courtthat the implied term of trust and confidence, by reason of its breadth, imposed obligations on employers and employees which were wider than "necessary" in the relevant sense. Similarly in emphasising (and endorsing) the critical points of the reasons for judgment of Jessup J, Gageler J highlighted the fact that the (rejected) implied term of trust and confidence was of broad and uncertain scope, without prescriptive content. I note too that one of the reasons why the term of trust and confidence was not implied in *Gramotnev* was its undefined scope and content.

[103] I have also considered paragraph [330] of the judgment of Jessup J, which is to be read with paragraph [293]. At [293], his Honour said (my emphasis) –

> … Since the employee must perform his or her tasks personally … there is a term [implied into contracts of employment] that the employer is to take reasonable care for the safety of the employee (an obligation now considerably overwritten by statute). **There is also a term that the employer will not require the employee to perform an illegal act (which may, perhaps, be viewed as another way of stating the limitation on the employee's duty to obey directions to those which are lawful).** Each proceeds from the fundamental premise that the contract of employment is one which requires the employee himself or herself to perform work personally in accordance with directions, and in physical and regulatory environments, over which he or she presumptively has no control …

[104] At [330], his Honour said (my emphasis) –

> … there are indeed respects in which, in any employment relationship, the employee is entitled to have trust and confidence in the employer. Here I return to the subjects of safety and lawfulness first mentioned at [293] above. Because of the obligation borne by the employee to perform his or her work personally, he or she must have trust and confidence in the employer to provide a safe working environment. There is no better way to describe the proper expectations of, for example, an operator who climbs into the cabin of a tower crane, or a miner who travels far beneath the surface of the earth, in compliance with the employer's directions. **The employee must also have trust and confidence that the employer will not require him or her to perform an act that is unlawful or contrary to some applicable code of conduct**, such that, for example, a truck driver could not be required to travel over a distance that would inevitably require him or her to break the speed limit, and an employed athlete could not be required to ingest dietary supplements that were contrary to the code governing his or her sport. **But the trust and confidence to which these circumstances relate is reflected in the implied obligations to which I have already referred. Those obligations are well-justified by necessity.**

[105] For the following reasons, I am of the view that the defendants raise a reasonably arguable defence based upon the implication of the No Unlawfulness Term in law.

[106] *First*, the No Unlawfulness Term proposed by the defendants is not a term requiring the plaintiff[25] not to act unlawfully *in a general sense* but rather a term requiring the plaintiff company not to *operate its business* or *carry on practice* unlawfully. Such a term is significantly narrower in scope than the term considered by the High Court in *Barker.* It is not vulnerable to objections based on its breadth or its uncertainty or its lack of prescriptive content in the same way as the term in contemplation in *Barker* was.

[107] *Secondly*, in my view, nothing in the High Court decision undermines Jessup J's analysis of the implied obligations of employment contracts including the employer's obligation not to require its employee to act unlawfully or contrary to some applicable code of conduct. I do not consider it unreasonable for the defendants to argue that the No Unlawfulness Term is to be implied as an incident of, or an analogue to, the implied term that an employer not require an employee to act unlawfully or contrary to an applicable code of conduct.

[108] *Thirdly*, I note that Kiefel J found no scope for the operation of the implied term of trust and confidence in claims for common law damages arising out of dismissals because of the operation of relevant employment legislation. Her Honour also found that contracts of employment were not rendered futile if the more specific requirement, that an employer attempt to redeploy an employee, were not implied. However her Honour observed that where an employer is dishonest in the conduct of its business, *Malik* confirmed that an employee had the right to terminate his or her employment although that right did not depend on a term of trust and confidence – rather, on constructive dismissal. Kiefel J's observation, that *Malik* confirms an employee's right to terminate their employment if an employer is dishonest in the conduct of its business, provides further support for an arguable case that the No Unlawfulness Term is to be implied.

[109] *Fourthly*, I acknowledge the plaintiff's argument that the No Unlawfulness Term is equivalent to the employer's obligation not to conduct a dishonest or corrupt business and that such a term was an aspect of the implied term of trust and confidence rejected in *Barker* which ought also to be considered rejected. But it was the broad implied term, without prescriptive content, which was considered and rejected in *Barker.*

[110] Bearing in mind the principles applicable to this application for strike out, in my view, it cannot be said that a case based on the implication of the No Unlawfulness Term in law is untenable because of the decision in *Barker*.

[111] The *Barker* argument was the argument pressed by the plaintiff in oral submissions. As to the other arguments made in writing: whilst the No Unlawfulness Term is not a settled class of term implied into employment contracts, in my view, as I have indicated, there is a tenable argument that it is an analogue of the implied term that an employer not require an employee to work unlawfully particularly in the light of Jessup J's analysis.

---

[25] Including through its directors.

[112] Jessup J's analysis also provides a foundation for a reasonable argument that the implication of the No Unlawfulness Term is necessary and within appropriate bounds, particularly because it is not an open-ended term without content.

[113] Further, the argument that the term is not necessary because employment contracts contain a term to like effect seems to support, rather than take away from, the defendants' arguments.

[114] As to whether the employees' rights under the contract would be rendered nugatory or worthless without the implication of the No Unlawfulness Term, I refer to the discussion above about the No Unlawfulness Term being an analogue of the implied term that an employer not require an employee to work unlawfully. I also refer to my discussion of this argument below in the context of my considering the implication of the term *in fact* on the basis that the employment contracts in this case fall within a *class* of contracts for the employment of professionals bound by professional and ethical obligations.

The No Unlawfulness Term – whether reasonably arguable that it ought to be implied in fact

[115] The critical question is whether the implication of the No Unlawfulness Term is necessary to give business efficacy to the employment contracts.

