Grubb v Toomey [2003] TASSC 131 (3 December 2003)

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The recent Tasmanian case of *Grubb v Toomey* involved the issue of whether there is an implied term in a contract for sale and purchase of real property, where that contract is made subject to finance, that a vendor allow access to the property in question to a purchaser's financier. The case was heard by Justice Pierre Slicer of the Tasmanian Supreme Court. His Honour found that such a term is implied on the basis of business efficacy. The case is of interest for two reasons: firstly, although there have now been a number of cases that have sought to delineate the obligations of a purchaser where the contract is made subject to finance, few have delineated the obligations of the vendor; secondly, it is unclear why his Honour deemed it necessary to discuss the vexed issue of the general obligation of good faith in contracts, when he decided that the relevant term was implied on the basis of business efficacy.

The Facts

On 31 May 2002, Grubb and Toomey entered into a contract for the sale of the Toomey's land for the purchase price of $93,500. A deposit of $2,000 was provided to the estate agent. The contract contained a condition precedent that the purchaser obtain finance for the amount of $85,000 within 14 days of the date of the contract. The contract was to be completed within 30 days of the confirmation of finance.

Accordingly, on 3 June, Grubb applied to the Connect Credit Union for finance. On 5 June, he was advised that the loan had been approved, subject to an inspection of the property by Connect Credit Union's property valuer. On the same day a registered valuer was retained by the Credit Union for this purpose.

On 5 June, the valuer contacted the real estate agent who acted for the vendor, in order to arrange access for the valuer. However, the agent

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advised the valuer that access was denied as Toomey had taken back his keys to the property and had instructed the agency that he was no longer selling the property. The valuer tried to gain access once again on 13 June, but access was again denied.

Grubb's solicitors tried to contact Avery Partners, the solicitors named in the contract as acting for Toomey. Avery Partners denied that they acted for him and recommended that Grubb's solicitors contact Toomey directly.

On June 17, Grubb's solicitors wrote to Toomey requesting access. Toomey replied claiming that he had never been approached in relation to access to the property for inspection, that he was going away and that he would deal with the matter on his return.

Further negotiations between the solicitors for the parties were unproductive. Toomey's position was as reflected in a letter from his then solicitors on 9 April 2003. It stated, in part, that there was:

> [N]ever any contractual obligation upon our client to allow your client to inspect our client's premises. There is nothing in the contract that you can point to or indeed that any one can point to which establishes that obligation and in the circumstances our client will not be acceding to your client's demands in this matter.

Grubb then commenced proceedings. He came to the Court seeking a declaration pursuant to s 39[1] of the *Conveyancing and Law of Property Act 1884* (Tas) that the contract of sale made on or about the 30th May 2002 between the applicant as purchaser and the respondent as vendor for the sale and purchase of a unit in Glenorchy, Tasmania, contained an implied term that, in order to facilitate the performance of the contract the vendor must allow a valuer, on behalf of the purchaser's financier, access to the property, in order to allow the purchaser to attempt to obtain finance as required by clause 4.1(b) of the contract.

1 Section 39 provides:

> A vendor or purchaser of real or leasehold estate, or their representatives respectively, may at any time apply in a summary way to a judge in chambers in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract, not being a question affecting the existence or validity of the contract, and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

The Issues

Grubb argued that it was a term of the contract that the vendor permit access to the purchaser's financier and that this term was implied by law, by custom and trade usage, or alternatively, in fact.

Clause 4 of the contract provided as follows:

> (a) that, unless disclosed in this Contract, there are no restrictions on the use of the Property at this date which may hinder or prevent the Purchaser from using the Property for the purpose of *a residential dwelling.*
>
> (b) that the *Connect Credit Union* makes available to the Purchaser a loan of *Eighty Five Thousand* (*$85,000*) upon terms currently available in transactions of a similar nature within *14* days of this date.
>
> (c) ... The Purchaser must use all reasonable endeavours to fulfil the conditions precedent in clause 4.1(b) and 4.1(c) within the time allowed for doing so.

