On the facts here Gleeson CJ and Crennan J found that it could not. In the full Federal Court Gyles J made an observation to similar effect (at [162]).

Finally, there were two respects in which it had been asserted in these proceedings that CGU had been in breach of the duty imposed on it by section 13 of the ICA. The first was based on CGU's failure to provide an indemnity in respect of each claim made on AMP within the time period after the provision of information in respect of each of claim contemplated by the protocol (established by AMP for the handling of the claims). This was the argument advanced at first instance and dealt with by Heerey J. It is also in relation to a breach of this nature that both the comments that a failure to handle claims in a timely fashion may amount to a breach of the section 13 duty and the difficulty in granting an indemnity for such claims as relief for the breach alleged (identified in the joint judgment of Gleeson CJ and Crennan J) are apposite.

The second respect in which it had been asserted that there had been a breach of duty by CGU was identified by Emmett J in the context of the appeal to the full Federal Court. It was a failure to act with the utmost good faith in relation to the policies in the manner in which CGI conducted itself in its defence of the proceedings instituted against it by AMP for the recovery of AMP's claimed indemnity under the policies. In particular, it was by taking a stance in the proceedings that AMP was required to establish by admissible evidence that it was legally liable to any investor whose demand had been settled in order to recover an indemnity under the policies for that liability and any amounts paid in settlement of it. It was for the purposes of reconsidering inter alia this argument (which was also bound up with AMP's claim based on estoppel) that the majority of the full Federal Court directed that the proceedings be remitted. It was to this argument that the first three of the four questions that the majority of the full court directed the trial judge to reconsider were directed. However, the majority of the High Court held (Kirby J dissenting) that it was not appropriate for the proceedings to be remitted for the further consideration of any of these issues. Accordingly, the effect of the decision of the majority of the High Court was that to the extent that AMP may have been able to advance a claim that CGU had been in breach of its section 13 duty on this second basis, in the end that claim also failed.

By Greg Nell SC

No tortious duty of good faith: CGU Workers Compensation (NSW) Limited v Garcia [2007] NSWCA 193

This recent judgment of the New South Wales Court of Appeal deals with whether there is a tortious duty to act in good faith at common law and more particularly whether such a duty is owed by an insurer of a workers compensation policy in respect of the handling of claims under that policy or whether such a duty is to be implied into the statutory workers compensation policy, as an implied term of that policy. In addition, this judgment also provides guidance as to the approach that a court should take when issues arise as to the existence or scope of a novel tort as well as to the circumstances in which a term imposing a duty of good faith may be implied into a contract.

The underlying claim

The appeal arose out of proceedings in the District Court of New South Wales in which the respondent (Mr Garcia) had claimed damages from his employer's workers compensation insurer for its alleged breach of a duty to act in good faith in dealing with a claim for workers compensation that the respondent had made on the insurer in respect of injuries that the respondent was said to have sustained in August 1999 in the course of his employment.

Initially, the respondent's claim was accepted by the insurer, who made weekly compensation payments to the respondent whilst he was unable to work. But in January 2000, the insurer terminated these weekly payments, based on medical evidence said to indicate that the respondent's then symptoms were due to a degenerative condition and any aggravation of that condition caused by the events of August 1999 had by that time ceased. The respondent brought proceedings against the insurer in the Compensation Court claiming (inter alia) reinstatement of his weekly compensation payments. Those proceedings were fixed for hearing in April 2001. However, on the day of the hearing, the insurer indicated that the respondent's claim for compensation had been re-accepted.

The respondent claimed to have suffered both economic and non-economic loss (extending beyond the amounts recoverable in the Compensation Court proceedings) as a consequence of the insurer's decision to terminate his weekly compensation payments and commenced proceedings against the insurer in the District Court for the recovery of damages in respect of that loss.

The respondent's claim in those proceedings was put in two ways. The first was that the insurer was in breach of an implied term of the statutory workers compensation policy that it would 'deal fairly and in good faith with' the worker. Secondly, the insurer was also alleged to have been in breach of a tortious duty of good faith that it owed the worker, being a 'duty to act in good faith towards the plaintiff [worker] in relation to any claims made under the [Workers Compensation] Act by the plaintiff'.