[116] Mr McPherson's employment contract employed him as a partner of HWM.[26] By clause 4, Mr McPherson agreed to "honestly and faithfully serve" HMW and to use his "best endeavours" to promote its interests and welfare.

[117] By clause 8.1, HMW agreed to pay the annual subscription costs of Mr McPherson's membership of one of the Institute of Chartered Accountants, the Australian Society of Practicing Accountants or the National Tax and Accountant's Association.

[118] By clause 11.5, HMW could terminate Mr McPherson's employment immediately if he was guilty of misconduct.

[119] By clause 17, Mr McPherson agreed to "abide by" "all policies of [HMW] as they exist, are replaced, amended or varied from time to time". The "policies" were "documented in [HMW's] Office Policies and Procedures manual".[27]

[120] The Office Policies and Procedures manual included, relevantly, the following (my emphasis) –

> **Ethical Requirements**
>
> - The provisions of APES[28] 320 will be adhered to by all members of the team.

---

[26] Known at the relevant time as Wallace Accounting and Financial Group.
[27] I have proceeded on the basis that Mr Hoeft's employment contract was in similar terms.
[28] APES is the acronym for Accounting Professional and Ethical Standards.

- All professional team members will familiarise themselves with APES 110 Code of Ethics for Professional Accountants issued by the Accounting Professional and Ethical Standards Board and conduct themselves in accordance with that code.
- **All members of the firm will maintain the highest level of integrity in their professional services. They will carry out their duties with truthfulness and honesty**.

  …
- **The principals of the firm and managerial staff will not direct team members to act contrary to technical and/or professional standards.**

  …

[121] The APES Code of Ethics requires all members to comply with it and, in applying its requirements, to be guided by "not merely the words" but also "the spirit" of the Code.

[122] The Code is in three parts. Part A establishes the fundamental principles of professional ethics for members. It also provides a conceptual framework for members to apply to identify threats to compliance with the fundamental principles; evaluate the significance of those threats; and, if necessary, apply safeguards to eliminate or reduce threats to an acceptable level.

[123] The "fundamental principles" include the principle of "Professional Behaviour". Section 150 of the Code elaborates upon that fundamental principle. It relevantly states –

> **Professional Behaviour**
>
> 150.1 The principle of professional behaviour imposes an obligation on all Members to comply with relevant laws and regulations and avoid any action or omission that the Member knows or should know may discredit the profession. This includes actions or omissions that a reasonable and informed third party, weighing all the specific facts and circumstances available to the Member at that time, would be likely to conclude adversely affects the good reputation of the profession.

[124] The Code acknowledges that the circumstances in which members operate might create "specific threats to compliance with the fundamental principles". In accordance with its conceptual framework approach, members are required to identify, evaluate and address threats to compliance with the fundamental principles.

[125] Section 200 of the Code describes how the conceptual framework applies in certain situations to Members in Public Practice. Section 200.2 states (my emphasis) –

> A Member in Public Practice **shall not knowingly engage in any business**, occupation or activity **that impairs or might impair integrity, objectivity or the good reputation of the profession** and as a result would be incompatible with the fundamental principles.

[126] A "Member in Public Practice" is defined as "a Member … in a Firm that provides Professional Services. This term is also used to refer to a Firm of Members in Public Practice and means a practice entity and a participant in that practice as defined by the applicable professional body. A "Firm" includes a "sole practitioner, partnership, corporation or other entity of professional accountants".

[127] Section 300.15 of the Code explains that in some circumstances, Members in Business may consider it necessary to resign. Section 300.15 states –

> In circumstances where a Member in Business believes that unethical behaviour or actions by others will continue to occur within the employing organisation, the Member in Business may consider obtaining legal advice. In those extreme situations where all available safeguards have been exhausted and it is not possible to reduce the threat to an Acceptable Level, a Member in Business may conclude that it is appropriate to resign from the employing organisation.

[128] A "Member in Business" is defined as "a Member employed or engaged in an executive or non-executive capacity in such areas as commerce, industry, service, the public sector, education, the note for profit sector, regulatory bodies or professional bodies, or a Member contracted by such entitles.

[129] I proceed on the basis that the first and second defendants were both Members in Public Practice and Members in Business.

Plaintiff's submissions

[130] The plaintiff submitted that the No Unlawfulness Term was not required to be implied *in fact* to give business efficacy to the HMW contracts of employment with the first and second defendants.

[131] The plaintiff submitted that the strict requirements for the implication of terms in fact had not been met. Those requirements, as stated in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*, are that the term to be implied must –[29]

(a) be reasonable and equitable;

(b) be necessary to give business efficacy to the contract;

(c) be obvious;

(d) be capable of clear expression; and

(e) not contradict any express term of the contract.

[132] The plaintiff observed that, while these five requirements had to be met for the implication of the term in fact, the defendants had pleaded only one – that is, that the term was necessary to give business efficacy to the contract. The plaintiff complained that the defendants' pleading was inadequate. In response, the defendants said that this was the first time the complaint had been raised and took me to relevant correspondence

[29] (1977) 180 CLR 266 at 282 – 283.

between the parties to make the point. The defendants did not make a considered response to the plaintiff's complaint about their pleading at the hearing, and it is not therefore appropriate for me to deal with it now.

[133] As to requirement (a) from *BP Refinery*: The plaintiff submitted that nothing on the pleaded facts indicated that the implication of such a term would be reasonable and equitable.

