Trust me, trust me not: 
Doubt cast on the implied term of mutual trust and confidence

Summary
On 10 September 2014, the High Court of Australia unanimously rejected the implication of a term of mutual trust and confidence into employment contracts. That decision¹ puts Australia at odds with the current position in the United Kingdom, Hong Kong and Singapore. However, it may provide scope for the Hong Kong and/or Singapore courts to similarly do so in the future.

The Australian decision
Stephen Barker was employed by the Commonwealth Bank of Australia for over 27 years before being made redundant. He brought a claim alleging that the Bank failed to comply with its redeployment policy, and that, in doing so, it breached the term of mutual trust and confidence which he argued was implied into his contract of employment.

At first instance, and on appeal, the court held that such a term was implied, and that it had been breached. However, the final avenue of appeal for the Bank – the High Court of Australia – found in the Bank’s favour, holding that a term of mutual trust and confidence will not be implied into employment contracts in Australia.

The basis of the decision was that a term will only be implied at law where it is ‘necessary’ – and not merely ‘reasonable’ – to imply it. As employment contracts operate effectively without an implied term of mutual trust and confidence, it cannot be said that the implication of such a term is necessary. However, the Court noted that this finding did not mean that other terms, such as an employee’s duty of fidelity, were unable to be implied or that the exercise of contractual powers and discretion should not be limited by good faith or rationality requirements.

Why the difference from the United Kingdom position?
In the United Kingdom, lower courts and employment tribunals had recognised that a breach of the implied term of trust and confidence could give rise to constructive dismissal claims since the late 1970s, but this was

considered by the then House of Lords for the first time in 1998 in the Malik case\(^2\). The Lords regarded this as a welcome and sound development, recognising that an employer should not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust with any of its employees.

The High Court of Australia found that the reasons for the implication of a term of mutual trust and confidence in the United Kingdom reflected a consensus in decisions reached by the courts and tribunals following the enactment of a constructive dismissal provision in legislation, and that this differed from the position in Australia.

This is the first time that the High Court of Australia has been required to directly consider the issue, and the majority decision suggested that an implied term of mutual trust and confidence was a complex issue that was more appropriate to be dealt with by Parliament than the judiciary. Such an approach is consistent with New Zealand, where the implied term has a statutory basis.

**How does this affect employers in Hong Kong and Singapore?**

Courts in Hong Kong and Singapore have to date followed the United Kingdom approach and implied a term of mutual trust and confidence in employment contracts.

However, when the question of whether employment contracts should have a term of mutual trust and confidence implied next arises for consideration, the Barker decision will undoubtedly be drawn to the relevant court’s attention. If Barker is followed, the implied term of mutual trust and confidence could be eliminated from the common law in either or both jurisdictions.

**Where do the Singapore courts currently stand?**

A number of recent decisions from the Singapore courts have recognised that the implied term of mutual trust and confidence exists in employment relationships, thereby entrenching in Singapore a similar approach to that taken in the United Kingdom.

In the 2013 Cheah Peng Hock\(^3\) decision, the Singapore High Court applied the principles in Malik, confirming that the implied term of mutual trust and confidence “operates as a default rule”. The courts, including the Court of Appeal, also reaffirmed the position that the implied term of trust and confidence is settled law in Singapore in the 2014 decisions of Brader Daniel John v Commerzbank\(^4\) and Wee Kim San Lawrence Bernard v Robinson\(^5\). It bears mention that the appeal against the Cheah Peng Hock decision was also dismissed by the Court of Appeal, the highest court of law in Singapore.

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\(^3\) Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd [2013] 2 SLR 0577.

\(^4\) Brader Daniel John and others v Commerzbank AG [2014] 2 SLR 0081.

Interestingly, in the Commerzbank decision, the Singapore High Court departed from the decision reached by the UK Court of Appeal in a similar case which had been brought earlier by former employees of the bank in the UK\(^6\) and took the view that the bank’s conduct had not been in breach of its implied term of trust and confidence (although breach of its contractual promise to pay bonuses was accepted, leading ultimately to judgment in favour of the employees, as in the UK case).

Therefore, the position in Singapore seems relatively settled in favour of this implied term remaining in place.

The application of the implied term of mutual trust and confidence is, however, subject to an important caveat: that any express contractual terms to the contrary may modify (or negate) the scope of an implied term. This was acknowledged in the Cheah Peng Hock decision, as it was in another recent case in relation to the employee’s implied duty of fidelity, which the court held had been negated by an express (but narrower) term.

**What about Hong Kong?**

Similarly to Singapore, it is quite settled in Hong Kong that a term of mutual trust and confidence will be implied into all employment contracts.

The most significant case to consider the issue recently was Williams v Jefferies Hong Kong Limited\(^7\). The Hong Kong Court of First Instance stated there that the implied term of mutual trust and confidence applies to every employment contract, and that it ‘is not in any way or to any extent affected’\(^8\) by the terms of the employee’s contract of employment.

This comment casts some doubt on the enforceability in Hong Kong of a caveat such as the one discussed in the Singapore Cheah Peng Hock decision. However, it should be noted that the decision was one of a single Deputy High Court Judge in the Court of First Instance, and is therefore not binding on, for example, the Court of Appeal.

**Practical implications for employers**

Australian employers now have the certainty of knowing that they are not bound by an implied term of mutual trust and confidence. Given that the courts in Singapore and Hong Kong look to Australian decisions as persuasive authority, the Barker decision may threaten the application of the implied term of mutual trust and confidence, and invites uncertainty vis-à-vis the scope and obligations that it imposes on employers in Hong Kong and Singapore.

Employers should therefore ensure that their employment contracts are drafted appropriately so as to best manage the risks that come with such uncertainty, and should carefully consider whether any express terms are intended to override or supplement any implied terms.


\(^7\) [2013] HKCFI 1011 and [2013] HKCFI 1103.

\(^8\) [2013] HKCFI 1103 at [8].
Further Information

If you would like to discuss the above, its implications for your existing practices and documentation, and/or any steps which ought to be taken as a result, feel free to contact Laure de Panafieu, Benjamin Harris or Joel Cheang or any of your other existing contacts in our Hong Kong or Singapore offices.