The judgment in the District Court

The proceedings in the District Court were heard by Goldring DCJ who upheld the respondent's claim on the second of the above two bases and awarded the respondent damages of $ 451,317.50 (including $ 50,000 exemplary damages).

In doing so, his Honour acknowledged that this tortious duty of good faith which he found the insurer to be in breach of was a novel one under Australian law and one that did not arise under principles of negligence. In particular, it was not just a duty of care within the framework of the existing law of negligence or an action for a breach of a specific statutory duty. Rather, it was said to be a completely new tort. However, both this decision and this new tort were confined to

the situation as between an insurer and a worker and in relation to the statutory policy provided for by the workers compensation legislation, even though the duty of good faith comprised in this tort was said to exist independently of the workers compensation scheme.

His Honour's conclusion that the insurer owed the respondent a duty of good faith rested effectively on the decision and reasoning in *Gibson v Parkes District Hospital* (1991) 26 NSWLR 9 ('*Gibson*'), in which Badgery-Parker J had held that a workers compensation insurer and an employer owed a duty to act in good faith in the processing of a workers compensation claim, the breach of which may attract a liability in tort. Goldring DCJ concluded that the reasoning in *Gibson* was both directly on point and compelling. Moreover, his Honour concluded that insofar as later decisions from other jurisdictions expressed reservation about the correctness of the decision in *Gibson*, they were either distinguishable or not to be followed.

The decision in *Gibson* has not met with universal approval elsewhere in Australia. For instance in Victoria, McDonald J came to the opposite conclusion in *Gimson v Victorian Workcover Authority* [1995] 1 VR 209, holding that:

- there was no basis in law for concluding that circumstances might exist giving rise to a common law duty which was imposed on a person to act in good faith in that person's dealings or relationship with another, the breach of which would give rise to a remedy in damages in tort; and
- the provisions of the Victorian Accidents Compensation Act did not give rise to such a duty, at least in the circumstances of the case before him. In reaching these conclusions, McDonald J was not persuaded by either the decision or reasoning of the judgment in *Gibson*. Nor was his Honour able to conclude that that judgment was, by analogy, of assistance in determining whether in the circumstances of the case before him it may be soundly and properly argued that, in the absence of any contractual relationship, a duty of good faith may nevertheless be owed at common law by a compensation insurer. Accordingly, McDonald J concluded that the plaintiff's claim that the defendants owed the plaintiff such a duty had no good foundation in law and disclosed no cause of action.

More recently in Queensland, McMurdo J held in *Lomsargis v National Mutual Life Association of Australasia Ltd* [2005] Qd R 295 that an insurer under a contract governed by the *Insurance Contracts Act 1984* (Cth) was not liable in tort to its insured for failing to act towards the insured in good faith. In doing so, his Honour distinguished the decision in *Gibson* (on which the plaintiff in that case had relied), on the grounds that it was concerned with the existence of a duty and remedies for its breach in a particular statutory context (namely workers compensation legislation) rather than in the context of an insurance contract governed by the Insurance Contracts Act and therefore did not deal with whether there was a tortious duty of good faith which was owed concurrently with the contractual duty implied in a contract of insurance by section 13 of the Insurance Contracts Act, being the issue confronting his Honour.

The appeal

The defendant insurer appealed. The Court of Appeal allowed the appeal and dismissed the respondent's underlying claim. The principal judgment was given by the president of the Court of Appeal, Justice Mason, with whom both Hodgson and Santow JJA agreed. Justice Santow also went on to make some additional observations about the approach that should be taken when an issue arises with respect to the existence or scope of a novel tort, both generally and in the context of the particular proceedings before him.

There is no tortious duty of good faith

In allowing the appeal, Mason P concluded that there was no tortious duty of good faith at common law – in particular such a duty was not owed by an insurer of a workers compensation policy in respect of the handling of claims under that policy – and that Goldring DCJ had erred both in concluding that there was such a duty and in finding that the insurer had been in breach of that duty in the present instance.

Essentially, his Honour reached this conclusion in two ways. The first was following an examination both of the new tort conceptually and of the circumstances in which it was said to arise. The second was having regard to the existing authorities, including the judgment of Badgery-Parker J in *Gibson* upon which Goldring DCJ had relied heavily.

