NEWS Release

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The Duty Of Good Faith How Good Do You Need To Be?

Good Faith is a legal concept that is often bandied about when parties to a contract are having a dispute. We intuitively understand Good Faith to mean being reasonable or fair. This is in line with some common definitions of Good Faith:

- honesty in fact and observance of reasonable standards of fair dealing;
- faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; and
- the absence of bad faith.

Now that we know what it means, the real question is: how does it affect the day-to-day world of commercial leasing? For this, we need to look at this legal concept in action: how it has been used by the Courts, where it is headed, and, how it impacts commercial behaviour, if at all.

When Will a Duty to Act in Good Faith be Implied?

The duty to Act in Good Faith has been injected into many legal relationships where there is a "power imbalance" between the parties, such as employer/employee and franchisor/franchisee. Aside from these special relationships (and there are more), the courts in Canada have not recognized a stand-alone duty of Good Faith. The Ontario Court of Appeal has said: "The implication of a duty of good faith has not gone so far as to create new, unbargained for rights and obligations."

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As between a commercial landlord and tenant, there is no general duty of Good Faith. This is not one of those special relationships.

Good Faith and Negotiations

Similarly, there is no independent obligation or duty to negotiate in Good Faith. When negotiating, each party is free to look after its own interests and make the best deal possible, unless the parties have specifically agreed to negotiate in Good Faith. For example, the parties may agree in an offer to lease to negotiate the form of lease in Good Faith, or the lease may provide that the parties will negotiate the renewal in Good Faith.

Good Faith and Discretion

One area where there is a well established duty to Act in Good Faith is where one of the parties has a discretion to be exercised. For example, any "consent, not to be unreasonably withheld" must be determined using Good Faith. This means that the party must exercise its discretion reasonably and not for any collateral or ulterior purpose. Even a consent that "may be unreasonably and arbitrarily withheld" must be determined using Good Faith.

Good Faith and Performance of the Terms of a Contract

The final area where the courts have implied a duty of Good Faith is in the performance of the terms of a contract. The Ontario Court of Appeal has observed that Canadian courts have not developed a comprehensive and principled approach to implying duties of Good Faith. They have implied a duty of Good Faith into the performance and enforcement of contracts on an *ad hoc* basis, "to ensure that parties do not act in a way that eviscerates or defeats the objectives of the agreement that the parties have entered into". Essentially, Good Faith is another equitable tool in the

judicial toolbox used to ensure that justice is done. The trouble is, it's often difficult to predict when and how a judge will use this equitable tool.

It is noticeable, though, that when implying a duty of Good Faith in the performance or enforcement of a contract, the courts have been cautious not to create unbargained-for rights. This is particularly true where the parties have negotiated a comprehensive agreement that includes an "Entire Agreement" clause. The courts try to respect the right of business people to negotiate their own agreements. It is a relief to note that we have not yet seen any case where the courts have found there to be no breach of any specific term of an agreement, but nevertheless found a breach of an implied duty of Good Faith. However, we should never say "never" - the courts are known to be creative in administering justice.

A Couple of Commercial Leasing Scenarios

Consider a couple of scenarios: first we have a commercial lease which has no right to relocate or in any way modify a tenant's premises. The landlord undertakes a major redevelopment of its property and asks the tenant to accommodate by relocating or altering its premises. The landlord offers reasonable compensation to the tenant. The tenant refuses and demands strict compliance with the lease, knowing this will put the landlord to great expense and inconvenience. The tenant's hidden agenda is to force an expensive buy out.

In our second example we have a "Ma & Pa" store in an aging shopping centre. They have no exclusive. They run a modest business. After a few years the landlord spruces up the shopping centre and brings in some national retailers. One is a direct competitor of Ma & Pa and will drive them out of business. The landlord does not mind because it foresees leasing their space to yet another national retailer.

In both examples one party might be said to be acting in bad faith because they have an ulterior purpose to harm the other party, contrary to the reasonable expectation that a party should not do anything to harm the other. At present, the law favours both of these barracudas since neither lease contains an express term to stop them. Good Faith alone is not a solid foundation for a claim. At least, not yet.

Announcements

The partners of Daoust Vukovich LLP are delighted to announce that JOSEPH GRIGNANO has joined them as a partner at the firm. Joseph articled with the firm and has been practicing commercial leasing law with us ever since.

Daoust Vukovich LLP is pleased to announce a new addition to our team: JAMIE PAQUIN joined our firm in January of 2006 as a lawyer in the corporate/commercial leasing and real estate sections. Jamie graduated from Laurentian University in 2000 with a BA degree in law and justice. He completed his law degree at the University of Toronto and was called to the bar in 2005.

Our secret for closing files lies as much in what is taken out as in what is put in. By eliminating exorbitant expenses and excess time, by shortening the process through practical application of our knowledge, and by efficiently working to implement the best course of action, we keep our clients' needs foremost in our minds. There is beauty in simplicity. We avoid clutter and invest in results.

Often a deal will change complexion in mid-stage. At this critical juncture, you will find us responsive, flexible and able to adjust to the changing situation very quickly and creatively. We turn a problem into an opportunity. That is because we are business minded lawyers who move deals forward.
The energy our lawyers invest in the deal is palpable; it makes our clients' experience of the law invigorating.

20 Queen Street West, Suite 3000, Toronto, Ontario M5H 3R3 | Tel: 416~597~6888 | Fax: 416~597~8897 | Web: www.dv-law.com

FRANCINE BAKER-SIGAL
416-597-8755
francine@dv-law.com

JEANNE BANKA
416-597-0830
jbanka@dv-law.com

JOANNA BOARD
416-597-9225
jboard@dv-law.com

DENNIS DAOUST
416-597-9339
ddaoust@dv-law.com

WENDY DONNELLY
416-597-9306
wdonnelly@dv-law.com

BITALI FU
416-598-7053
bitalif@dv-law.com

LINDA GALESSIERE
416-597-8758
Lgalessiere@dv-law.com

JOSEPH GRIGNANO
416-598-7049
jgrignan@dv-law.com

RONALD HABER
416-597-6824
rhaber@dv-law.com

WOLFGANG KAUFMANN
416-597-3952
wolfgang@dv-law.com

LYNN LARMAN
416-598-7058
llarman@dv-law.com

MIMI LIN
416-597-8493
mimil@dv-law.com

DAWN MICHAELOFF
416-597-8578
dmichaeloff@dv-law.com

FRANCES PENG
416-598-7038
fpeng@dv-law.com

ALICE PERALTA
416-597-1536
aperalta@dv-law.com

NATALIE VUKOVICH
416-597-8911
nvukovich@dv-law.com

DEBORAH A. WATKINS
416-598-7042
dwatkins@dv-law.com