Toomey argued that cl 4 imposed obligations on the purchaser only, or that at least cl 4(a) only permitted inspection of public records. There was no obligation on the vendor to permit physical inspection. Grubb argued that cl 4(a) would permit access to determine whether the building was structurally sound or whether the building was hazardous through non-observance of statutory requirements. He contended that cl 4(b), the 'subject to finance clause', should be interpreted as containing a term permitting access by a person acting on behalf of the purchaser to ascertain whether there was sufficient value in the property to secure the interest of an intended mortgagee and that such a term ought be implied by virtue of law, fact and/or custom.

Decided cases have held that where a contract is made subject to finance, the purchaser is under an implied duty to act honestly[2] to obtain such finance. In addition, there has been some suggestion that the purchaser must also act reasonably.[3] For instance, in the case of *Smith v Pisani* [2001] SASC (9 March 2001), a subject to finance clause stipulated that the subject finance was to be for a term of 27 years, at a rate not exceeding current interest rates, repayable monthly and 'otherwise on such terms and conditions as the lender requires'. Justice Gray held the purchaser obliged to accept a loan which she had been offered which was

2 *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537; *Meehan v Jones* (1982) 149 CLR 571 per Mason J and Wilson J (at 591, 597) who found at least an obligation on the purchaser to act honestly.

3 See the discussion of the court (Franki, Pidgeon and Franklyn JJ) in *Erley Pty Ltd & Ors v Gunzburg Nominees Pty Ltd & Anor* [1998] WASCA 75 (3 April 1998). The Court ultimately found only an obligation on the part of the purchaser to act honestly.

in accordance with the terms of the clause, but which the purchaser claimed were not satisfactory to her. His Honour found that there was an implied duty on the purchaser to act reasonably and honestly in obtaining finance under the clause.

Such implied duties can arise where the contract includes a condition precedent, because the condition that must be satisfied is generally interpreted by the courts as precedent to further performance under the contract, rather than to the contract itself: *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537. Therefore, contractual rights and duties between the parties exist and are enforceable. Terms can be implied in law, by custom or in fact, that is, to give 'business efficacy' to the contract.

In Australia in recent years there has been increasing judicial support for the notion that all contracts should have implied into them a duty of good faith.[4] However, there is contention between a 'wide' view and a narrower view of a general obligation of good faith in contracts. The wide view would hold that there is an obligation of good faith, including the duty to cooperate, implied into all contracts.[5] The narrower view is that the guiding principle for the implication of terms, including an obligation of good faith, is that of necessity: is the implication necessary to allow each party to have the benefit of the contract? Would failure to imply a term render the enjoyment of the contract 'nugatory, worthless or seriously undermined'?[6]

Although it is clear that a purchaser must at least act honestly, if not reasonably, in pursuit of finance, relatively little authority exists on the vendor's obligations in such a case.

The Decision

His Honour began by making some observations about the general obligation of good faith. He stated:

> The dominant principle underlying the implication of a contractual term might well be the obligation to exercise good faith in its performance, from

4 The issue was raised, but not decided, in *Royal Botanic Gardens and Domain Trust v South Sydney Council* (2002) 186 ALR 289.

5 See, for example, *Renard Constructions ME Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234.

6 Such a view was adopted by the WA Supreme Court in the case of *Central Exchange Limited v Anaconda Nickel Ltd* [2002] WASCA 94, where Malcolm CJ, Wallwork and Steytler JJ, upheld a decision of Parker J refusing to imply a term of good faith into a contract. See further P Baron, R Carroll and A Freilich, 'Implied Terms: Central Exchange Ltd v Anaconda Nickel Ltd' (2003) 31(3) *UWALR* 293.

> which the subsidiary obligations arise. In *Renard Constructions ME Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, Priestly JA accepted the proposition that the law did imply a term that the powers conferred by the contract had to be exercised reasonably. He considered that implication arising from "reasonable exercise" accorded with current standards of contracts.[7]

After noting that in *Asia Pacific Resources v Forestry Tasmania* 101/1997, Underwood J had stated that 'a duty of good faith and fair dealing in ... performance and ... enforcement' was not part of the common law of Australia, Justice Slicer observed that:

> The terms 'good faith and fair dealing' might not themselves form a basis for the implication of a particular term, but the more specific tests, as stated by the High Court in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 might themselves be derived from a wider conceptual approach. That approach was referred to by Sheller JA in *Alcatel Australia v Scarella* (1998) 44 NSWLR 349 in which he approved of the decision in *Renard Constructions* (supra) and noted with approval similar statements made in *Hughes Bros Pty Ltd v Trustees of Roman Catholic Church (Archdiocese of Sydney)* (1993) 31 NSWLR 91 and *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* (1993) 45 FCR 84.[8]

