FATE OF TRUST AND CONFIDENCE IN EMPLOYMENT CONTRACTS

The implied term of trust and confidence can potentially have a significant impact on the operation of the contract of employment, especially with regards to the obligations it imposes on employers. However, whether there is indeed such an implied term is not settled in Singapore. The highest courts in the UK and Australia have taken diametrically-opposed views. The aim of this article is to consider the path Singapore should take.

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I. Introduction

1 In the UK, as will be elaborated below, it is well established that every contract of employment has an implied term in law that the employer and employee will act with trust and confidence towards each other, though such a term may be excluded by express agreement. The emergence of this implied term of trust and confidence, especially with respect to the duties it imposes on employers, is seen as one of the most important developments in employment law in this century. However, very recently in *Commonwealth Bank of Australia v Barker*,[1] the highest court in Australia has held that no such term can be implied by law in employment contracts in Australia. The aim of this article is to examine the reasoning given in this recent case and to consider whether it should be followed in Singapore. However, before embarking on that, the current position in the UK and Singapore will be briefly laid out.

II. Position in the UK

2 The leading case in the UK that is seen as having crystalised the implied term of trust and confidence in contracts of employment is *Malik v Bank of Credit and Commerce International SA*.[2] Following the disastrous collapse of the Bank of Credit and Commerce International, two employees who had lost their jobs brought a claim for stigma damages. They alleged that owing to the fact that the bank had operated

1 [2014] HCA 32.
2 [1998] AC 20.

in a corrupt and dishonest manner (which fact became widely known), they had become handicapped in the labour market in acquiring a new job in the financial services industry. The main issue before the House of Lords was whether such stigma damages were recoverable. However, before addressing that issue, the court had to consider whether any term had been breached. The two employees alleged that the implied term of trust and confidence had been breached. The court agreed and in this connection, Lord Steyn (with whom Lord Goff of Chieveley, Lord Mackay of Clashfern and Lord Mustill agreed) stated:[3]

> The applicants do not rely on a term implied in fact. They do not therefore rely on an individualised term to be implied from the particular provisions of their employment contracts considered against their specific contextual setting. Instead they rely on a standardised term implied by law, that is, on a term which is said to be an incident of all contracts of employment … Such implied terms operate as default rules. The parties are free to exclude or modify them. …
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> … It imposes reciprocal duties on the employer and employee. Given that this case is concerned with alleged obligations of an employer I will concentrate on its effect on the position of employers. For convenience I will set out the term again. It is expressed to impose an obligation that the employer shall not:
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> > 'without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee:' …
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> … The evolution of the term is a comparatively recent development. The obligation probably has its origin in the general duty of co-operation between contracting parties … The reason for this development is part of the history of the development of employment law in this century. The notion of a 'master and servant' relationship became obsolete. Lord Slynn of Hadley recently noted 'the changes which have taken place in the employer-employee relationship, with far greater duties imposed on the employer than in the past, whether by statute or by judicial decision, to care for the physical, financial and even psychological welfare of the employee:' …
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> …
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> The evolution of the implied term of trust and confidence is a fact. It has not yet been endorsed by your Lordships' House. It has proved a workable principle in practice. It has not been the subject of adverse criticism in any decided cases and it has been welcomed in academic writings. I regard the emergence of the implied obligation of mutual trust and confidence as a sound development.

3 *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 at 45–46.

3 The next major decision in the UK was *Johnson v Unisys Ltd*,[4] which again made reference to the implied term of trust and confidence. The issue in *Johnson v Unisys Ltd* was whether the implied term of trust and confidence extended to termination. On the facts, the claimant brought a claim for unfair dismissal under the Employment Rights Act[5] and was awarded the statutory maximum amount of damages. Subsequent to that, the claimant brought a common law claim for breach of the implied term of trust and confidence. The House of Lords (with Lord Steyn dissenting) while recognising the implied term of trust and confidence, held that it should not be extended to termination. One of the main reasons for this was that if such an implied term extended to termination, it would conflict with the existing statutory scheme which among other things had certain limits in terms of compensation. However, in the subsequent UK House of Lords decision of *Eastwood v Magnox Electric plc*,[6] the court clarified that if there was a breach of the implied term of trust and confidence before the dismissal or termination (such as in relation to suspension), financial losses flowing therefrom could be claimed. This demarcation principle has been followed in subsequent cases.[7] Aside from this restriction, the implied term of trust and confidence has been applied to a wide array of situations.[8]

III. Position in Singapore

4 There have been several cases in Singapore which have referred to the implied term of trust and confidence,[9] but it was not until *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd*[10] that it can be said that the implied term of trust and confidence was clearly recognised in Singapore, at least at the High Court level.[11] In *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd*, the plaintiff alleged that the defendant

4 [2003] AC 518; [2001] 2 All ER 801.

5 c 18 (1996) (UK).

6 [2005] AC 503.

7 See, for instance, *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2012] 2 AC 22. It has also been followed in Singapore: see *Wee Kim San Lawrence Bernard v Robinson & Co (Singapore) Pte Ltd* [2014] 4 SLR 357.

8 For a list of such situations see, for instance, *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577 at [56].

9 *Arul Chandran v Gartshore* [2000] 1 SLR(R) 436; *Tullett Prebon (Singapore) Ltd v Chua Leong Chuan Simon* [2005] 4 SLR(R) 344; *Aldabe Fermin v Standard Chartered Bank* [2010] 3 SLR 722; *Wong Leong Wei Edward v Acclaim Insurance Brokers Pte Ltd* [2010] SGHC 352; *Chan Miu Yin v Philip Morris Singapore Pte Ltd* [2011] SGHC 161.

10 [2013] 2 SLR 577. Since then, it has been referred to in two High Court decisions, namely, *Brader Daniel John v Commerzbank AG* [2014] 2 SLR 81 and *Leong Hin Chuee v Citra Group Pte Ltd* [2015] SGHC 30.

11 Apparently there was an appeal to the Court of Appeal which was dismissed: see *Brader Daniel John v Commerzbank AG* [2014] 2 SLR 81 at [113].

employer had breached the implied term of trust and confidence in various ways and was hence constructively dismissed. Quentin Loh J in the High Court agreed with him and stated:[12]

> In my judgment unless there are express terms to the contrary or the context implies otherwise, an implied term of mutual trust and confidence, and fidelity, is implied by law into a contract of employment under Singapore law.

