*Natalie Williams**

BARTLETT v AUSTRALIA & NEW ZEALAND BANKING GROUP LTD [2016] NSWCA 30 (7 MARCH 2016)

I Introduction

In *Bartlett v Australia & New Zealand Banking Group Ltd*,[1] Mr Bartlett was wrongfully dismissed by the Australia and New Zealand Banking Group Limited (ANZ)[2] for committing serious misconduct by allegedly posting confidential internal information to a journalist.

The New South Wales Court of Appeal concluded that for ANZ to exercise its power to summarily dismiss Mr Bartlett under the contract terms, it was insufficient just to form the opinion that serious misconduct had occurred.[3] It was also necessary for ANZ to prove the existence of the serious misconduct.[4] Because ANZ failed to establish that Mr Bartlett had engaged in serious misconduct, the Court held that the bank was not entitled to summarily dismiss Mr Bartlett.[5] Although the Court had ultimately resolved the primary argument through the conclusion above, it was the Court's discussion of Mr Bartlett's fall back argument that occupied the majority of the judgment, and in the process, raised several important issues. The Court held that even if it were sufficient for ANZ to summarily dismiss Mr Bartlett based on its opinion that he committed serious misconduct, the process of forming the opinion had to be reasonable in the *Wednesbury* sense.[6] ANZ's inadequate investigative process and lack of procedural fairness meant that it did not act reasonably when forming its opinion.[7]

By implying a requirement of reasonableness into employment termination clauses that are subject to employers' opinions, the Court took a significant step forward in

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1 [2016] NSWCA 30 (7 March 2016) ('*Bartlett*'). The New South Wales Court of Appeal overturned *Bartlett v Australia and New Zealand Banking Group Ltd* [2014] NSWSC 1662 (24 November 2014).

2 *Bartlett* [2016] NSWCA 30 (7 March 2016) [77] (Macfarlan JA).

3 Ibid [30]–[34] (Macfarlan JA).

4 Ibid [36] (Macfarlan JA).

5 Ibid [75]–[77] (Macfarlan JA).

6 *Associated Provincial Pictures Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 233–4. See ibid [49] (Macfarlan JA).

7 *Bartlett* [2016] NSWCA 30 (7 March 2016) [51]–[54] (Macfarlan JA).

clarifying some uncertainty in contract law regarding the implication of such broad terms into employment contracts.[8] Justice of Appeal Simpson's dissenting view extended the requirement of reasonableness even further, thus raising significant future implications. The contrast shown between Simpson JA's broad dissenting view and that of the majority also demonstrates the continued underlying uncertainty and hesitancy of courts in this area of law. Practically, despite this case appearing to give employees greater protection, alternate options of termination allow employers to avoid the higher burden involved when terminating for serious misconduct.

II Background

Mr Paul Bartlett was the State Director of ANZ's Institutional Property Group in New South Wales.[9] On 15 August 2012, he was summarily dismissed by ANZ after an investigation by the bank concluded that Mr Bartlett had engaged in serious misconduct.[10] The alleged misconduct was the doctoring and posting of a confidential internal email to a journalist at the *Australian Financial Review* in Sydney.[11]

The investigation deduced Mr Bartlett to be the person responsible because he was one of the 10 recipients of the original email, one of the six Sydney based recipients of the email and the only one who knew of the journalist.[12] The substance of the conclusion was derived from a handwriting analysis between Mr Bartlett's handwriting and the writing on the envelope used to post the letter.[13] A one page report by Ms Michelle Novotny, a forensic document and handwriting examiner, concluded with high probability that Mr Bartlett was the author of the envelope.[14]

Following his termination, Mr Bartlett sought damages for wrongful dismissal in the Supreme Court of Appeal.[15] Justice Adamson rejected his claim, finding him liable for the doctoring and posting of the email.[16] Her Honour also held that based on the relevant term of the contract, ANZ's bona fide opinion that the serious misconduct

8 There is considerable debate over whether terms such as good faith or reasonableness are principles of construction or implied terms: see, eg, J W Carter and Elisabeth Peden, 'Good Faith in Australian Contract Law?' (2003) 19 *Journal of Contract Law* 155; Anthony Gray, 'Good Faith in Australian Contract Law after *Barker*' (2015) 43 *Australian Business Law Review* 358, 374–5. While the Court did not identify whether it construed or implied the requirement of reasonableness, the author has interpreted the decision of the Court to be an implication rather than a construction.

9 *Bartlett* [2016] NSWCA 30 (7 March 2016) [1] (Macfarlan JA).