[134] As to (b): The plaintiff observed that the plurality in *Barker* held that the requirement of business efficacy was equated with the requirement of necessity. In *Barker* at [28] – [29] the plurality said that the requirement that a term implied in fact be necessary to give business efficacy to the contract was "a specific application of the criterion of necessity". Further, the plurality said that the "necessity" which would support an implied term in law is demonstrated where, without it, the enjoyment of the rights conferred by the contract "would or could be rendered nugatory, worthless, or perhaps, be seriously undermined" or the contract would be "deprived of its substance, seriously undermined or drastically devalued". In *Barker*, the plurality held that the implied term imposed mutual obligations which were wider than those which are necessary.

[135] Drawing on *Barker*, the plaintiff argued that there was no need for the implication of the No Unlawfulness Term. There was already a term implied into employment contracts that the employer would not require the employee to do anything unlawful. Nothing more was necessary. The absence of the No Unlawfulness Term had no bearing on the entitlements conferred by the employment contracts – even though the relevant business in which the defendants were employed was a business of professionals with ethical obligations. The contracts were commercially effective without the implication of the term. The plaintiff also relied upon *Barker* to argue that an obligation not to conduct an unlawful practice was a subset of the overarching obligation of trust and confidence which was not implied because it was not "necessary".

[136] As to (c): The plaintiff submitted that a term about how an employer would conduct its business was not "obvious" in the sense that the parties would consider it too obvious to require express expression. The plaintiff referred to several authorities including *Bonney v Hartmann*.[30] That case concerned a contract for the sale of a mare between "racing men" and illustrates the way in which the court is to approach the "obvious" question.

[137] Hartmann sold a mare to Bonney for £210; to be paid by way of £105 cash, with the balance of the purchase price to be paid out of her prize money. Under the contract, Bonney agreed to "in a thorough and bona fide manner, train, feed and keep the said filly for racing purposes". The contract provided that if Bonney defaulted, Hartmann could retake possession of the mare. As it turned out, the mare won no races and, because of an injury, became permanently unfit for racing. Bonney then used her for breeding. The defendant seized her on the basis of Bonney's default of the condition that he keep her for racing purposes. Bonney sued Hartmann for conversion.

---

[30] [1924] St R Qd 232.

[138] The question for the court was whether to imply into the contract a condition that, if the mare were to become unfit for racing purposes, then the plaintiff was under no obligation to continue to train or keep her for racing purposes.

[139] In implying such a term, McCawley CJ took the following approach (footnotes omitted) [31]

> … Scrutton LJ said in *Reigate v Union Manufacturing Co* ...: "The first thing is to see what the parties have expressed in the contract; … an implied term is not to be added because the Court thinks it would have been reasonable to insert it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties: 'What will happen in such a case?' they would both have replied: "Of course, so and so will happen; we did not trouble to say that: it is too clear". Unless the Court comes to such conclusion as that it ought not to imply a term which the parties themselves have not expressed."
>
> The present contract is a contract between racing men concerning a racing mare. Supposing it had been asked at the time the contract was being negotiated: "What will happen should the mare become temporarily unfit to be trained for racing purposes?" The answer of the vendor would, I think, have been "Of course you need not train her". "And if she becomes permanently unfit?" "It would be absurd to keep her for a purpose for which she is permanently unfit."

[140] The term was implied and the failure to keep the mare for purposes for which she was "unfitted" was not a default.

[141] As to (d): The plaintiff accepted that the No Unlawfulness Term was capable of clear expression (but this was not decisive).

[142] As to (e): The plaintiff accepted that the No Unlawfulness Term did not contradict any express term of the employment contracts (but this was not decisive).

Defendants' submissions

[143] The defendants submitted that *Barker* did not stand for the proposition that the term of trust and confidence, or a similar term, could not be implied *in fact* in order to give *a particular contract* business efficacy. In the present case, the implication of the No Unlawfulness Term met all of the requirements of *BP Refinery (Westernport) Pty Ltd v Shire of Hastings.*

---

[31] At 285.

[144] The defendants referred to *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*[32] and *Electricity Generation Corporation v Woodside Energy Ltd*[33] for the High Court's statements about the approach to the construction of a commercial contract.

[145] I note in those cases the High Court's emphasis on the context and purpose of the contract and the "reasonable businessperson's" understanding of it. The plurality in *Mount Bruce*[34] said (footnotes omitted, my emphasis) –

> [46] The rights and liabilities of parties under a provision of a contract are determined objectively, by reference to its text, context (the entire text of the contract as well as any contract document or statutory provision referred to in the text of the contract) and purpose.
>
> [47] In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean. That inquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and **the commercial purpose or objects to be secured by the contract**.
>
> …
>
> [51] … Unless a contrary intention is indicated in the contract, a court is entitled to approach the task of giving a commercial contract an interpretation on the assumption "that the parties … intended to produce a commercial result". Put another way, a commercial contract should be construed so as to avoid it "making commercial nonsense or working commercial inconvenience".

[146] The statements of the plurality in *Electricity Corporation* were to the same effect.

[147] The defendants submitted that a reasonable business person in the position of the parties would have known and understood that the employment contract secured the services of a Chartered Accountant to perform accounting services for an accounting practice conducted by Chartered Accountants. A reasonable business person in the position of the parties would have known and understood that Chartered Accountants were bound to conduct practice according to the Code. Indeed, the employment contracts contemplated as much. In that context, there was nothing unreasonable about requiring an employer to conduct a lawful enterprise. The implication of the No Unlawfulness Term was necessary to give business efficacy to the contract. And the No Unlawfulness Term was obvious in the relevant sense: indeed the office policy contemplated adherence with professional normative and ethical obligations.