5 However, the defendant had accepted that there was such an implied term and as such this issue was not contested. Aside from the High Court decision of *Cheah Peng Hock v Luzhou Bio Chem Technology Ltd*, reference should be made to three Court of Appeal decisions which may have a bearing on the issue.

6 The first is *Latham Scott v Credit Suisse First Boston*.[13] On the facts, Latham raised several issues, two being of importance in the present context. The first was that, he was entitled to non-guaranteed bonus which was not paid to him and second, his dismissal was made in bad faith. In relation to the first issue, the court held that since the bonus was discretionary in nature, Latham had no legal right to make a claim. In relation to the second issue, the court examined in detail whether the dismissal was indeed made in bad faith and came to the conclusion that it was not. Though there was no reference to the implied term of trust and confidence as such, in essence, the determination on the first issue seems to support the stand that there was no implied duty of trust and confidence while the determination in relation to the second issue seems to suggest there was indeed such a duty.[14] However, even in relation to the issue of bad faith relating to the dismissal, the parties were merely arguing based on the facts, without contesting whether a dismissal could indeed be subject to such an implied limitation.

7 The second is *Ng Giap Hon v Westcomb Securities Pte Ltd*.[15] On the facts, one issue was whether in the contract between an agent and the principal a duty of good faith could be implied by law. The court held that the doctrine of good faith was a fledging doctrine and that the law in this area was still in a state of flux. Given that the theoretical foundations and structure of the doctrine were not settled, the court came to the conclusion that a duty of good faith could not be implied by law into contracts, in the Singapore context.

12 *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577 at [59].
13 [2000] 2 SLR(R) 30.
14 See also *Chan Miu Yin v Philip Morris Singapore Pte Ltd* [2011] SGHC 161 at [48].
15 [2009] 3 SLR(R) 518.

8 *Ng Giap Hon v Westcomb Securities Pte Ltd* was distinguished in *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd*. Quentin Loh J stated that the concept of good faith imposed far higher duties, for instance by bringing "with it all connotations of a contract *uberrmae fidei*, *ie*, one of the fullest confidence".[16] However, he opined that the implied duty of trust and confidence placed a much more limited duty. In another High Court decision, *Chan Miu Yin v Philip Morris Singapore Pte Ltd*,[17] the court again distinguished *Ng Giap Hon v Westcomb Securities Pte Ltd*, but this time by stating that employment contracts were *sui generis*.

9 The next case was *Wee Kim San Lawrence Bernard v Robinson & Co (Singapore) Pte Ltd*.[18] The main issue in this case was whether, assuming that the appellant was constructively dismissed as a consequence of his employer breaching the implied term of mutual trust and confidence, he could claim damages beyond the amount of salary payable for the contractual notice period stated in his employment contract. The court referred to all the major UK authorities cited earlier and in doing so, seemed to have accepted the existence of such a term. For instance, at one point the court stated:[19]

> Losses of such a nature that flow from a breach of the implied term of mutual trust and confidence are conceptually distinct from those resulting from the premature termination of an employment contract, and *are therefore recoverable* in principle and liable to be assessed in an appropriate manner. [emphasis added]

Nonetheless, it was not contested before the court whether the implied term did indeed exist in Singapore. Further, the court also made passing reference to the dissenting judgment of Jessup J in *Commonwealth Bank of Australia v Barker* and alluded to the fact that the decision was under appeal.[20]

10 In short, while there is clear support for the implied term of trust and confidence at the High Court, when it comes to the Court of Appeal, the position seems far less clear.

16 *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577 at [49].
17 [2011] SGHC 161 at [59].
18 [2014] 1 SLR 1382 (HC), [2014] 4 SLR 357 (CA).
19 *Wee Kim San Lawrence Bernard v Robinson & Co (Singapore) Pte Ltd* [2014] 4 SLR 357 at [27].
20 *Wee Kim San Lawrence Bernard v Robinson & Co (Singapore) Pte Ltd* [2014] 4 SLR 357 at [30].

IV. Position in Australia: *Commonwealth Bank of Australia v Barker*

A. Facts and finding

11 The respondent, Mr Barker, was employed by the Commonwealth Bank of Australia since 1981 in a senior position till the time he was made redundant in 2009. Clause 6 of his contract of employment with the bank allowed termination by four weeks' notice or salary in lieu of notice. Clause 8 provided for redundancy payments in the event that the employee was made redundant. Clause 8 included the following words, "In the case where the position occupied by the Employee becomes redundant and the Bank is unable to place the Employee in an alternative position with the Bank or one of its related bodies …" and continued to provide for the amount of compensation payable. In February 2009, Mr Barker was made redundant and informed that if he was not redeployed his contract could come to an end in four weeks' time. He was asked to clear out his desk and, his e-mail account and intranet access were terminated. Thereafter, there was some attempt on the bank's part to inform Mr Barker about possible redeployment opportunities but these attempts were made via e-mail. Since his e-mail account was terminated, Mr Barker did not see them. He got to know about some redeployment opportunities only later when he received the information through his personal e-mail account. When no redeployment was found by the exit date, his contract was terminated. Mr Barker then brought a claim. He framed in claim in two ways. First, he relied on a certain "Redundancy, Redeployment, Retrenchment and Outplacement Policy" which he alleged, formed part of the contract and was breached. Second, he alleged that the implied term of trust and confidence had been breached by the bank, in not conducting the termination or redundancy process in a proper manner. Mr Barker *did not* bring a claim based on cl 8 of his employment contract. The primary judge found that the policy referred to above had not been incorporated into the contract of employment. Nonetheless, he went on to hold that the bank was in breach of the implied term of trust and confidence in being inactive in complying with those policies. On appeal to the Federal Court,[21] the majority, comprising Jacobson and Lander JJ agreed that the implied term had been breached, but not in the sense of the inaction relating to not following the policies, but more generally in the sense that the bank did not take positive steps to consult with Mr Barker about alternate redeployment opportunities. Jessup J dissented. On appeal to the High Court of Australia, the court (comprising French CJ, Kiefel, Bell, Gageler and Keane JJ) unanimously allowed the appeal (in a rather brief judgment) and held that in the

21 *Commonwealth Bank of Australia v Barker* [2013] FCAFC 83.