In relation to the first, Mason P agreed with the appellant's submissions that the workers compensation legislation did not require, let alone call forth, the 'novel tort' that Goldring DCJ had found below. In the course of his judgment, Mason P also expressed agreement with remarks made in *OBG Ltd v Allan* [2007] UKHL 21 that it was not for the courts to create a cause of action out of a regulatory or criminal statute which Parliament did not intend to be actionable in private law :

> Where substantive and procedural obligations are spelt out in detail with their enforcement remitted (in the main) to a court, then the silence of the legislature as regards a duty of fair dealing that sounds in damages is pregnant with the rejection of any such duty.

Central to this part of his Honour's reasoning were issues concerning coherence (or perhaps more correctly a lack of coherence) between this new tort and the framework within which it must be placed. This need for coherence was also approved by Santow JA and addressed separately in his reasons for judgment. In particular, his Honour stated that whilst the lack of such coherence would preclude the introduction of a novel tort, its presence may not of itself suffice to justify it.

When examined conceptually, Mason P found that for this new tort to have a role to play, it must of necessity find its place within the interstices of the existing statutory workers compensation framework. In particular, it must not contradict the terms or policies of the statutory and contractual frameworks within which it would be placed. Furthermore, it was also wrong in principle to contemplate any role for this new tort unless and until the contractual ordering of the relationship was understood and respected. This is especially where this new tort was being ventured (as it was by the respondent in this case) as a gap filler intended to deliver remedies such as exemplary damages and recompense for delayed payment that both the statute and contract law generally withheld. In the course of his judgment,

Mason P identified three problems that were said to demonstrate powerful arguments why this new tort should not be invoked to trump so-called inadequacies (from the worker's point of view) of the statutory contract, namely that Australian law has thus far not accepted exemplary damages for breach of contract, that the statute and common law already compensated for the impact of delay in meeting a contractual claim and that there is under the common law only a qualified recognition of damages for disappointment, distress and injured feelings caused by non-performance of a contract.

In respect of the coherence as between the new tort and the statutory scheme generally, Mason P identified a number of policy considerations that (in his opinion) negated the need to find a tort of good faith (or even an implied contractual term to that effect). His Honour also identified a number of respects in which the alleged tortious duty was incompatible (both practically and legally) with the legislative regime, which prescribes in detail the substantive and procedural rights and obligations of all the participants and within which framework the parties are permitted to pursue their rights with vigour and self interest. These respects included:

- that the duty contended for intersected sharply across the statutory mechanisms and the adversary context in which the whole scheme was embedded;
- that claims for consequential loss that would arise under a duty of good faith lay uneasily with the detailed limits of claims under the workers compensation legislation and its focus on the management of workplace injuries; and
- that the insurer's duties are already closely monitored through a system of licensing and criminal penalties, with the legislation already imposing various duties on the insurer and creating offences for failing to comply with certain obligations. Mason P concluded that a duty of good faith in the making or maintaining of a claim, the breach of which sounds in damages, lay very uncomfortably within such a framework.

As for the second aspect of this part of his Honour's decision, Mason P found that the authorities did not support the existence of a tortious duty of good faith, especially one which (as his Honour characterised it) cut across the legislative and contractual framework in some respects shattering the coherence of the statutory workers compensation scheme. In this regard, his Honour referred to the recent 'stern warnings' of the High Court (in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 81 ALJR 1107) against intermediate courts of appeal stepping beyond long established authority derived from English precedents or considered dicta of the High Court itself, and concluded that:

> … the present case lies well past that point on the plank where even bold judicial spirits might think to stand without firm external support or compelling analogy in the existing case law.