10 Ibid.

11 Ibid.

12 Ibid [17] (Macfarlan JA).

13 Ibid [11] (Macfarlan JA).

14 Ibid [12] (Macfarlan JA).

15 Ibid [2] (Macfarlan JA).

16 Ibid.

occurred was sufficient justification to summarily dismiss Mr Bartlett.[17] Her Honour rejected Mr Bartlett's submission that ANZ had to prove objectively the occurrence of the serious misconduct to justify the termination.[18] Mr Bartlett then appealed to the Court of Appeal.[19]

III Terms of Contract and Issues of Construction

The relevant terms of Mr Bartlett's contract of employment are cls 13 and 14.

Clause 13 stated that a failure to comply with the employment agreement provisions may result in ANZ taking disciplinary action.[20] This may include suspension and in certain circumstances, termination of employment.[21] Clause 14.3(a) gives ANZ the power to terminate the employment for any reason by giving four months' written notice.[22] Clause 14.3(b) gives ANZ the power to terminate the employment at any time, without notice, *if ANZ holds the opinion* that Mr Bartlett engaged in serious misconduct, serious neglect of duty or serious breach of the terms of the employment agreement.[23]

The key issues for the Court of Appeal to determine in the interpretation of the contract were:

1 whether ANZ needed to prove an objective existence of serious misconduct to terminate under cl 14.3(b) or whether it was sufficient for it to hold the opinion that serious misconduct occurred;[24]

2 if ANZ only needed to prove that it held the requisite opinion, whether ANZ was required to act reasonably in forming that opinion;[25]

3 whether ANZ had a duty to act reasonably when exercising its power under cl 14.3(a) to terminate for any reason on four months' notice.[26]

17 Ibid [24]–[28] (Macfarlan JA).

18 Ibid.

19 Ibid [4] (Macfarlan JA).

20 Ibid [20] (Macfarlan JA).

21 Ibid.

22 Ibid.

23 Ibid.

24 Ibid [29] (Macfarlan JA).

25 Ibid [38] (Macfarlan JA).

26 Ibid [86] (Macfarlan JA). The Court also briefly considered issues relating to the quantum of damages and evidence. However, they will not be covered in this case note which focuses primarily on issues of construction.

IV Decision

A *Correct Construction of cl 14.3(b)*

In the process of answering this issue, the Court considered cl 13 of the employment agreement — which only allows ANZ to take disciplinary action subject to an actual breach of the employment agreement provisions, and not only on the basis of the bank's opinion that the breach occurred.[27] Even once the breach was established objectively, the right to dismiss was only available 'in certain circumstances'.[28] In reading the contract as a whole, the Court determined that construing cl 14.3(b) as permitting termination on the sole basis of ANZ's opinion conflicted with cl 13.[29] To reconcile these provisions, the Court construed cl 14.3(b) to mean that ANZ's opinion would only apply in determining the seriousness of the misconduct and not to its existence.[30] In conformity with cl 13, termination is only available under cl 14.3(b) in the certain circumstances where ANZ is of the opinion that these actual breaches are serious.[31] This approach corresponds with the employer's narrow common law right to summarily dismiss an employee and takes into consideration the likely severe financial and reputational consequences of summary termination.[32]

To dismiss under cl 14.3(b), ANZ would then need to establish that Mr Bartlett actually engaged in the misconduct that it considered serious.[33] While Ms Novotny concluded that it was highly probable that Mr Bartlett was the author of the envelope, Mr Bartlett's expert, Mr Dubedat, decided otherwise. Between the two contradictory handwriting expert reports, the Court rejected Ms Novotny's evidence because she departed from generally accepted methodology and misapplied fundamental principles of handwriting analysis.[34] Because ANZ failed to prove that Mr Dubedat's expert report should be rejected, the Court concluded that the bank had not established on the balance of probabilities that Mr Bartlett was the author of the writing on the envelope.[35] Therefore, ANZ was not entitled to summarily dismiss Mr Bartlett's employment.[36]

B *Whether ANZ Was Required to Act Reasonably*

Despite resolving the primary issue, the Court went further and addressed Mr Bartlett's alternate argument. If ANZ had the power to summarily dismiss under cl 14.3(b) on

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27 Ibid [30] (Macfarlan JA).