Australian context, there was no implied term in law that the employer owed a duty of trust and confidence towards the employee.

B. Reasoning

12 Having looked at the facts briefly, the reasons why the Australian High Court came to such a conclusion will now be highlighted. The matters raised by Jessup J in the Federal Court would also be referred to where appropriate.

(1) Necessity

13 One of the reasons advanced was that for a term to be implied by law, it had to be necessary. However, for a term to be necessary under Australian law, it had to be shown that without the implication of that term the contract would be "rendered nugatory or worthless, or seriously undermined".[22] Four out of the five judges in the High Court referred to this test and they held that the implied term of trust and confidence did not measure up to this test. Jessup J in the Federal Court also made reference to this test and further commented that given that the origins of the implied term of trust and confidence only emerged in the 1970s and the "law of employment managed quite satisfactorily without the implied term for many years",[23] it was unnecessary to imply such a term.

(2) History of development

14 Another reason advanced by the court was that the history of development of the implied term of trust and confidence was unique to UK and it could not be reciprocated in Australia. This factor was highlighted by all the judges in the High Court as well as Jessup J in the Federal Court. For instance, Kiefel J described the unique circumstances through which the implied term of trust and confidence arose in the UK:[24]

> The words adopted in *Malik* as the formulation of the term of trust and confidence, to be applied in connection with the duties of employers, did not have their origin in decisions of the ordinary courts, but rather those of employment tribunals exercising statutory powers with respect to unfair dismissals. The Trade Union and Labour Relations Act 1974 (UK) contained a provision to the effect that an employee was to be taken to be dismissed if the employee terminated

22 *Commonwealth Bank of Australia v Barker* [2014] HCA 32 at [31] and [60].
23 *Commonwealth Bank of Australia v Barker* [2013] FCAFC 83 at [212].
24 *Commonwealth Bank of Australia v Barker* [2014] HCA 32 at [68] to [69]. See also, *Wee Kim San Lawrence Bernard v Robinson & Co (Singapore) Pte Ltd* [2014] 4 SLR 357 at [24].

> the contract on account of the employer's conduct (which some call 'constructive dismissal'). In *Western Excavating (ECC) Ltd v Sharp*, the Court of Appeal held that, for the provision to apply, the employer must be guilty of conduct which amounted to a significant breach going to the root of the contract of employment.
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> The question for the employment tribunals was what conduct on the part of an employer, which caused the employee to resign, qualified as a breach of this kind. In *Courtaulds Northern Textiles Ltd v Andrew*, the Employment Appeal Tribunal accepted that 'it was an implied term of the contract that the employers would not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties.' The purpose and importance of the term of trust and confidence was explained in *Woods v WM Car Services (Peterborough) Ltd*. Without it, it was said, an employee had no remedy even if his or her employer had behaved unfairly, and so employers could 'squeeze out' employees and still avoid a statutory claim for unfair dismissal.

(3) Uncertainty

15 All the judges in the High Court as well as Jessup J in the Federal court directly or indirectly referred to the inherent uncertainty surrounding the implied term of trust and confidence. In fact, Jessup J in the Federal Court had this to say: "[T]he 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."[25] This observation of his was approved by Gageler J in the High Court as well.

(4) Not corollary to employee's implied duty of fidelity and good faith

16 Another reason advanced by Kiefel J in the High Court as well as Jessup J in the Federal Court was that the implied term of trust and confidence sought to be imposed on the employer was not a corollary to an employee's duty of fidelity and good faith. Kiefel J after referring to cases in which the employee was held to have breached the implied term of trust and confidence towards the employer stated:[26]

> The duty of mutual trust and confidence of which these cases speak is not some abstract concept. It refers to conduct, on the part of an employee, which is contrary to the interests of the employer and serious enough to have the effect that the employer could not reasonably be expected to have confidence in the employee. The duty reflects an essential aspect of the relationship between the employer and employee. Whilst trust and confidence is maintained, the

25 *Commonwealth Bank of Australia v Barker* [2013] FCAFC 83 at [318].
26 *Commonwealth Bank of Australia v Barker* [2014] HCA 32 at [66].

> relationship endures. In that sense, the employee's duty may be said to be directed to the maintenance of the relationship. Yet the law recognises that, where a point of no confidence is reached, it would be intolerable for the employer to continue with the relationship. In such circumstances, termination of the employment is justified.

A little later he also stated:[27]

> 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.

17 Thus in essence when applied to the employer, it imposes far wider obligations. It is not just concerned with conduct which can justify resignation. Further, the implied term of trust and confidence can impose positive obligations[28] on the employer and may require him to act fairly.[29] If employees were subject to such requirements, that could be very onerous and unreasonable.

(5) Interaction with legislation

18 All the judges in the High Court as well as Jessup J in the Federal Court referred to the issue of how the implied term uncomfortably interacted with statutory provisions. For instance, Kiefel J stated:[30]

> It may be accepted that policy initially favoured the use of the term trust and confidence in the context of unfair dismissal claims where the legislation left a gap. However, the potential for the term to create anomalies suggest that the policy of the law is not an appropriate basis for the application of the term.

An added complication was that in Australia there was state legislation as well, which varied from state to state.[31] As mentioned earlier, this was also the reason why in the English case of *Johnson v Unisys Ltd*, the House of Lords refused to extend the implied term of trust and confidence to termination.

(6) No prior local support

19 Yet another reason was there was no clear support for the imposition of the implied term of trust and confidence in Australia. Four out of five judges in the High Court and Jessup J in the Federal

27 *Commonwealth Bank of Australia v Barker* [2014] HCA 32 at [81].
28 *Commonwealth Bank of Australia v Barker* [2014] HCA 32 at [39] and [84].
29 *Commonwealth Bank of Australia v Barker* [2014] HCA 32 at [103].
30 *Commonwealth Bank of Australia v Barker* [2014] HCA 32 at [99].
31 *Commonwealth Bank of Australia v Barker* [2014] HCA 32 at [18].