[148] The defendants referred in written submissions to *Heimann v Commonwealth*,[35] which set out the general principles which apply to the implication of terms in a contract,

---

[32] (2015) 256 CLR 104.
[33] (2014) 251 CLR 640.
[34] French CJ, Nettle and Gordon JJ.
[35] (1938) 38 SR (NSW) 691.

including the need for the purported term to be "clearly necessary". Jordan CJ said (my emphasis) – [36]

> … it is essential that the express terms of the contract should be such that it is **clearly necessary to imply the term in order to make the contract operative according to the intention of the parties as indicated by the express terms**. It is not sufficient that it would be reasonable to imply the term … It must be clearly necessary. And the test of whether it is clearly necessary is whether the express terms of the contract are such that both parties, treating them as reasonable men … must clearly have intended the term, or, if they have not adverted to it, would certainly have included it, if the contingency involving the term had suggested itself to their minds …

[149] The defendants submitted that the term was capable of clear expression – there is a written code by which all Chartered Accountants must operate; and its implication was not inconsistent with the contract.

Discussion and conclusion

[150] Terms implied in fact are unique to a particular contract and are based on the intention or the presumed intention of the parties. Because of the differences between the contract and circumstances in *Barker* and the contract and circumstances in the present matter, I do not consider the outcome in *Barker* to have any obvious bearing on the success or otherwise of an argument that the No Unlawfulness Term ought to be implied in fact in this case.

[151] In *Hospital Products Ltd v United States Surgical Corporation*,[37] Deane J said that care should be taken to avoid an over-rigid application of the cumulative criteria specified in *BP Refinery*. *Hospital Products* also made the point that the question for the court was *not* whether the implication of the term would be reasonable or desirable – rather whether the implication of the term was necessary to ensure the effective operation of the contract in a business sense.

[152] In *Hospital Products*, an American company's exclusive Australian distributor of its stapling products directly competed with the company by manufacturing his own products in Australia and by filling orders intended for the company with his own products. Hospital Products sued the distributor, seeking damages for breach of contract (among other relief).

[153] One of the primary judge's findings was that there was implied into the contract between the company and the distributor a term that that the distributor *would not do anything inimical to the market in Australia* for the company's products.

[154] The High Court held that no such term was to be implied.

---

[36] (1938) 38 SR (NSW) 691 at 694 and 695.
[37] (1984) 156 CLR 41.

[155] The contract was explicit about what was expected of the distributor during it. He was (among other things) required to devote his best efforts to distribute the company's products in Australia and to build its Australian market. It was held that however desirable it might have been to the company, the distributorship agreement was able to operate without the implication of a term that the distributor not do anything which would enable him to damage the company's Australian market after the distribution agreement was over.

[156] Dawson J said (my emphasis) –[38]

> … it is not enough that it is reasonable to imply a term; it must be necessary to do so to give business efficacy to the contract. In my view it is plain that a distributorship agreement containing the express terms found by the judge [which included express terms that the distributor would devote his best efforts to the distribution of the stapling products in Australia and the "building up" of the company's Australian market] **was capable of an effective operation in a business sense without the implication of a further term** …

[157] In *Hawkins v Clayton*, Deane J referred to the need for a degree of flexibility in this context (my emphasis) –[39]

> The most that can be said consistently with the need for some degree of flexibility is that, in a case where it is apparent that the parties have not attempted to spell out the full terms of their contract, a court should imply a term by reference to the imputed intention of the parties if, but only if, it can be seen that the implication of the particular term is **necessary for the reasonable or effective operation of a contract of that nature in the circumstances of the case** …

[158] In my view, the commercial or business purpose of the contracts in this case was not simply to *employ* the first and second defendants but to employ them as professional Chartered Accountants in a professional firm of accountants.

[159] As professionals, the first and second defendants were bound by prescribed professional obligations. Indeed, that was a theme of the contracts of employment, reflected in their clauses and via the Policies and Procedures and Codes they incorporated.

[160] In my view, the first and second defendants' *employability as professionals* was necessary for the reasonable and effective operation of the contracts. Their continuing ability to carry out the work of a Chartered Accountant depended upon their adhering to their professional obligations and maintaining appropriate standards of conduct.

[161] As Chartered Accountants, the first and second defendants were required to avoid actions which may discredit the profession. Specifically, (as per the APES Code of Ethics) they were not to "knowingly engage in any business operation or activity that impairs or might impair integrity, objectivity or the good reputation of the profession".

---

[38] (1984) 156 CLR 41 at 139.
[39] (1988) 164 CLR 538 at 573.

[162] In those circumstances, I am of the view that it is reasonably arguable that –

- it was a condition of the contract that the principals of the firm and managerial staff not direct members to act contrary to professional standards;
- it was a condition of the contract that the first and second defendants abide by HMW's policies, which included their adherence to the APES Code of Ethics;
- if at the time at which those conditions were being considered, someone said to the parties –

  "Will the defendants' engagement with the firm itself impair the integrity or good reputation of the profession?" or "What about the principals themselves? Will they act unlawfully in the conduct of their practice or contrary to professional standards?"

  – the parties would have said "Of course not – the principals themselves will act lawfully in the conduct of the practice and in accordance with professional standards" (*cf Bonney v Hartmann, Mount Bruce, Heimann*);
- the implication of the No Unlawfulness Term was necessary for the reasonable and effective operation of the contracts in a business sense. Were it not implied, the professionals were at risk of losing their employability as professionals for (for example) engaging in a business which might impair the good reputation of the profession;
- the rights conferred upon the employees by the contract (not to be directed to act contrary to professional standards) would be seriously undermined were the No Unlawfulness Term not to be implied: The employees would be acting contrary to professional standards were they to knowingly "engage" in a business run by principals who were conducting themselves unlawfully or contrary to professional standards;
- it cannot be said that the employment contracts would be operative according to the intention of the parties if, whilst the professional employees were bound to behave ethically, lawfully and professionally, those employing them were not so bound (*cf Heimann*). In a professional sense, such a contract would be incapable of effective operation.