28 Ibid.

29 Ibid [31] (Macfarlan JA).

30 Ibid.

31 Ibid.

32 Ibid [32]–[34] (Macfarlan JA).

33 Ibid [36] (Macfarlan JA), [114] (Simpson JA).

34 Ibid [62]–[75] (Macfarlan JA).

35 Ibid [76] (Macfarlan JA), [114] (Simpson JA).

36 Ibid [77] (Macfarlan JA).

the sole basis of it holding an opinion that a serious misconduct occurred, they are obliged to act reasonably, in the *Wednesbury* sense, in the process of forming that opinion.[37] The Court was persuaded to reach that conclusion through a review of cases on commercial contracts that gave one party the power to make a decision that would affect another.[38]

This approach is consistent with the principle in *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* that where a party has an express power to significantly affect another party's interests if satisfied that a certain state of affairs exists, that party must reach a reasonable and honest state of satisfaction to exercise that power.[39] This reasoning also correlates with the decision in *Burger King Corporation v Hungry Jack's Pty Ltd*[40] where the Court of Appeal found that terms of reasonableness and good faith were implied to govern the exercise of a general power of termination.

C *Whether ANZ Acted Reasonably*

If ANZ had the power to summarily dismiss under cl 14.3(b) on the basis of its opinion that a serious misconduct occurred, the deficiencies in the investigation process meant that the bank did not act reasonably in the *Wednesbury* sense when forming the opinion, thus invalidating the decision of termination.[41] There were two main criticisms of the investigation.[42] First, ANZ's unwarranted limitation of the investigation to the email's 10 recipients and one employee when the number of people who could have been responsible for the forging were between 50 and 60.[43] Secondly, Mr Bartlett was unreasonably denied access to copies of Ms Novotny's brief summary report and to obtain an expert report in response.[44] This was contrary

37 Ibid [49] (Macfarlan JA). In regards to applying a *Wednesbury* standard of reasonableness to a contractual duty to consider a certain matter, this approach follows the decisions of the Victorian Court of Appeal in *Cromwell Property Securities Ltd v Financial Ombudsman Service Ltd* (2014) 288 FLR 374, 401 [93] (Warren CJ and Osborn JA) and the Supreme Court of England and Wales in *Braganza v BP Shipping Ltd* [2015] UKSC 17 (18 March 2015) [36] (Lady Hale and Lord Kerr) ('*Braganza*'). In *Braganza,* the Court held that if a power to exercise is subject to the employer's opinion, the employer is obliged to act reasonably in the *Wednesbury* sense in forming the opinion. Under the *Wednesbury* standard, a decision is invalidated if the decision-making process was so unreasonable that no reasonable decision-maker would ever have made it: *Bartlett* [2016] NSWCA 30 (7 March 2016) [46] (Macfarlan JA).

38 *Bartlett* [2016] NSWCA 30 (7 March 2016) [39]–[49] (Macfarlan JA).

39 (1993) 45 FCR 84, 94 (Gummow J); *Bartlett* [2016] NSWCA 30 (7 March 2016) [40] (Macfarlan JA).

40 [2001] 69 NSWLR 558, 573 [185] (Sheller, Beazley and Stein JJA).

41 *Bartlett* [2016] NSWCA 30 (7 March 2016) [49], [51]–[54] (Macfarlan JA), [114] (Simpson JA).

42 Ibid [51] (Macfarlan JA).

43 Ibid [52] (Macfarlan JA).

44 Ibid [53] (Macfarlan JA).

to the bank's own Performance Policy to provide procedural fairness to employees faced with serious disciplinary action by giving them a reasonable opportunity to respond to both allegations made against them and the evidence relied on.[45]

D *Whether ANZ Was Required to Act Reasonably and in Good Faith Under cl 14.3(a)*

The Court held that although ANZ did not have the power to summarily dismiss under cl 14.3(b), it would still have dismissed under cl 14.3(a) by giving Mr Bartlett four months' notice.[46] The Court rejected Mr Bartlett's contention that the bank's power to dismiss for any reason on four months' notice had to be exercised reasonably or in good faith.[47] None of the relevant authorities justified implying a restriction on the power under cl 14.3(a).[48] This restriction would also be inconsistent with the power to dismiss on notice *for any reason*.[49] Unlike cl 14.3(b), ANZ is not required to form an opinion before exercising the power under cl 14.3(a).[50]

Justice of Appeal Simpson, however, dissented with the majority's view on this point.[51] Her Honour considered the three cases put forward by Mr Bartlett in support of his contention.[52] Her Honour proposed that if these authorities can be taken to support the principle that a term of good faith and fair dealing is to be implied in termination clauses in commercial contracts, then it is difficult to argue why the same cannot be implied into employment contracts.[53] However, due to the lack of cases cited to support the implication of such terms into employment contracts, her Honour acknowledged that this matter will remain unanswered.[54]

Her Honour highlighted that this approach is not inconsistent with *Commonwealth Bank of Australia v Barker*.[55] While the Court in *Barker* rejected the implication of mutual trust and confidence obligations into employment contracts, what was proposed in *Bartlett* was limited narrowly to reasonableness and good faith in exercising the right of termination.[56] Furthermore, the Court in *Barker* noted that

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45 Ibid [54] (Macfarlan JA).