Justice Slicer then noted the elements that must be satisfied in order to imply a term in fact: it must be reasonable and equitable; it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; it must be so obvious that 'it goes without saying'; it must be capable of clear expression; and it must not contradict any express term of the contract.[9]

In relation to the purchaser's obligations, the authorities were, in his Honour's view, clear. Justice Slicer observed that a subject to finance clause has long been held to impose a requirement that the purchaser is required to act in good faith and is subject to an implied obligation to make all reasonable efforts to obtain finance. His Honour relied upon *Perri v Coolangatta Investments Pty Ltd* (1982) 56 ALJR 445, and *Meehan v Jones* (1982) 149 CLR 571 in support of this proposition.[10]

His Honour went on to say that this, in turn, requires the performance of mutually cooperative acts, citing *Electronic Industries Ltd v David Jones*

7 *Grubb v Toomey* [2003] TASSC 131 (3 December 2003) para 23.

8 *Ibid* para 24.

9 *Ibid* para 25.

10 *Ibid* para 22.

Pty Ltd (1954) 91 CLR 288 at 298 and *CSS Investments Pty Ltd v Lipman Pty Ltd* (1987) 76 ALR 463 as authority.[11]

In relation to implication in fact, Justice Slicer said that:

> Clause 4(b) of the contract is a common term used in agreements for the sale of land. The condition is that the purchaser will use all reasonable endeavours to obtain sufficient finance to enable completion of the contract. It is self-evident from the term that the purchaser is seeking the provision of that finance from a third person, usually an institution or professional lender. It is usual for the finance provider to require security for the loan, usually provided by mortgage. A mortgage attaches to the land and affords the mortgagee a legal and equitable interest. A prudent lender would require satisfaction that there existed a valid title to the land and that its value would be sufficient, in the event of default, to secure the loan. That satisfaction requires evaluation, usually provided by one with skill and expertise in the area of valuation which, in turn, might require inspection of the property. In order to provide business efficacy, a term implicit in the clause is that the vendor permit access for the purpose of valuation. The term is necessary to make the contract work and is so obvious that it goes without saying (*Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (supra), the court at 489). The respondent had prevented access to the property within the time permitted to the applicant to obtain finance.[12]

Thus the term was necessary to give business efficacy to the contract: 'A vendor ought not be permitted to frustrate or rescind a contract by means of refusal to permit inspection'.[13]

Having decided that the term was necessary to give business efficacy to the contract, his Honour found it unnecessary to decide the other grounds put forward by the applicant.

The implications of the decision

The decision is of interest for its statement of the implied obligations of the vendor where a contract is made subject to finance. The writers are of the opinion that Justice Slicer was clearly correct in deciding that a term that the vendor allow access to the purchaser's financier for the purposes of providing finance to the purchaser was necessary to give business efficacy to the contract. The very performance of the contract relied on the vendor's cooperation in this matter.

11 *Ibid.*

12 *Ibid* para 26.

13 Such a refusal would amount to a repudiation of the contract.

His Honour's expounded legal justification for the implication of the term is problematic: although his Honour notes that an explicit and so named general duty of good faith forms no part of Australian contract law, he seems to be asserting that, in reality, it does exist, clothed in the criteria required for the implication of terms in fact, i.e. the requirement of the need for business efficacy is simply an expression of the obligation of good faith.

Resort to notions of good faith and unconscionability were not, in the writers' view, necessary in determining whether or not a term should be implied in fact. Such a discussion may be warranted where the issue is one of whether or not a term is to be implied in law into all contracts. Even then, the existence of the term and its scope are hotly debated, and the writers would agree with the narrower view that the basis for the implication of a term of good faith should be necessity. With respect, Slicer J's attempt to accelerate the introduction of an explicit recognition of an obligation of good faith in all contracts via the accepted test for the implication of terms, has the potential to cause some confusion and destroy the certainty that has been built up through the case law on this subject. It would be preferable for single judges to await a clear pronouncement by the High Court on the existence of a contractual duty of good faith.