[163] It follows that, in my view, the pleadings raise a reasonably arguable defence that the No Unlawfulness Term is to be implied in fact into the employment contracts. That is not to say that I am of the view that the defendants' argument will ultimately succeed but I do not consider it unarguable or something which should not be placed before a court in the ordinary way.

Charter Term

[164] The plaintiff submitted that the Charter Term (as a stand-alone term that HMW would not operate its business contrary to the Charter, By-Laws or Regulations of the ICAA) was not to be implied as a matter *of law* because –

(a) it was not a settled term implied into contracts of employment. The defendants had been unable to identify a case in which such a term was implied;

(b) it was not necessary. It was wrong for the defendants to allege that Catalano, Whitelaw and Wallace were "obliged" to conduct themselves in the manner alleged. The obligations imposed by the ICAA were not legal obligations to act in accordance with the Charter. A breach by a member of the ICAA carried with it certain process and sanctions as prescribed by the provisions of the Charter documents;

(c) the employment contracts were not rendered nugatory or worthless without the implication of the Charter Term. It was not pleaded that any breach of the Charter Term rendered the employment contracts less valuable. To the contrary – none of the benefits bestowed by the contract were dependent upon HMW complying with the Charter Terms. This was fatal; and

(d) implying the Charter Term was outside the bounds within which terms would be implied. There was no need to elevate the professional obligations of the parties to contractual terms as between employer and employee. To do so would create an undesirable trend. Counsel for the plaintiff asked rhetorically whether an employee could treat an employment contract as repudiated if a principle of the business committed a criminal offence? Or failed to lodge a business activity statement or pay tax? Counsel submitted that I ought not to overlook the enormity of implying such a term.

[165] The plaintiff also submitted that the Charter Term was not to be implied as a matter *of fact*. It argued that it was not reasonable and equitable to impose upon an employer a term that it must conduct its business to the standard of an association of which it has not been alleged to have been, at any material time, a member. Even if it were a member, the requirements imposed were a private matter between it and the association. It bore no relationship to the terms upon which HMW employed its employees. –

> On the defendants' own case, all of Mr Catalano, Mr Whitelaw and Mr Wallace would have been required, by the Contracts of Employment, to conduct HMW in the manner alleged. This would mean that if any one of them did not act in accordance with the requirements of the ICAA, the defendants (or other employees) could treat that as repudiation of their employment agreement and resign and/or sue for damages irrespective of whether that breach involved or in any way affected the defendant or involved that person's work. Such a term cannot have been intended by the parties and cannot be reasonable. The mere fact that a business or its owner had an obligation to do something did not mean that it made an implied promise to an employee not to do that thing: that was not reasonable and not necessary.

[166] The plaintiff argued that the implication of the term was not necessary because the contracts were commercially effective without it. It was not obvious: it was complicated and obscure. The fact that there was a specific provision in the employment contracts requiring the defendants to comply with the Code of Ethics meant that the term required the specific agreement of the parties. Although the term was capable of clear expression – that was not decisive. And although the term did not contradict the contract – that was not decisive.

[167] In deciding whether to strike out the defence based on the Charter Term as a stand-alone term, I have borne in mind the cautious approach that I must take to the power to strike out.

[168] From the point of view of the implication of terms in law, the contracts in this case may be thought of as falling within the class of contracts for the employment *of professionals by professionals* who are bound by professional obligations. Characterising the contracts as falling within that class takes away from the plaintiff's arguments about the enormity of the consequences of the implication of such a term for *all employees*.

[169] Consistently with my views about the implication of the No Unlawfulness Term in law, I consider that the implication of the Charter Term in law is not unarguable.

[170] From the point of view of the implication of terms in fact, I am of the view that it is not unarguable that the implication of the Charter Term is necessary to give commercial and business efficacy to the contracts. In my view, one "benefit" conferred by the contracts was the benefit of professional employment which, reasonably arguably, might be rendered nugatory if, via their employment, the first and second defendants were in breach of their professional obligations by knowingly engaging in a business that might impair the integrity or good reputation of the profession (for example).

[171] Indeed, it is arguable that it was contemplated by the plaintiff that a "Member in Business" who believed others in the business were behaving unethically and who had exhausted all available "safeguards" could "pull the parachute" and resign.[40]

[172] It follows that I will not order the striking out of the defence based on the implication of the Charter Term as a stand-alone term.

Code Term

[173] Paragraph 25(d) of the Amended defence asserts that clause 17 of the employment contracts provided "to the effect" that HMW, by its professional team members, would conduct the practice in accordance with the Code of Ethics and thereby in compliance with parts 150.1 and 2002 thereof.

[174] The plaintiff defined this term as the "Code Term". The defendants referred to it as the "Incorporation Term".

[175] Clause 17 of the employment contracts stated –

> 17 **Policies**
>
> You [that is, the employee] agree to abide by all policies of Wallace HMW as they exist, are replaced, amended or varied from time to time. These policies are documented in our Office Policies and Procedures Manual.

---

[40] Transcript 1 – 24 – 1 – 25.

[176] The defendants submitted that the Code Term/Incorporation Term (that the practice would be conducted in accordance with the Code of Ethics) was expressly incorporated into the employment contracts by reference to the Manual in clause 17.

Plaintiff's submissions

[177] The plaintiff submitted that paragraph 25(d) should be struck out because the allegation it made could not be sustained. Clause 17 did not say that HMW agreed to anything. It only concerned the employee's agreement to abide by the policies.