46 Ibid [83]–[85] (Macfarlan JA).

47 Ibid [86]–[87] (Macfarlan JA), [107] (Meagher JA).

48 Ibid.

49 Ibid.

50 Ibid.

51 Ibid [122]–[133] (Simpson JA).

52 *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1; *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* [1999] FCA 903 (2 July 1999); *Kellogg Brown & Root Pty Ltd v Australian Aerospace Ltd* [2007] VSC 200 (15 June 2007).

53 *Bartlett* [2016] NSWCA 30 (7 March 2016) [126] (Simpson JA).

54 Ibid [127] (Simpson JA).

55 (2014) 253 CLR 169 ('*Barker*')

56 *Bartlett* [2016] NSWCA 30 (7 March 2016) [131] (Simpson JA).

its decision does not reflect on the issue of 'whether there was a general obligation to act in good faith in the performance of contracts'.[57] Her Honour concluded that whether the implication of good faith into cl 14.3(a) should be seen as falling within or outside the reasoning of *Barker* is a question that should not be addressed until the Court has heard a full and considered debate.[58] The foundational proposition — that good faith should be implied into employment contracts — was not included in Mr Bartlett's submissions before the Court.[59]

However, her Honour agreed with the proposed orders because Mr Bartlett only raised this contention in the post-hearing written submissions.[60] Furthermore, although unpersuaded that good faith should not apply, her Honour viewed the authorities cited by Mr Bartlett to support his contention as insufficient to establish the proposition that good faith should be applied to employment contracts.[61]

Her Honour held that if Mr Bartlett's above contention were accepted, it cannot be presumed that ANZ would have nonetheless terminated Mr Bartlett's employment[62] as this is a question of fact that cannot be fully explored until the correct construction of cl 14.3(a) is established.[63] Her Honour argued that for the same reasons that the handwriting evidence was insufficient to establish serious misconduct, it would also be unreasonable for the Bank to rely on this evidence to dismiss under cl 14.3(a).[64]

V Broader Impact of the Decision

This case highlights the continuing uncertainty surrounding the implication of a general duty of good faith in contractual performance or in the exercise of discretionary contractual rights and powers, particularly for employment contracts.[65] While some intermediate courts have recognised the implication of good faith as part of the law of performance of commercial contracts in certain circumstances,[66] the conflicting decisions and lack of consensus over key aspects of good faith have caused this

57 Ibid; *Barker* (2014) 253 CLR 169, 195–6 [42] (French CJ, Bell and Keane JJ).

58 *Bartlett* [2016] NSWCA 30 (7 March 2016) [131]–[132] (Simpson JA).

59 Ibid [132] (Simpson JA).

60 Ibid [135] (Simpson JA).

61 Ibid.

62 Ibid [134] (Simpson JA).

63 Ibid [133] (Simpson JA).

64 Ibid [134] (Simpson JA).

65 See, eg, *Barker* (2014) 253 CLR 169, 214 [107] (Kiefel J); *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45, 63 [40] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

66 See, eg, *United Group Rail Services Ltd v Rail Corporation New South Wales* [2009] 74 NSWLR 618, 634 [58] where Allsop P stated that the concept of good faith was recognised by the New South Wales Court of Appeal as 'part of the law of performance of contracts'; *Gramotnev v Queensland University of Technology* [2015] QCA

area of law to be in a 'chaotic state'.[67] Although High Court guidance appears to be pressing, the High Court has continually failed to clarify this unsettled area of law despite multiple opportunities to do so,[68] forcing intermediate courts to contend with such uncertain issues themselves.[69]

In relation to employment contracts specifically, despite some recognition and application of good faith in commercial contracts, intermediate courts appear less willing to recognise it in employment contracts.[70] While the High Court in *Barker* expressly left open the question of 'whether contractual powers and discretions may be limited by good faith and rationality requirements',[71] its strong rejection of the implied term of mutual trust and confidence may have resulted in an increased reluctance among lower courts to imply similar broad terms in employment contracts post-*Barker*.[72] This may be surprising as the vulnerability and relational aspect involved in employment contracts may demonstrate a greater need for the implication of such terms into employment contracts as compared to commercial contracts.[73]

However, the Court's discussion on the alternate issue and conclusion to imply a term of reasonableness into employment termination clauses subject to an employer's opinion demonstrates a significant step forward from the usual reluctance of courts to imply broad terms into employment contracts. This case plays a helpful role in answering the question left open by *Barker* on how reasonableness might limit discretionary contractual powers. Furthermore, Simpson JA's broad view in dissent that good faith should possibly be implied into employment contracts raises significant questions that may lead the path for future courts in clarifying the role of good faith in employment contracts.