Court looked into the history of Australian cases relating to trust and confidence and came to the conclusion that the term was not well established in Australia. Though there was a passing reference to this term in two High Court decisions, none of them constituted an actual determination that such a duty should indeed be implied by law in all employment contracts in Australia.[32] Jessup J in the Federal Court also stated that there were 11 cases which considered the implied term of trust and confidence at the intermediate appellate level, but on "no occasion has it been held, in the sense amounting to part of the *ratio decidendi*, that the implied term is, or is not, a feature of a contract of employment law in Australia".[33]

(7) Social policy

20 Three of the five judges in the High Court and as well as Jessup J in the Federal Court also referred to fact that whether such a term should be recognised turned on policy considerations and that it was not appropriate for courts to make that decision. For instance, French CJ, Bell and Keane JJ stated that:[34]

> The complex policy considerations encompassed by those views of the implication mark it, in the Australian context, as a matter more appropriate for the legislature than for the courts to determine.

V. Arguments against *Commonwealth Bank of Australia v Barker*

21 Having looked at the reasoning given in *Commonwealth Bank of Australia v Barker*, the counter-arguments will now be addressed, with particular reference to Singapore.

A. Necessity

22 In Singapore, as long as terms implied by law are concerned, as Andrew Phang Boon Leong J stated in *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* ("*Forefront*"):[35]

> The *rationale as well as test* for this broader category of implied terms is, not surprisingly, quite *different* from that which obtains for terms implied under the 'business efficacy' and 'officious bystander' tests. In the first instance, the category is much broader inasmuch (as we have

32 One case related to employee misconduct and the other related to employer negligence: see *Commonwealth Bank of Australia v Barker* [2014] HCA 32 at [67].

33 *Commonwealth Bank of Australia v Barker* [2013] FCAFC 83 at [239].

34 *Commonwealth Bank of Australia v Barker* [2014] HCA 32 at [40].

35 [2006] 1 SLR(R) 927 at [44]. See also, *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518.

> seen) the *potential* for application *extends* to *future* cases relating to the same issue with respect to the *same category* of contracts. In other words, the decision of the court concerned to imply a contract 'in law' in a particular case *establishes a precedent* for similar cases in the future for *all* contracts of *that particular type*, unless of course a higher court overrules this specific decision. Hence, it is my view that courts ought to be as – if not more – careful in implying terms on this basis, compared to the implication of terms under the 'business efficacy' and 'officious bystander' tests which relate to the *particular contract and parties only*. Secondly, the test for implying a term 'in law' is broader than the tests for implying a term 'in fact'.

23 The issue of necessity in relation to terms implied by law was not mentioned in *Forefront*'s case, but in the earlier case of *Cold Storage Singapore (1983) Pte Ltd v Management Corporation of Chancery Court*,[36] the Court of Appeal seemed to have accepted that for a term to be implied by law, it had to be necessary.[37] Nonetheless, exactly what will amount to being necessary in the context of terms implied by law, does not seem to have been considered in the Singapore. Thus first, the exact test may not be the same as in Australia. Second, what is necessary or not necessary is ultimately a question of policy[38] and the policy reasons why such a term should be implied are discussed below. Further, in response to Jessup J's comment highlighted earlier, it is suggested, that ignores the fact that law is not static and is always morphing. If Jessup J's argument were to be accepted, it may also be questioned why the law should develop or recognise the law of negligence in 1932, given that the prior to that, the common law managed quite successfully without it.

24 As to the policy considerations why it is necessary to impose such a term, one of the most important and obvious reasons is the particularly vulnerable position of the employee and, the fact that employment is very central to an individual.[39] For instance, Lord Steyn in *Johnson v Unisys Ltd*, stated:[40]

> Since 1909 our knowledge of the incidence of stress-related psychiatric and psychological problems of employees, albeit still imperfect, has greatly increased. What could in the early part of the last century dismissively be treated as mere 'injured feelings' is now sometimes accepted as a recognisable psychiatric illness. … These considerations are testimony to the need for implied terms in contracts of

36 [1991] 2 SLR(R) 992 at [5].

37 It is also difficult to see how or why a term should be implied into all contracts of a particular type if it was not necessary.

38 This is also in line with the "broader" test referred to by the court in *Forefront*'s case. See also, *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR(R) 769 at [90] and [92].

39 See also Douglas Brodie, "Fair Dealing and the World of Work" (2014) 43 *Industrial Law Journal* 29.

40 *Johnson v Unisys Ltd* [2003] AC 518; [2001] 2 All ER 801 at [19].

> employment protecting employees from harsh and unacceptable employment practices. This is particularly important in the light of the greater pressures on employees due to the progressive deregulation of the labour market, the privatisation of public services, and the globalisation of product and financial markets: see Burchell and others, "Job Insecurity and Work Intensification" (1999), a report published for the Joseph Rowntree Foundation, at pp 60–61. This report documents a phenomenon during the last two decades 'of an extraordinary intensification of work pressures'. The report states as a major cause the fact that the 'quantity of work required of individuals has increased because of under-staffing so that hours of work have lengthened and, more importantly, the pace of work has intensified'. Inevitably, the incidence of psychiatric injury due to excessive stress has increased. The need for protection of employees through their contractual rights, express and implied by law, is markedly greater than in the past.

Lord Hoffmann in the same case stated:[41]

> At common law the contract of employment was regarded by the courts as a contract like any other. The parties were free to negotiate whatever terms they liked and no terms would be implied unless they satisfied the strict test of necessity applied to a commercial contract. Freedom of contract meant that the stronger party, usually the employer, was free to impose his terms upon the weaker. But over the last 30 years or so, the nature of the contract of employment has been transformed. It has been recognised that a person's employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem. The law has changed to recognise this social reality. … The contribution of the common law to the employment revolution has been by the evolution of implied terms in the contract of employment. The most far reaching is the implied term of trust and confidence.

25 Reference may also be made to the position in Canada. In *Wallace v United Grain Growers Ltd*,[42] the Supreme Court of Canada held there as an implied duty not to act unfairly or in bad faith in the employment context. Iacobucci J delivering the judgment of the majority stated:[43]

> The contract of employment has many characteristics that set it apart from the ordinary commercial contract. … As K Swinton noted in "Contract Law and the Employment Relationship: The Proper Forum for Reform", in B J Reiter and J Swan, eds, *Studies in Contract Law* (1980), 357, at p 363:

41 *Johnson v Unisys Ltd* [2003] AC 518; [2001] 2 All ER 801 at [35]–[36].
42 [1977] 3 SCR 701.
43 *Wallace v United Grain Growers Ltd* [1977] 3 SCR 701 at [91]–[93] and [98].