[178] The plaintiff submitted that the three decisions relied upon by the defendants in support of the incorporation of the Code Term were distinguishable because they were not dealing with codes of ethics.

[179] Those three cases were *Riverwood International Australia Pty Ltd v McCormick*,[41] *Goldman Sachs JBWere Services Pty Ltd v Nikolich*[42] and *Yousif v Commonwealth Bank of Australia*[43] I have considered them below – but I note now that I do not accept that it is appropriate to distinguish those cases from the present case on the basis of the nature of the term sought to be incorporated As Jessup J explained in *Goldman Sachs*, *Riverwood* sets out the approach to be followed to determine whether a contract should be held to incorporate a particular term. Nothing about those decisions suggests that the *Riverwood* approach would not extend to the contemplation of the incorporation of a term requiring conformity with an ethical or other code.

Defendants' submissions

[180] The defendants submitted that clause 17 expressly incorporated all of the policies of the plaintiff as documented in its Policies and Procedures Manual. The Code of Ethics "was one such policy".

[181] Whilst clause 17 was expressed in terms of Mr McPherson and Mr Hoeft agreeing to "abide by" the policies, the use of that phrase imposed obligations on both parties to the contract. It obliged the principals of HMW to abide by the Code of Ethics as well.

[182] The defendants referred to *Riverwood* and *Goldman Sachs* as examples of contracts in which an employee's agreement to abide by, or comply with, certain policies was taken to oblige employers to comply with those policies. The defendants noted that the approach in *Goldman Sachs* was endorsed by the Court of Appeal in *Gramotnev v Queensland University of Technology*[44] and in *Gramotnev v Queensland University of Technology (No 2)*.[45]

---

41 (2000) 177 ALR 193.
42 [2007] FCAFC 120.
43 (2010) 193 IR 212.
44 (2015) 251 IR 448 [47].
45 [2019] QCA 108 [167] [178].

[183] The defendants submitted that the status and structure of the plaintiff as a practice of chartered accountants was at the forefront of its policies. The policies under consideration provided the ethical framework for the conduct of practice – they were not aspirational statements (as in *Gramotnev*).

[184] As I understood the defendants, they argued that the policies required "All professional team members" to conduct themselves in accordance with the Code of Ethics and that each of the Directors was a "professional team member". The defendants submitted that the relevant statement in the policies was in the nature of a promise by the plaintiff to its employees that conduct contrary to the code would not occur.

[185] I pause here to observe that the "Ethical Requirements" differentiate between the obligations of: (a) members of the team; (b) professional team members; (c) members of the firm; (d) principals of the firm; (e) the firm and (f) managerial staff. For example, "All members of the team" are to adhere to APES 320: but "All professional team members" are to familiarise themselves with APES 110 Code of Ethics. It is not clear whether the distinctions are intentional. The answer may lie in a detailed study of the whole of the policies and the relevant APES standards however no submissions were made to me about this matter and I have taken it no further.

[186] The defendants also submitted that the plaintiff's case was conducted on the basis that a verbal policy was, by clause 17, incorporated into the employment contract. It was "untenable" for the plaintiff to suggest that, while spoken policies were included, written ones were not.

Discussion and conclusion

[187] In *Riverwood*, the company's redundancy policy was contained in a certain company manual.

[188] The clause of the employment contract (a letter of engagement) under consideration was one which stated –

> You [that is, the employee] agree to abide by all Company Policies and Practices currently in place, any alternatives made to them, and any new ones introduced.

[189] The clause contained no specific reference to the relevant manual. The question was whether the clause incorporated into the contract an obligation *on the part of the company* to pay out the employee in accordance with its redundancy policy.

[190] The primary judge noted that the use of the expression "you agree to abide by" suggested an obligation on the part of the employee and not the company. His Honour stated that the courts were anxious to make sense of loosely or carelessly drafted commercial documents if possible, and approached the construction of the word "abide" from that perspective.

[191] The primary judge took the view that the obligation (to abide by) was linked to the manual, which included the redundancy agreement. His Honour described the manual as being concerned "principally, if not exclusively, with laying down employees' entitlements".

[192] In the circumstances of the employment contract, his Honour held that the employee's agreement to "abide by" the policies and practices should be construed as imposing a like obligation upon the company.

[193] An appeal against the decision of the primary judge was dismissed.

[194] North J construed the expression "abide by" to include the employee's agreement to accept the employer's offer that it would comply with the obligations imposed upon it by the manual. His Honour said –

> [107] The association of the expression "*abide by*" with the reference to the Manual, essential characteristics of which have been analysed earlier in these reasons, suggests that the clause was intended to oblige Mr McCormick [the employee] to comply with his obligations and also to signify that Mr McCormick had accepted an offer from Riverwood to the effect that it would comply with the obligations imposed upon it by the Manual. Thus, the clause reflected the parties' intention to offer and accept mutual obligations in accordance with the provisions of the Manual. The fact that the clause refers only to "*You*" is consistent with this construction. While Mr McCormick agreed to abide by the Manual, he was in part responding to Riverwood in that he agreed to accept its compliance with is obligations under the Manual. The phraseology of the clause was proffered by Riverwood. Mr McCormick's acceptance carried with it an acceptance of Riverwood's offer to abide by the Manual by conferring the benefits provided in the Manual in favour of Mr McCormick.
>
> [108] Thus, in my view, the natural meaning of the term under consideration, viewed in the context in which the contract of employment was made, imposed upon Riverwood an obligation to make the redundancy payments in accordance with the provision in the Manual.

