THE COURT OF APPEAL

(Neutral Citation Number: [2017] IECA 74)

Record No. 2015/512

Finlay Geoghegan J.
Peart J.
Hogan J.

BETWEEN

JOHN FLYNN AND BENRAY

PLAINTIFFS/

RESPONDENTS

AND

BRECCIA

FIRST NAMED DEFENDANT

/APPELLANT

AND

MICHAEL McATEER

SECOND NAMED DEFENDANT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 8th day of March 2017

1. In this appeal the appellants have sought to rely on the existence of a general principle of good faith as a ground for contending that there was an implied term in the shareholders' agreement which precluded the first defendant, Breccia, qua promoter, from enforcing a sale of Benray's shareholding in Blackrock Hospital Ltd. otherwise than in accordance with clauses 3.4.3 and 3.4.5 of that agreement. For all the reasons so elegantly set out in the principal judgment of Finlay Geoghegan J., I quite agree that there is no basis for the implication of such an implied term, even if there was such a general principle of good faith in our law of contract.

2. I also agree that it is unnecessary to decide in the present case whether our contract law contains a general principle of good faith beyond the existing recognised examples such as, for example, *uberrimae fid*ei in insurance law, suretyship and partnership. This is so even if, for example, other common law jurisdictions have arrived at such a conclusion regarding the existence of a general principle of good faith in respect of their own contract law: see, e.g., the decision of the Supreme Court of Canada in *Bhasin v. Hrynew* [2014] SCC 71.

3. It is true, of course, that the common law has not heretofore recognised any such general principle such as is found in the great continental civil codes of France, Germany and Switzerland or, for that matter, in the UNIDROIT Principles of International Commercial Commerce (2010). Thus, Article 7(1) of the UNIDROIT Principles states that:

> "Each party must act in accordance with good faith and fair dealing in international trade."

4. In some respects this, of course, all depends on what one means by "good faith" in this context. Quite obviously, the entire law of misrepresentation and deceit is founded on the premise that contracting parties should not lie or carelessly misrepresent the facts. It was in this sense that this Court has already said that it "would be manifestly unfair and at odds with the principles of good faith upon which the entire law of contract is founded", if those who made "specific statements designed to induce others into enter into contractual relations were later to be allowed to resile from that position and to claim that such statements were not to be taken seriously": see Spencer *v. Irish Bank Resolution Corporation Ltd. (in special liquidation)* [2016] IECA 346.

5. Other examples can be seen in the principle that the courts will not permit the self-induced frustration of a contract. In *Rooney v. Byrne* [1933] I.R. 609, 615 a contract for the purchase of a house was expressed to be subject to the purchaser obtaining loan approval. O'Byrne J. rejected the argument that this was entirely a matter for the purchaser, saying that "it was equally contemplated that the purchaser should make an effort to secure the advance." Similar thinking is evident in *Costelloe v. Maharaj Krishna Properties* (Ireland) Ltd. (1975) where a particular sale was expressed to be subject to obtaining Land Commission consent. Finlay P. held that the purchaser was required to make a bona fide effort to secure such consent and it would not suffice to submit an application for consent which was deliberately calculated to induce a refusal.

6. Taking this a step further it might be noted that this Court has also already held that a commercial document should be rectified where it was clear that one party was misled by what Ryan P. described as "sharp practice" of the other party: see *Slattery v. Friends First* [2015] IECA 149. In the same vein the High Court had previously held that if a party tendering a document which contains "conditions of an unusual or particularly onerous nature", that party "must take reasonable steps to draw attention to such conditions in order to establish that the other party has agreed to it": see *Carroll v. An Post National Lottery Company* [1996] IEHC 50, [1996] 1 I.R. 443, 464, *per* Costello P. It is also of interest that in his judgment Costello P. expressly approved of the *dicta* of Bingham L.J. in *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.* [1989] Q.B. 433, 445 where, in a case presenting similar issues to those at issue in *Carroll*, Bingham L.J. observed that a requirement to draw attention to particular conditions might yield "a result not very different from the civil law principle of good faith, at any rate so far as the formation of the contract in question is concerned."

7. If one looks further into our general law one can find instances of specific doctrines and concepts which correspond, however approximately, to civilian concepts of good faith: the equitable doctrines of unconscionability, fraud on a power and the principle that he or she who comes to equity must come with clean hands are all in their own way at least potential examples of this. The doctrine of constructive notice – with its requirement that (as explained by Henchy J. in *Northern Bank Ltd. v. Henry* [1982] I.R. 1, 12) the reasonable person "will be expected to look beyond the impact of his decisions on his own affairs and to consider whether they may unfairly and prejudicially affect his 'neighbour'" before they can properly plead that they should not be fixed with such notice – is another such example.

8. The fact that the Irish courts have not yet recognised such a general principle may over time be seen as simply reflecting the common law's preference for incremental, step by step change through the case-law, coupled with a distaste for reliance on overarching general principles which are not deeply rooted in the continuous, historical fabric of the case-law, rather than an objection per se to the substance of such a principle: see Healy, "Swimming against the Tide" (2016) 6 *King's Inns Law Review* 39, 43-45. Any Irish court wishing at some future stage to wrestle with these difficult problems would do well to reflect on Healy's profound and comprehensive analysis of these issues.

9. Indeed, the Law Reform Commission has argued that, viewed from the perspective of legal history, a principle of good faith was originally applied to all contracts and dealings, but that "subsequent English case law from the 19th century onwards largely confined its application to the insurance contract setting and [linked] the principle to a specific duty of disclosure in insurance": see *Report on Consumer Insurance Contracts* (LRC 113-2015) at para. 2.03. Viewed against that background, it may be, therefore that, as McKendrick has argued, it is only a matter of time before the English courts will come to recognise the existence of such a general duty of good faith in contract law: see *Contract Law: Cases and Materials* (Oxford, 2012) at 512. If that were to happen, this would doubtless presage a similar development in our own law at some later stage.

10. All of this is to say that some elements of the common law (including aspects of our contract law) already probably correspond – if only approximately – to the general duty of good faith which is acknowledged as a foundation principle of the continental civil codes. It may be that over time some further developments of the common law will ensure that this correspondence is even closer.

11. It is, however, unnecessary for present purposes to dwell on these issues or to offer any views as to how the common law might (or might not) evolve. It is sufficient to say that even if there were such a general principle of our contract law, it would not, for all the reasons set out by Finlay Geoghegan J. in her judgment, avail the plaintiffs in the present case. Even if there were such a general doctrine of good faith, it would not lead to the implication of the term for which the plaintiffs so forcefully and eloquently contended.