> … the terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does. Individual employees on the whole lack both the bargaining power and the information necessary to achieve more favourable contract provisions than those offered by the employer, particularly with regard to tenure.
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> This power imbalance is not limited to the employment contract itself. Rather, it informs virtually all facets of the employment relationship. …
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> This unequal balance of power led the majority of the Court in *Slaight Communications*, *supra*, to describe employees as a vulnerable group in society: see p 1051. The vulnerability of employees is underscored by the level of importance which our society attaches to employment. As Dickson CJ noted in *Reference Re Public Service Employee Relations Act (Alta.)* [1987] 1 SCR 313, at p 368:
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> > Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. …
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> …
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> The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal[44] employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.

26 However, while the above arguments may be based on the necessity from the employees' viewpoint, it should also be highlighted there is a copious body of literature[45] in organisational psychology

44 This principle applies not only to dismissal but throughout the employment contract as Iacobucci J himself later explained in *McKinley v BC Tel* [2001] 2 SCR 161 at [73]. See also *Prinzo v Baycrest Centre for Geriatric Care* (2002) 60 OR (3d) 474 at [34] and *Colwell v Cornerstone Properties Inc* 2008 CanLII 66139 (ON SC). See also the recent Supreme Court of Canada decision of *Bhasin v Hrynew* 2014 SCC 71 which has recognised a general duty of good faith in all contracts, in terms of performance.

45 See for instance, P Ghosh, A Rai & A Sinha, "Organizational Justice and Employee Engagement" (2014) 43(4) *Personnel Review* 628; Hao Zhao *et al*, "The Impact of Psychological Contract Breach on Work-related Outcomes: A Meta-analysis" (2007) 60 *Personnel Psychology* 647; Moorman, "Relationship Between Organizational Justice and Organizational Citizenship Behaviors: Do Fairness Perceptions Influence Employee Citizenship?" (1991) 76 *Journal of Applied Psychology* 845; S L Robinson & D M Rousseau, "Violating the Psychological Contract: Not Exception but the Norm" (1994) 15 *Journal of Organizational Behaviour* 245; T W Ng, D C Feldman & S S Lam, "Psychological Contract

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which suggests how if the employer behaves unfairly or unjustly, this can have a negative impact on employee productivity, performance, satisfaction, retention and even innovation.[46] For instance, Miller states:[47]

> The psychological contract is composed of the individual's beliefs about mutual obligations within the employment relationship, and includes beliefs about what the individual owes the employer, as well as what the employer owes the individual (Robinson,1996). …
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> Research in psychological contract breach and violation generally distinguishes between two types of outcomes: behavioral and attitudinal. Among attitudinal outcomes, contract breach is believed to be related to reduced organizational trust (Deery, Iverson & Walsh, 2006; Robinson, 1996; Robinson & Rousseau, 1994), increased intent to quit (Robinson & Rousseau, 1994; Suazo *et al*, 2005; Turnley & Feldman, 2000), reduced job satisfaction (Knights & Kennedy, 2005; Robinson & Rousseau, 1994), reduced organizational commitment (Coyle-Shapiro & Kessler, 2000; Knights & Kennedy, 2005), and increased employee cynicism (Cartwright & Holmes, 2006; Pugh, Skarlicki, & Passell, 2003).
>
> Behavioral outcomes of contract breach include higher levels of absenteeism (Deery *et al*, 2006), reduced job performance (Lester, Turnley, Bloodgood, & Bolino, 2002), reduced organizational citizenship behaviors (Coyle-Shapiro & Kessler, 2000; Schalk & Roe, 2007), increased workplace deviance (Bordia *et al*, 2008), and increased voluntary turnover (Robinson & Rousseau, 1994). …
>
> Conversely, contract fulfillment has been empirically linked with higher productivity (Dobos & Rousseau, 2004; Robinson, 1996), higher job satisfaction and motivation, (Guest & Conway, 1997), increased organizational commitment (Coyle-Shapiro & Kessler, 2000; Guest & Conway, 1997), increased organizational trust (Robinson, 1996), increased organizational citizenship behaviors (Coyle-Shapiro & Kessler, 2000; Robinson and Morrison, 1995; Turnley, Bolino, Lester, & Bloodgood, 2003), reduced turnover intentions (Dobos & Rousseau, 2004; Guest & Conway 1997; Turnley & Feldman, 1999). …

This also seems largely intuitive. Thus, by observing trust and confidence the employer may not only be advancing the interests of his employees. He is also likely to be advancing his own interests.

Breaches, Organizational Commitment, and Innovation-related Behaviours: A Latent Growth Modeling Approach" (2010) 95(4) *Journal of Applied Psychology* 744.

46 See also Douglas Brodie, "Mutual Trust and Confidence: Catalysts, Constraints and Commonality" (2008) 37 *Industrial Law Journal* 329 at 339.

47 David Glen Miller, "Outcomes of Psychological Contract Breach and Violation" (2010) (Psychology Master's dissertation, California State University) (UMI Dissertations Publishing).

27 Further, in considering policy, as may have been evident from the discussion above, it should also be borne in mind that employment typically involves a long-term relationship.[48] As Leggatt J observes in the recent case of *Yam Seng Pte Ltd v International Trade Corp Ltd*:[49]

> Such 'relational' contracts, as they are sometimes called, may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements.

B. History of development

28 First, the view that the implied term of trust and confidence emerged exclusively from a statutory context is not unanimous. For instance, Lord Steyn in *Malik v Bank of Credit and Commerce International SA*, stated that "[t]he obligation probably has its origin in the general duty of co-operation between contracting parties".[50]

29 Second, it may also be argued that there were already other independent strands in employment law which recognised the duty of trust and confidence on the part of the employer.[51] For instance, an employee is not obliged to obey unreasonable orders.[52] Similarly, though the employer is not expected to provide the employee with work, where the employee is rewarded by commission, there might be a duty to provide a reasonable amount of work.[53]

30 Third, even if it is true that the origins can be traced back to a particular statutory context, today in the UK, the term is clearly not restricted to any such context and thus it is suggested, whether it should be applicable in Singapore should be determined by looking at policy considerations and not history.

31 Fourth, as highlighted earlier, in Canada a similar term has been developed in a non-constructive dismissal/non-statutory context. In fact, it has very recently been recognised by the Supreme Court of

48 See also *Aldabe Fermin v Standard Chartered Bank* [2010] 3 SLR 722 at [54].

49 [2013] EWHC 111 at [142], though this was not with reference to terms implied by law and this was not an employment case. See also *Bhasin v Hrynew* 2014 SCC 71 at [60].