[195] Mansfield J construed the expression similarly. His Honour said –

> [150] In the light of the factual matrix referred to, I share the conclusion of the learned trial judge that the letter incorporates by reference the terms set out in the Manual from time to time including the Redundancy Agreement. I further agree with the conclusion that the presumed intention of the appellant and the respondent, by reason of the policy clause in the letter, was that the respondent would receive the benefits of the policies of the appellant in the Manual as they applied to him, including under the Redundancy Agreement (subject to that policy being changed by the appellant). The agreement "to abide by" those policies, in the circumstances, means that the respondent would receive or enjoy the

> benefits provided for by those policies but only according to their terms, and would himself comply with the terms of those policies as they applied to him.
>
> [151] I do not consider that the contents of the Manual demonstrate, as the appellant contends, that it did not intend to be contractually bound to comply with its policies (subject to their alteration). There are certain policies where such an intention is clear from the context. One example is that whereby it expects its employees to maintain the highest standard of corporate conduct, but it agrees not to criticise any employee for adverse consequences which flow from adherence to that standard. It is most unlikely that the appellant envisaged that it could blithely ignore its part of that policy, or at least could do so with legal impunity. Its Health Safety and Environment policy also has mutual obligations. It may also be observed that, in general, its policies are expressed in terms which are entirely apt to be treated as expressing mutually enforceable obligations; they are clear, precise, direct and mainly deal with matters which one might expect to be encompassed within a particular employment contract.

[196] In dissent, Lindgren J was not persuaded that the author of the letter intended to refer to the manual in his reference to Company Policies and Practices.

[197] In *Goldman Sachs* a majority of the Full Court of the Federal Court confirmed the primary judge's decision that sections (the "explicit promises") of a 'Working With Us" document (WWU) were terms of a contract of employment for the purposes of a claim for damages for breach of contract.

[198] The WWU covered many diverse topics. The employee had been given it when he was first offered employment. And he accepted an offer of employment when he had the WWU in his possession.

[199] The employee's offer of employment included the following statement –

> From time to time the Company has issued and will in the future issue office memoranda and instruments with which it will expect you to comply as applicable. If you have any queries at any time about which memoranda and instructions apply to you, you should raise that question with me or with Colin.

[200] Black CJ considered the case distinguishable from *Riverwood* because the company accepted, at the appeal, that some sections of the WWU (though not those relied upon by the employee) formed part of the contract of employment. The question in *Goldman Sachs* turned on the language of the WWU which, it was conceded, had contractual elements.

[201] Marshall J identified as the central question whether the parties intended to incorporate into their contract some or all of the matters dealt with in the WWU – in circumstances

in which the employee was expected to "comply as applicable" with presently existing and future "memoranda and instructions".

[202] Marshall J found the primary judge's conclusion that the WWU was incorporated into the contract 'compelling" for several reasons, including that the WWU "provided entitlements to employees in addition to setting out directions to them. It set out what each of the parties could expect the other to do, during its subsistence, in respect of a broad range of matters".

[203] The fact that the employee was required to acknowledge (in accepting the offer of employment) only certain provisions of the WWU did not mean that the parties did not intend to incorporate other provisions of the WWU into their contract.

[204] Marshall J found that the WWU was incorporated into the contract by reference to it in the letter of employment. It was not necessary to identify "a secure basis" for the incorporation of the WWU into the contract of employment: either the parties intended to incorporate the WWU into their contract of employment, or they did not.

[205] Jessup J did not consider the absence of any specific reference to the WWU in the letter of offer as fatal to the employee's case. The question was what the parties had intended. His Honour continued –

> [283] … That question was to be answered from a consideration of all of the relevant circumstances. It was, I consider, a most relevant circumstance … that WWU had been sent to the respondent with his letter of offer … the contemporaneous provision of WWU was a circumstance proper to be taken into account in drawing the inference with which his Honour was concerned.

[206] Jessup J agreed with the appellant that the quoted statement from the letter of offer was insufficient to establish the incorporation of the WWU.

[207] Jessup J thought his Honour was wrong to apply *Riverwood* to the *Goldman Sachs* case in the way that he did by comparing the use of "abide" with "comply". His Honour said –

> [287] … I would have no difficulty following the *approach* which was taken in *Riverwood.* That approach was to consider all the facts and circumstances surrounding the making of the contract in question, including the content of the documents which were controversial, for the purpose of considering whether the term contended for by the respondent had been established as a matter of inference. Beyond that, I read *Riverwood* as a judgment which turned entirely on its own facts. Little is to be gained … by picking apart the factual matrix in *Riverwood* with a view to lining up selected elements thereof with individual elements of the matrix in the present case thought to be corresponding in some sense. *Riverwood* was decided the way it was because their Honours in the majority agreed with the trial Judge that

> the parties intended a particular provision to be a term of the contract of employment. Necessarily they arrived at that conclusion after considering every fact or circumstance that had the potential to assist in the process of inference. It would be quite inappropriate, I consider, for a later court to seize upon individual elements of their Honours' fact-finding reasoning as though, somehow, they would have some binding or even persuasive impact upon the fact-finding process in which it was itself engaged.

[208] Jessup J noted that in *Riverwood*, the "abide by" term was critical and that without it, the respondent's case for express incorporation would have been difficult. In *Goldman Sachs*, the company had provided the employee with a copy of the WWU at the time it offered him employment on stated terms.

[209] After a detailed consideration of the WWU, Jessup J held that a health and safety statement contained in it was to be regarded as a term of the contract that the company would take "every practical step to provide and maintain a safe and healthy environment". However, his Honour found that the company had not breached that contractual term.

[210] In *Yousif*, an issue in a claim by an employee for damages for breach of contract was whether an "Appointment to Roles" policy was part of a contract of employment. The policy was contained in a document which contained an express disclaimer of incorporation. The primary judge held that the policy was not part of the contract of employment. An appeal against the primary judge's decision was dismissed.