Although in *Gibson* Badgery-Parker J concluded (at p34D) that it was just and reasonable to impose on a workers compensation insurer and an employer a duty to act in good faith in the processing of a workers compensation claim breach of which should attract liability for damages in tort, this conclusion was expressed in the context of an appeal against the decision of a master of the court permitting the plaintiff in that case (Mrs Gibson) to amend her Statement of Claim to include a claim for breach of this alleged duty of good faith. The *ratio* of the decision in *Gibson* is found at the conclusion of the judgment (at p36A) where his Honour states that in his opinion the defendant had not shown that the plaintiff's case for breach of the alleged duty was so clearly untenable that if the amendment was allowed it was liable to be struck out at that stage of the proceedings. It was on that basis and for that reason that his Honour dismissed the appeal and affirmed the master's order granting the plaintiff leave to amend her Statement of Claim to include a claim for breach of this alleged duty. It was observed by Mason P in the course of his judgment in *Garcia* that a search of the Supreme Court file in *Gibson* disclosed that those proceedings had been resolved by consent some time after the hearing before Badgery-Parker J and before Mrs Gibson's claim for breach of this alleged duty ever went to trial.

In light of the foregoing, Mason P stated that the decision in *Gibson* stood as authority (resting upon the reasoning of a respected judge of the Supreme Court) that the claim in question (that is, a claim for breach of the alleged duty of good faith) was arguable, in the sense that a pleading that avers such a claim ought not be struck out. The decision was not however authority for any broader proposition (nor did it bind the Court of Appeal).

In any event Mason P stated, and in the course of his judgment demonstrated, that there were a number of difficulties with the decision in *Gibson* 'even within the four corners of its own reasoning'. For instance, although Badgery-Parker J had correctly recognised that this putative tort was not a species of negligence, Mason P stated that his Honour had nevertheless placed significant and unexplained reliance upon decisions such as *Anns v Merton London Borough Council* [178] AC 728 and decisions in Australia and England discussing that precedent, which were negligence based. Insofar as Goldring DCJ had adopted similar reasoning, for instance in eliding the circumstances capable of giving rise to a duty of care and those said to generate this new tort, in particular so as to emphasise the vulnerability of the worker's position and the insurer's knowledge of those matters going to that vulnerability, his judgment was also criticised by Mason P. Whilst both Badgery-Parker J and Goldring DCJ had each also had regard to where a duty of good faith had been implied into a particular contract or class of contract, including contracts of insurance, in support of their respective conclusions as to the existence of the alleged tortious duty, Mason P concluded that their reasoning in this regard was unhelpful and to a degree erroneous. Rather, Mason P found that proof of a concurrent contractual duty of good faith suggested the need for real caution before reaching for a tortious backup, *a fortiori* if the resort to tort is part of an attempt to recover exemplary damages (such as those in fact awarded by Goldring DCJ) that would be unavailable in the contractual context.

As Mason P also observed, the case law subsequent to *Gibson,* including the decisions in *Gimson,* and *Lomsargis,* had been hostile to the reception of the new tort. Although Goldring DCJ had sought to draw support from the decision of Wallwork J (with whom Kennedy J agreed) in *Ilievsak-Dieva v SGIO Insurance Ltd* [2000] WASC 161

for his conclusion that as a matter of law, damages were available against a workers compensation insurer for breach of the duty of good faith at common law, Mason P found that this did not appear to be a correct reading of the reasons in that case. Similarly, Mason P stated that Goldring DCJ had also appeared to have misread the decision of McMurdo J in *Lomsargis* and had erred in distinguishing that decision on the basis that the respondent in the present case was not in a contractual relationship with the insurer (cf section 159 of the Workers Compensation Act). Moreover, Mason P observed that the use of the statutory duty of good faith implied by section 13 of the Insurance Contracts Act into contracts of insurance (although not workers compensation policies, by reason of section 9(1)(e) of that Act) as a 'gap filler' made it harder for the common law of Australia to accommodate the wide range of duties argued for by the respondent. In the opinion of Mason P this tended to strengthen the force of the reasoning in *Lomsargis* insofar as it rejected the tortious duty even in relation to a contract that has a statutory implied term.