50 *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 at 45. See also Douglas Brodie, "Beyond Exchange: The New Contract of Employment" (1998) 27 *Industrial Law Journal* 79.

51 See also Ter Kah Leng, "Good Faith in the Performance of Commercial Contracts Revisited" (2014) 26 SAcLJ 111 at 124–125.

52 See, for instance, *Bouzourou v The Ottomon Bank* [1930] AC 271.

53 See, for instance, *Devonald v Rosser & Sons* [1906] 2 KB 728.

Canada that there is a general duty of good faith in all contracts in terms of performance.[54] The implied term of trust and confidence in employment contracts has also been recognised in Hong Kong,[55] Malaysia[56] and New Zealand.[57] Though, the bulk of cases in these three other jurisdictions concern constructive dismissal there is no suggestion in them that the term is exclusively restricted to such a context. Indeed there have been cases[58] in these jurisdictions which have applied similar principles to other contexts.[59] It should also be mentioned that cases from other jurisdictions besides Australia and the UK were not referred to by the High Court in *Commonwealth Bank of Australia v Barker*.

C. Uncertainty

32 First, it is not a unanimous view that uncertainty will result. For instance, Leggatt J in the recent case of *Yam Seng Pte Ltd v International Trade Corp Ltd*,[60] had this to say about the doctrine of good faith, "the fear that recognising a duty of good faith would generate excessive uncertainty is unjustified. There is nothing unduly vague or unworkable about the concept. Its application involves no more uncertainty than is inherent in the process of contractual interpretation".

33 Second, even if it is accepted that there may be a certain amount of uncertainty,[61] it is suggested, the courts are used to dealing with all

54 *Bhasin v Hrynew* 2014 SCC 71.

55 *Bachicha v Poon Shiu Man Henry* [2000] 3 HKC 452; *Ko Hon Yue v Liu Ching Leung* [2010] HKCA 370.

56 *Jon Paul Dante v Malaysian Philharmonic Orchestra* [2013] 1 AMR 635.

57 *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372; *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] 2 NZLR 415; *Telecom South Ltd v Post Office Union* [1992] 1 ERNZ 711 at 722. As from 2000, s 4 of the Employment Relations Act 2000 (NZ), specifically incorporates a duty of good faith into contracts of employment, but the cases cited herein relate to the period before that.

58 See, for instance, *Wood v Jardine Fleming Holdings Ltd* [2001] 2 HKC 735; *Chan Kam Yau v The Hong Kong University of Science & Technology* [2007] HKDC 403; *Azhar Victor v Malaysian Airlines System Sdn Bhd* [2012] 3 AMR 17.

59 The other situations cited relate to the exercise of a discretionary power by the employer, though the High Court in *Commonwealth Bank of Australia v Barker* [2014] HCA 32 at [42] stated that it was not deciding on the issue of how discretions should be exercised. Nonetheless, the issues are closely related and this may be seen as just another facet of trust and confidence. See, for instance, John D McCamus, "Abuse of Discretion, Failure to Cooperate and Evasion of Duty: Unpacking the Common Law Duty of Good Faith in Contractual Performance" (2004) 29 Advoc Q 72; Douglas Brodie, "Beyond Exchange: The New Contract of Employment" (1998) 27 *Industrial Law Journal* 79.

60 [2013] EWHC 111 at [152].

61 In fact, all terms implied in law may involve some amount of uncertainty; see *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR(R) 769 at [90].

sorts of other normative standards like reasonableness which may also involve uncertainty.

34 Third, whether the implied term of trust and confidence does indeed give rise to undue uncertainty, it is suggested, depends on how it is applied by the courts in practice. Recognising such a term, but interpreting it more narrowly, may reduce the potential for uncertainty in the long run. For instance, in the Federal Court in *Commonwealth Bank of Australia v Barker*, the majority of judges held that there was a breach of the implied term on the facts whilst Jessup J stated that even if there was such an implied term, it was not breached on the facts.[62]

35 Fourth, if the employer feels that the implied term of trust and confidence exposes him to obligations of an uncertain nature, he can always expressly exclude it from the contract.[63]

D. Not corollary to employee's implied duty of fidelity and good faith

36 First, in Singapore, in *Cheah Peng Hock v Luzhou Bio-Chem Technology*, Quentin Loh J opined:[64]

> These statements, although expressed as an employee's duties to his employer, must *logically* apply to the employer as well. In fact the standard formulation of this implied term is the duty on both employer and employee not to undermine or destroy the *mutual* trust and confidence [emphasis added].

37 Second, the High Court in *Commonwealth Bank of Australia v Barker* seems to be suggesting that the duty on the part of the employee to act with fidelity and good faith is confined to repudiatory breaches (unlike the implied duty of trust and confidence imposed on the employer which can extent to non-repudiatory breaches as well). For instance, Kiefel J states:[65]

> It is necessary in the first place to distinguish between an employee's duty of trust and confidence, which the law has for a long time implied in contracts of employment, and the term recognised in *Malik*. The former is not concerned with obligations on the part of the employer, but with obligations of fidelity on the part of an employee

62 See also para 43 below in relation to the approach of the courts in New Zealand.

63 However, there have been some calls for treating such exclusions as being against public policy and hence invalid: see for instance, Douglas Brodie, "Beyond Exchange: The New Contract of Employment" (1998) 27 *Industrial Law Journal* 79; Douglas Brodie, "Fair Dealing and World of Work" (2014) 43 *Industrial Law Journal* 29.

64 *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577 at [54].

65 *Commonwealth Bank of Australia v Barker* [2014] HCA 32 at [63].

> to his or her employer, breach of which may justify dismissal. The term trust and confidence recognised in *Malik*, on the other hand, imposes obligations on an employer not to engage in 'trust-destroying conduct' which may sound in damages if breached.