[211] In arguing that the primary judged erred in concluding that the policy was not part of the terms of her employment contract, the appellant relied upon a paragraph of her contract which stated, "You are required to comply with all Bank policies and procedures existing from time to time". She relied upon *Riverwood* and *Goldman Sachs* to argue that, although phrased only in terms of her compliance, that statement imposed a contractual obligation on the Bank to comply with its policies as well. She argued that there was no relevant difference between the language of that statement and the language of the relevant statements in *Riverwood* and *Goldman Sachs*.

[212] The Full Court held that this argument involved an erroneous approach to the cases –

> *Riverwood* and *Goldman Sachs* both identify the importance of the context in order to determine the objective intention of the parties … Whatever the differences of approach or emphasis in *Riverwood* and *Goldman Sachs*, the reasons of all three Justices reflect the principle that whether or not a particular term forms a contractual obligation turns on the intent of the contracting parties, a objectively "conveyed by what was said or done, having regard to the circumstances in which those statements or actions happened": see *Ermogenous v Greek Orthodox Community of* SA Inc (2002) 209 CLR 95; 112 IR 56.

[213] Taking care not to draw upon factual similarities to reach a conclusion about the inclusion of the Code Term/Incorporation Term, I note that the language used in clause 17 is not the end of the matter. A court is required to determine the intention of the parties in the circumstances. However, in my view, those three authorities demonstrate that it would not be unreasonable for the defendants to present an argument to a court that, via clause 17, it was a term of the employment contracts that the plaintiff (through its directors) would abide by the Code of Ethics.

[214] The "Ethical Requirements" included the following statements, which expressly confer a "benefit" on the employees –

- The principals of the firm and managerial staff will not direct team members to act contrary to technical and/or professional standards.

- The principals of the firm and managerial staff will not put undue pressure on team members to adversely influence, impair or threaten their integrity.

[215] In my view, the defendants are entitled to argue that the parties intended there to be mutual obligations on the parties to the contract, all of whom were professionals, to adhere to the provisions of APES 320 and to familiarise themselves with, and conduct themselves in accordance with, the APES 110 Code of Ethics for Professional Accountants.

[216] It follows that I will not strike out the paragraph of the defence which is based on the incorporation of the Code Term/Incorporation Term.

Good Faith Term

[217] The Good Faith Term was pleaded at paragraph 25(c) of the defence.

Plaintiff's submissions

[218] The plaintiff's position was that there was doubt that the Good Faith Term would be implied at all. However, it did not apply to strike out the paragraph of the defence which relied upon it. Rather, the plaintiff submitted that paragraphs 25A(2)(e) and 25A(g), alleging conduct said to breach the Good Faith Term, ought to be struck out because it could not breach that term.

[219] In its written submissions, the plaintiff argued –

> … the complaint is that certain of the conduct said to constitute breaches of the duty cannot be a breach of the Good Faith Term as they do not plead any failure to: co-operate to achieve goals under the Employment Contracts; apply honest standards in the performance of those contracts; or any failure

> to comply with standards in relation to the contracts which are reasonable in the light of the parties' interests. This is the statement of the relevant obligation (should it exist) as propounded by Mason J in "*Contract, Good Faith and Equitable Standards in Fair Dealing*[46] which has been applied in all of the cases referred to in *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd* (2010) WASCA 222 at [48] to [55] and more recently in this Court by Jackson J in *Aurizon Network Pty Ltd v Glencore Coal Queensland Pty Ltd & Ors* [2019] QSC 163.

[220] The plaintiff submitted that paragraph 25A(e) concerned Mr Catalano's private affairs and could not be a breach of the duty of good faith because it did not involve the performance of the employment contracts. It involved no allegation of a failure to co-operate, or to act honestly in the performance of the employment contracts or to act to a standard with was not reasonable in light of the parties' interest.

[221] Paragraph 25A(g) had nothing to do with the employment contracts. At best it was an allegation of unlawful corrupt or dishonest conduct, which, relying on *Barker* could not be sustained. Further, it involved no allegation of a failure to co-operate, or to act honestly in the performance of the employment contracts or to act to a standard which was not reasonable in the light of the parties' interest.

Defendants' submissions & consideration

[222] At the beginning of their oral submissions, the defendants reminded me that it had not been submitted that paragraphs 25A(e) and 25A(g) ought to be struck out if the other terms in paragraph 25 remained. As I understand the defendants argument, the matters alleged in paragraphs 25A(e) and 25A(g) are relevant to its allegations of breach of the other terms it contends ought to be implied.

[223] Very properly, counsel for the plaintiff confirmed that it was only if the other paragraphs were "to go" that I would need to consider striking out paragraphs 25A(e) and 25A(g).

[224] Because I will not order the strike out of the paragraphs concerning the other asserted implied terms, I will not order the striking out of paragraphs 25A(e) or 25A(g).

[225] In any event, the defendants submit, striking out those paragraphs would not "quell the controversy". Those paragraphs served "further or alternative ends" (as per paragraph 67 of the amended defence) which were not under directly attack. I note that paragraph 67 of the defence pleads (among other things) that equitable relief should be refused because HMW did not come with clean hands in the premises of 25A(a) – (g); HMW's enforcement of the contracts was unconscionable in the premises of paragraphs 17, 20, 25, 25A and 25B; and, in the premises of 25A(a) to (g), it was contrary to public policy to enforce the restraints.

Summary

---

[46] (2000) 116 LQR 66, 69.

[226] The application for strike out is dismissed.

[227] I will hear the parties as to costs.

...

[228] There being no submission that it should be otherwise, the costs of the application are reserved.