Despite this significant step, the conflict seen between the majority's decision to limit the *Wednesbury* standard of reasonableness only to employment termination

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127 (10 July 2015) [162] (Jackson J). For a review of the relevant authorities, see Jeannie Paterson, Andrew Robertson and Arlen Duke, *Principles of Contract Law* (Thomson Reuters, 5th ed, 2015) 341 [14.85] n 92; Gray, above n 8, 362.

67 Andrew Stewart et al, *Creighton & Stewart's Labour Law* (Federation Press, 6th ed, 2016) 538 [17.53].

68 See, eg, *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45, 63 [40], 94 [156]; *Barker* (2014) 253 CLR 169, 195–6 [42], 214 [107].

69 Gray, above n 8, 358–9.

70 See, eg, *State of New South Wales v Shaw* [2015] NSWCA 97 (17 April 2015) [3] (Beazley P, Ward and Gleeson JJA); *Swindells v Victoria* [2015] VSC 19 (3 September 2015) [172] (Macaulay J); *Regulski v Victoria* [2015] FCA 206 (13 March 2015) [219] (Jessup J); *Gramotnev v Queensland University of Technology* [2015] QCA 127 (10 July 2015) [172] (Jackson J); cf *Adventure World Travel Pty Ltd v Newsom* (2014) 86 NSWLR 515, 521 [26] (Meagher JA).

71 *Barker* (2014) 253 CLR 169, 195–6 [42] (French CJ, Bell and Keane JJ).

72 See above n 70.

73 See, eg, Stewart et al, above n 67, 529 [17.54].

clauses subject to an employer's opinion,[74] and Simpson JA's dissenting broader view that reasonableness should be extended to clauses where termination can be exercised on notice,[75] demonstrates the continued underlying hesitancy of courts to imply such broad terms. If a superior court such as the New South Wales Court of Appeal displays hesitation over such issues, it is quite possible that the uncertainty surrounding the implication of good faith into employment contracts may continue until a full and informed debate happens before the High Court.

Practically, this decision may be seen as securing greater protection for employees. Employers will now need to ensure that they act reasonably and afford procedural fairness in any process of investigation or termination for serious misconduct. Furthermore, employers will need to be cautious when drafting contracts to ensure consistency among the provisions. However, it may be more commercially realistic to recognise that employers will now choose the option of terminating employees by simply providing them four months' notice and paying them out instead of bearing the higher burden of objectively proving serious misconduct.

VI Conclusion

The law surrounding the implication of good faith, especially in relation to employment contracts, is a particularly unsettled area of law due to the lack of consistency among the decisions of the lower courts.[76] The High Court's hesitancy to provide clarification and its recent decision to leave this question open in *Barker* has only further added to the uncertainty of courts to imply broad terms of good faith and reasonableness into employment contracts.[77] However, in the midst of this uncertainty, *Bartlett* stands out as a decision that takes a definite and logical step forward to imply a term of reasonableness to constrain termination clauses subject to an employer's opinion. The Court of Appeal's approach provides helpful guidance to future courts on the role of good faith and reasonableness in termination clauses, thus clarifying some uncertainty surrounding the implication of such broad terms in employment contracts.

However, the contrast shown between the majority's refusal to extend the implication of reasonableness to clauses allowing termination of employees on four months' notice, and Simpson JA's dissenting broad view that good faith should be possibly implied into employment contracts, demonstrates the underlying continued uncertainty in contract law surrounding implication of broad terms of good faith or reasonableness. Unless courts are inspired to continue stepping forward to clarify the role of good faith, *Bartlett* may fall into the category of a limited exception, and this step forward will be reduced to a small step.

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74 *Bartlett* [2016] NSWCA 30 (7 March 2016) [49], [87] (Macfarlan JA), [106]–[107] (Meagher JA).

75 Ibid [126], [133] (Simpson JA).

76 See above nn 65–7.

77 Gray, above n 8, 358–9.

While this decision appears to afford greater protection to employees by ensuring that employers act reasonably and with procedural fairness when investigating or terminating for serious misconduct, it may have little effect practically. It is more likely in commercial reality that employers may choose to avoid the heavier burden of objectively proving serious misconduct, and instead dismiss employees by giving them four months' notice and paying them out, thus reducing any possible practical significance of the case.