38 However, it is difficult to see how a breach by an employee can never, be non-repudiatory and result in the payment of mere damages. For instance, if the employee makes an urgent overseas call using the office phone for personal purposes; that breach may not necessarily be repudiatory and the employer may just be able to claim the expenses incurred from the employee. Further, if the real concern is that damages may become payable in unforeseen circumstances, while there have been cases where damages have been awarded,[66] this has not been common. In fact, most of the cases deal with constructive dismissal rather than a claim for common law damages. In addition, the cases in which damages have been awarded have not been highly controversial except perhaps with the exception of the federal court decision in *Commonwealth Bank of Australia v Barker*.[67]

39 Third, in relation to the point about imposing positive or onerous duties, it should be stressed that the implied term of trust and confidence does not make either party a fiduciary in relation to the other. For instance, as stated in *Nottingham University v Fishel*:[68]

> This is consistent with the recognition that the duty is one where each party must have regard to the interests of the other, but not that either must subjugate his interests to those of the other. The duty of trust and confidence limits the employer's power, but it does not require him to act as a fiduciary. It is a contractual but not a fiduciary obligation.

40 This point was also stressed by Quentin Loh J in *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd*, who, while accepting the concept of trust and confidence, distinguished it from the duty of good faith:[69]

> The danger of implying a duty of good faith into contracts of employment is to introduce a potentially far reaching concept which may impose positive duties and fetters the freedom of parties, particularly those of equal bargaining power who are not protected under the Employment Act (Cap 91, 2009 Rev Ed) or under the

66 See for instance, *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577, *Scally v Southern Health and Social Services Board* [1992] AC 294; *Gogay v Hertfordshire County Council* [2000] IRLR 703.

67 See also para 43 below in relation to the approach of the courts in New Zealand.

68 [2000] IRLR 471 at 483. See also *Bhasin v Hrynew* 2014 SCC 71 at [65].

69 *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577 at [46] and [49].

> common law, to contract. It will probably also conflict with written terms.
>
> … there is no need to make matters more uncertain by introducing a concept of good faith which brings with it all the connotations of a contract *uberrmae fidei*, *ie*, one of the fullest confidence or of the utmost good faith, which normally govern contracts between insurer and insured, solicitor and client, guardian and ward and partnership.

41 It is also worth reiterating what Lord Steyn stated in *Malik v Bank of Credit and Commerce International SA*:[70]

> An the implied obligation as formulated is apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employees' interest in not being unfairly and improperly exploited.

42 Similarly in *Brader Daniel John v Commerzbank AG*, Lionel Yee JC held that there was no breach of the implied term of trust and confidence on the facts and stated:[71]

> The assessment of whether there has been a breach of this implied term should not focus on the subjective unhappiness of the employees to the exclusion of the pressures that employers face.

43 Thus, if courts were to take such a more balanced or nuanced approach, the fears the Australian High Court were concerned about, may turn out to be unfounded. For instance, one academic writer commenting on the practice of the New Zealand courts observes:[72]

> While the implied term of mutual trust and confidence is now a well established part of New Zealand employment law … its impact on employers has been limited … the decisions of the Court of Appeal have minimised the impact of the term on employers … the term has not imposed substantive new obligations on employers …

E. Interaction with legislation

44 In relation to the issue of interaction with legislation, though several concerns were raised (such as the statute in question conferring protection only on certain individuals, or the statute in question only allowing a claim to be heard, at a specialised tribunal, or within a certain time frame), it appears the main concern[73] was that statutes often provided a statutory limit as to compensation whereas a common law

70 [1998] AC 20 at 46.

71 *Brader Daniel John v Commerzbank AG* [2014] 2 SLR 81 at [118].

72 Gordon Anderson, "Good Faith in the Individual Employment Relationship in New Zealand" (2011) 32 *Comparative Labor Law & Policy Journal* 685 at 702.

73 See Douglas Brodie, "Mutual Trust and Confidence: Catalysts, Constraints and Commonality" (2008) 37 *Industrial Law Journal* 329 at 332.

claim is not subject to any such limit. This was the issue in *Johnson v Unisys Ltd* as well as mentioned earlier. In *Commonwealth Bank of Australia v Barker*, the High Court made reference to the Australian unfair dismissal legislation which had a cap in relation to compensation. In the Federal Court, Jessup J also referred to Australian anti-discrimination legislation, some of which also had caps in relation to compensation.[74]

45 In this regard, first, in Singapore, the statutory protection conferred on employees is far less as compared to Australia or the UK. For instance, there is no anti-discrimination legislation. Second, even in relation to unfair dismissal, the main provision in Singapore is s 14(2) of the Employment Act.[75] However, s 14(2) does not provide any cap in relation to compensation unlike the corresponding provisions in the UK or Australia. It is also in no way as comprehensive. In addition, very importantly, s 14(6) of the Employment Act provides that "Any direction of the Minister under subsection (4) shall operate as a bar to any action for damages by the employee in any court in respect of the wrongful dismissal." This suggests that for employees covered by the Employment Act, while both a common law action and a s 14(2) claim cannot be brought, it is possible to bring a common law action *without* bringing a s 14(2) claim. There is no such provision in the UK or Australia.

46 Nonetheless, even if it is held that as a result of this statutory position, or perhaps as a result of an express right to terminate in the contract,[76] an action cannot be brought for the breach of the implied term of trust and confidence in relation to the termination, it is suggested, this should not be a bar to recognising trust and confidence is other contexts as is the position in the UK.

F. No prior local support

47 In relation to the issue of having no prior local support, in Singapore as stated, the term has been recognised and applied in *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd*, though, also as highlighted earlier, the position in the Court of Appeal seems unsettled.

74 See Carolyn Sappideen, Paul O'Grady, Joellen Riley & Geoff Warburton, *Macken's Law of Employment* (Thomson Reuters, 7th Ed, 2011) at p 604.

75 Cap 91, 2009 Rev Ed.

76 See for instance, *Reda v Flag Ltd* [2002] IRLR 747; *Air New Zealand v Raddock* [1999] 1 ERNZ 30.

G. Social policy

48 It is indeed true that the implication of trust and confidence into employment contracts involves social policy and the policy reasons why such a claims should be recognised have already been canvassed. It is also difficult to see why a Singapore court should not delve into such issues, given that courts in several other common law jurisdictions, as highlighted earlier, have done so. It may also be argued that many areas in law, like torts, involve complex social policies and yet that has not generally deterred common law courts from adopting a "bold spirit"[77] and recognising and developing those areas, independent of statutory initiatives. In addition, the last five years or so have seen significant changes in the employment landscape in Singapore with employees being conferred more statutory rights than ever before. Thus, it may be argued that, by recognising the implied term of trust and confidence, the courts are merely following an already existing social policy trend set by Parliament rather than creating a new one.