In the course of his reasons, Mason P also referred to a number of decisions which were inconsistent with the existence of the new tort and which either had not been referred to Badgery-Parker J or Goldring DCJ or were not referred to in their respective judgments. These included:

- the decisions of the English Court of Appeal and House of Lords in *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665 and *Banque Financiere de la Cite SA v Skandia (UK) Insurance Co Ltd* [1991] 2 AC 249 which McDonald J had drawn upon for support in *Gimson* in concluding that there was no duty. Whilst Mason P conceded that these decisions were far from being directly on point, he nevertheless stated that their reasoning generally undermined the authority of *Gibson*;
- the 'additional persuasive decision' of the English Court of Appeal in *Bank of Nova Scotia v Hellenic War Risk Association (Bermuda) Ltd* (1990) 1 QB 818 in which a differently constituted Court of Appeal, having confirmed the correctness of their earlier decision in the *Banque Keyser* case and thereby held that a contract of insurance did not contain an implied term requiring the parties to act with the utmost good faith one to the other, the breach of which sounded in damages, also went on to find that there was no corresponding tortious duty that might be invoked to fill in the contractual gap. This decision had not been cited to Badgery-Parker J in *Gibson* nor mentioned by Goldring DCJ in his judgment below; and
- the earlier unreported judgment of the New South Wales Court of Appeal in *Employers Mutual Indemnity (Workers Compensation) Ltd v A Donald Pty Ltd* (unreported 23 Oct 1997) in which the Court of Appeal had, in the context of a claim by an insurer for payment by an employer of a workers compensation policy premium, 'briefly but firmly rejected' an argument that the insurer owed was a tortious liability to the employer to act in good faith.

Having regard to the present state of the authorities Mason P concluded that there was no universal common law duty of good faith in the performance of a contract of insurance and that for all the reasons set out in his judgment such a duty did not exist in the circumstances of the present case.

Implied contractual duty of good faith

Because of his conclusion as to the existence and breach of the tortious duty of good faith, Goldring DCJ found that it was unnecessary to decide whether the statutory policy contained an implied term to similar effect and whether the insurer was also in breach of that implied term. Whilst the respondent's argument below in this regard was repeated on appeal, it was rejected by the Court of Appeal, who found that there was no implied contractual term to the effect contended by the respondent, in particular one that would sound in damages for its breach.

Although the respondent had been able to point to decisions recognising that some commercial contracts contain terms implied as a matter of law imposing an obligation of good faith and reasonableness in the performance of contractual obligations, Mason P stated that the cases do not establish that such an implied term is to be included into every contract or even into every aspect of a particular contract. Australian law has not yet taken this step as regards an implied term of good faith and fair dealing in performance.

Such a duty may, however, be implied as a matter of law in specific classes of contracts or as a matter of fact to give business efficacy to a particular contract. As to the former, in determining whether the implication is to be drawn from a particular class of contract, Mason P stated that the central criterion was one of 'necessity', a matter to be tested against any applicable statutory policy. However, his Honour did not find that this criterion had been satisfied in the circumstances in which the claim before him arose.

Mason P also found that in the circumstances before him the implication of such a term was not necessary to give efficacy to the statutory policy and its working out would contradict the express terms of that policy and its statutory framework. The reasons that his Honour had earlier given for rejecting the alleged tortious duty were (in his opinion) equally applicable in the context of the alleged implied term and in rejecting the implication of any such term.

For those reasons, the Court of Appeal concluded that there was no relevant contractually implied duty of good faith, of which the insurer could be said to have been in breach and thereby liable in damages to the respondent and that the respondent's claim thereby also failed on that basis.

Whether the insurer had been in breach

Although it was strictly unnecessary to decide the issue, given his conclusion that there was no tortious duty or implied term of which the insurer might be said to have been in breach, Mason P nevertheless went on to state that in his opinion there were sufficient matters of concern in the trial judge's reasoning on breach to set aside his discussion on that topic. In particular, seven reasons were given. In identifying these reasons, Mason P did not go so far as to suggest that there was no evidence that might have grounded a finding of breach of the alleged duty. However, his Honour was not persuaded that there was such a breach for the reasons given by Goldring DCJ below. Although given his conclusion that there was no tortious duty

or implied term, Mason P was not prepared to determine as on a rehearing what conclusion should have in fact been drawn on the question of breach.

Conclusion

In concluding that there was no tortious duty of good faith at common law, the Court of Appeal's judgment has effectively overruled the decision in *Gibson*, insofar as that decision has in the past been invoked as authority for the existence of such a tortious duty at least on the part of a workers compensation insurer, and thereby brought the position in the New South Wales into line with that under Victorian, Queensland and English law. Although in its judgment the Court of Appeal also provided some guidance as to how a claim that seeks to extend the existence or scope of a tort, including a novel tort, should in the future be dealt with, it also reveals the difficulties that are likely to be encountered in that regard by a claimant seeking to advance such a claim, particularly at first instance and which requires travelling beyond long established authorities.

