

Unconscionability, good faith and insurance law

Harrison Smith

Judges' Clerk – Auckland High Court

The statutory unconscionability provisions

- Recommended in Ministry of Business, Innovation and Employment reports
- Introduced as sections 7 and 8 of the Fair Trading Act 1986
- Section 7 provides:

A person must not, in trade, engage in conduct that is unconscionable.

- Section 8 list of factors to consider – no definition of “unconscionable”
 - This includes the extent to which the parties acted in good faith

Key principles from Australian case law

- Unconscionability assessed by reference to a “normative standard of conscience”
- This is a high standard – targets egregious conduct
- Elements of the equitable doctrine not requirements of the statutory claim
- Unlikely to be a requirement of “moral obloquy” here

The insurance law context

- Insurance contracts attract a duty of utmost good faith
- Unconscionable conduct could well be pleaded where a breach of this duty is alleged
- Examples of unconscionable conduct in the insurance law context:
 - *Australian Securities and Investments Commission v Cash Store Pty Ltd (in liq)* [2014] FCA 926
 - *Australian Securities and Investments Commission v Financial Circle Pty Ltd* [2018] FCA 1644

A step towards a general duty of good faith in contract?

- Criticism that there is no rationale for the duty of good faith in insurance law
- There would be a rationale for it if good faith was an organising principle of contract law generally
 - *Bhasin v Hrynew* [2014] 3 SCR 494
- Previous reluctance to a duty of good faith in contract was to avoid interference with commercial parties
- Statutory unconscionability now puts good faith in issue for commercial parties