VI. Still left after *Commonwealth Bank of Australia v Barker*

49 In the event that *Commonwealth Bank of Australia v Barker* is nonetheless adopted in Singapore, it should also be highlighted that the High Court in that case, left open certain issues.

50 First, the implied term of co-operation is well established in Australia and that was left intact. For instance, Kiefel J stated:[78]

> The courts will also imply 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.

On the facts, this could not be applied because it was not established that Mr Barker had a contractual right to redeployment. In Singapore, there is some support[79] for stating that there is a duty of cooperation when it comes to the performance of contracts.

77 See *Lim Meng Suang v AG* [2015] 1 SLR 26 at [80]. Though the Court of Appeal in this case also showed hesitance to go into matters of social policy, the issue in this case was far more controversial and politically charged. Further, there were no cases from other jurisdictions to support the appellants' interpretation of the particular statutory provision in question, unlike in the present context where there is support from several jurisdictions, excluding Australia.

78 [2014] HCA 32 at [61].

79 See for instance, *Chan Miu Yin v Philip Morris Singapore Pte Ltd* [2011] SGHC 161 at [24]; *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2006] 1 SLR(R) 634 at [48]–[49]; *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [83]. See also the Malaysian case of *Kwan Kwok Kwong v Trenolo Resources Sdn Bhd* [2000] 3 MLJ 731 at 738.

51 Second, French CJ, Bell and Keane JJ stated:[80]

> 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.[81]

52 In Singapore, following *Ng Giap Hon v Westcomb Securities Pte Ltd*, it is unlikely to be implied by law that there is a duty of good faith in contracts generally, at least in the near future.[82] However, as for the subsequent point, this was actually applied on the facts of *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd*,[83] where the court held that the various discretions conferred on the Board were not absolute, and were subject to implied limitations. On the other hand, as stated earlier, in *Latham Scott v Credit Suisse First Boston*, the Court of Appeal seemed to have come to an opposite conclusion in relation to the issue of discretionary bonuses.[84] Thus, whether this avenue is open in Singapore appears unsettled.

53 However, it should also be highlighted that it has been said[85] that the first two points discussed above are just facets of the implied duty of trust and confidence and should be subsumed under such a general term for clarity and simplicity.

54 Third, the High Court also stated that the term of trust and confidence may be implied as a matter of fact,[86] though on the facts, there was no particular feature in the contract which supported such an implication. In *Ng Giap Hon v Westcomb Securities Pte Ltd*, the following

80 *Commonwealth Bank of Australia v Barker* [2014] HCA 32 at [42].

81 Instead of making reference to public law, this may also be seen as a rule of construction. For instance, in *Brader Daniel John v Commerzbank AG* [2014] 2 SLR 81 at [27], the court held that the variation clause in question could not be intended to cover "weighty matters" given the wide discretion it gave to the employers.

82 However, there have been subsequent calls to embrace the duty of good faith, see for instance, Colin Liew, "A Leap of Good Faith in Singapore Contract Law" [2012] Sing JLS 416 and Ter Kah Leng, "Good Faith in the Performance of Commercial Contracts Revisited" (2014) 26 SAcLJ 111. See also the recent Supreme Court of Canada decision of *Bhasin v Hrynew* [2014] SCC 71 which has recognised the duty of good faith in all contracts in terms of performance.

83 See also *Tan Ging Hoon v MMI Holdings Ltd* [2008] 3 SLR(R) 807.

84 As to discretionary bonuses, see also Ravi Chandran, "Bonuses (and Other Payments) in Employment" (2012) 24 SAcLJ 338.

85 See for instance, John D McCamus, "Abuse of Discretion, Failure to Cooperate and Evasion of Duty: Unpacking the Common Law Duty of Good Faith in Contractual Performance" [2004] 29 Advoc Q 72; Douglas Brodie, "Beyond Exchange: The New Contract of Employment" (1998) 27 *Industrial Law Journal* 79.

86 See also *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111.

was mentioned as one possible situation where there could be an implied duty of good faith between the agent and the principal based on facts:[87]

> A possible variation of the situation referred to in the preceding paragraph is where it is proved by the agent that there has been a *wilful default by the principal in order (and solely) to avoid payment of the commission to the agent* … Indeed, it would appear that the clearest example in this regard would be one where the agent has done all that it has undertaken to do pursuant to the commission contract, but the principal nevertheless indulges in conduct in order (and solely) to avoid paying commission to the agent. [emphasis in original]

As can be seen from the above example, situations where such a term can be implied based on the facts may not be a common occurrence.

55 Fourth, though not directly addressed by the High Court, there could also be breach of a more specific implied term (of fact or even, possibly, law). For instance, it might be an implied term of fact that the employer would not reprimand the employee in humiliating circumstances[88] or that the employer should not require an existing employee to undergo medical examination unless the employer has reasonable grounds for doing so.[89] However, such an approach will result in a litany of small individual implied terms which would add complexity. Further, there may be difficulties classifying all actions into specific terms and having an overarching term can cater for situations which may otherwise be difficult to frame.[90] Having an overarching term, may also help in other ways. For instance, in *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd*,[91] while some actions taken individually were not seen as breaching the implied term of trust and confidence, *overall*, the court had no hesitation in coming to the conclusion that the implied term of trust and confidence had been breached.

VII. Conclusion

56 It is suggested that there are good grounds in Singapore, for not following *Commonwealth Bank of Australia v Barker* and instead, recognising the implied duty of trust and confidence in contracts of employment as is the position in the UK. Having a general duty of trust and confidence implied term in law can work to the benefit of the

87 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [85].
88 *Hilton International Hotels (UK) Ltd v Protopapa* [1990] IRLR 316.
89 *Bliss v South East Thames Regional Health Authority* [1995] IRLR 308.
90 See also Ter Kah Leng, "Good Faith in the Performance of Commercial Contracts Revisited" (2014) 26 SAcLJ 111 at 125.
91 [2013] 2 SLR 577 at [112] and [122].

employee and *as well as* the employer. However, in order to reduce the potential uncertainly and in order not to impose onerous obligations on either party, a correct balance has to be struck when it comes to applying the term to the actual facts at hand.