By Greg Nell SC

Legal professional privilege: AWB Limited v Cole (No1) (2006) 152 FCR 382

This decision arose out of the Australian Government's Inquiry into Certain Australian Companies in relation to the United Nations Oil for Food Programme (Oil for Food Inquiry), conducted by former Supreme Court judge, Terence Cole, from late 2005 through until November 2006.

The case involved a claim by AWB Limited (*AWB*) for legal professional privilege in relation to a document, a draft statement of contrition, which had been produced to the Inquiry by one of AWB's employees (in response to a notice to produce) and subsequently tendered during the examination of the then Managing Director of AWB, Mr Lindberg, in the course of the Inquiry's public hearings. The document was said by AWB to have had been mistakenly produced to the Inquiry and that there had been no intention to waive the privilege which AWB claimed attached to it. After the document had been tendered, AWB applied to the Commissioner for its return and removal from the exhibits before the Inquiry. The Commissioner (assuming in favour of AWB that the document had been produced inadvertently and any privilege that might have attached to it had not thereby been waived), ruled that the document did not attract legal professional privilege, giving detailed reasons in support of that ruling.

AWB applied to the Federal Court of Australia for a declaration that the draft statement of contrition was privileged and for a review of the commissioner's ruling to the contrary. That application was opposed by the Commonwealth, Commissioner Cole having filed a submitting appearance and advised the court that he would take no part in the proceedings and would abide the court's determination of AWB's claim. In support of its application, AWB claimed that the draft statement was protected by both 'advice privilege' and 'litigation privilege'. The issues raised by the former were whether the draft statement was brought into existence for the dominant purpose of obtaining legal advice or whether it recorded legal advice provided by AWB's lawyers for the benefit of AWB? The issues raised by the second basis of AWB's claim were whether the document had been brought into existence for the dominant purpose of being used in connection with litigation that was reasonably in prospect and what amounted to 'litigation' for the purposes of that privilege? The onus was of course upon AWB to establish the privilege claimed.

The proceedings were heard by Justice Young who held that, having regard to its contents and the circumstances in which it had come into being, the draft statement of contrition did not fall within any of the established categories of legal professional privilege and was therefore not properly the subject of a claim for privilege.

In his detailed reasons for judgment, Justice Young has provided both a comprehensive discussion as to what qualifies as 'advice privilege' and a useful summary of the principles that are to be applied in determining whether or not a document is properly the subject of that privilege. In the course of that discussion, his Honour has also collated many of the recent authorities, both Australian and English, on the content of advice privilege and what is required to be proved in order successfully to establish a claim for that privilege. Space does not permit an examination of his Honour's discussion of either these principles or authorities to be included in this case note. Suffice it to say that his judgment (especially paragraphs [60] – [63] and [85] – [110]) as well as his Honour's later judgment in *AWB Limited v Cole (No. 5)* (2006) 155 FCR 30 are a useful resource for those seeking to assert or challenge a claim for legal professional privilege, particularly advice privilege.

In rejecting AWB's claim that the draft statement was protected by litigation privilege, Justice Young held that the rationale for litigation privilege did not support its extension to a commission of inquiry and that the privilege therefore did not extend to documents brought into existence for the dominant purpose of being used in connection with such an Inquiry. That is of course not to say that legal advice privilege may not attach to work undertaken in connection with an Inquiry, provided that the dominant purpose is satisfied. Justice Young also rejected, on the facts before him, AWB's claim that the draft statement of contrition had been brought into existence for the dominant purpose of being used in connection with any litigation which might follow on from the inquiry or the commissioner's final report. In those circumstances, his Honour did not decide whether potential future litigation of that kind fell within the scope of the litigation privilege.

Leaving aside the substantive questions raised by AWB's application, Justice Young also held that :

- the *Royal Commissions Act 1902* (Cth) did not abrogate legal professional privilege and that the provisions of that Act should be read down so as not to require production of documents that were properly the subject of a claim for legal professional privilege; and