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## Good Faith – Lonsargis v General Mutual Life

His Honour Mr Justice McMurdo

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## **An Insurer's Breach of the Duty of Good Faith: Exemplary Damages?**

**Justice Philip McMurdo  
Supreme Court of Queensland**

I have been asked to speak to my judgment last year in *Lomsargis v National Mutual Life Association of Australasia Ltd* [2005] 2 Qd R 295. I held there that under Australian law an insurer's breach of its duty of good faith towards an insured does not result in a liability in tort. As requested I will discuss that judgment, but resist a strong temptation to better express it. It is important to understand what that judgment did decide, correctly or otherwise, and significantly, what it did not decide. In summary, I held that there was no tortious duty of good faith and therefore no means for an insured to recover exemplary damages upon that basis. I was not asked to decide, and did not decide, whether a breach of the *contractual* duty of good faith might arguably be within that small category of cases where exemplary damages can be awarded for breach of contract. Whilst there are authorities which indicate an answer to that question, there is no Australian case which directly answers it.

### **The duty of good faith**

As every insurance lawyer knows, contracts of insurance carry with them mutual duties of good faith. In Australia that duty has two sources. The first is the common law, under which insurance contracts have long been regarded as *uberrimae fidei*, of the utmost good faith. The second is the *Insurance Contracts Act 1984* (Cth), and in particular s 13. It provides that:

“A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.”

There are two parts to that section. First there is the express statement of the duty itself. This is in terms which appear to enact what has long been the common law. Secondly, the section gives a particular effect to the duty by the implication of a term

in a contract of insurance. That is significant in a number of ways. It is important for the consequences of a breach of that duty. And, as I discussed in *Lomsargis*, it has a significance for the imposition or otherwise of a liability in tort for a failure to act in good faith. The implication of a contractual term to this effect makes for an important difference between the law in this country and that in England.

Somewhat surprisingly, there is comparatively little authority on the remedies available at common law for breach of the duty. Due to the enactment of s 13 in 1984, the body of case law is unlikely to grow. But there was an exploration of this in the judgment of Chesterman J in *Re Zurich Australian Insurance Limited* [1999] 2 Qd R 203. The policy of insurance there was effected in 1972 so that the Act had no application. As Chesterman J there discussed, the relationship of good faith operated as “the basis for implying a more specific duty” in particular contexts, such as in pre-contract disclosure or in what is required of an insured by way of steps to reduce or to minimise its loss.<sup>1</sup> He referred to the judgment of Stephen J in *Distillers Co, Bio-Chemicals (Australia) Pty Ltd v Ajax Insurance Co Ltd* (1974) 130 CLR 1, which discussed the common law requirement of good faith in the context of an insurer’s right to defend proceedings against the insured. In *Distillers*, the insured was concerned by a condition of the policy that the insurer might decline indemnity if the insured settled the claim against it without the insurer’s approval, and it unsuccessfully sought a declaration that the condition had no application where the insurer refused to conduct the defence of the claims against the insured. Stephen J said that the insurer’s power to withhold consent to a settlement was not one which it could exercise arbitrarily and that where conflicts of interest arose as between an insured and insurer, the insurer was to exercise its powers “with due regard for the interests of the insured”.<sup>2</sup>

A similar view to that of Chesterman J appears in the judgment of Marks J in *Protean (Holdings) Ltd (Receivers and Managers appointed) v American Home Assurance Co* (1986) 4 ANZ Insurance Cases 60-683. Marks J said that he did not understand Stephen J in *Distillers* to have spoken:

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<sup>1</sup> [1999] 2 Qd R at 210  
<sup>2</sup> (1974) 130 CLR at 29

“... of any duty which is disembodied from the contract of insurance, or which is to be implied as a discrete term or obligation, breach of which in itself might give rise to damages. Rather, he spoke of a duty which might be implied to give business efficacy to the exercise of express rights and obligations. ... the discussion of Stephen J was in the context of giving business operation to insurance contracts by attaching to them concepts of fair dealing.”<sup>3</sup>

So according to these authorities, the common law duty of good faith was not in itself a duty which, if breached, would give rise to a right to damages. It was effectively a rule of construction of the express terms of the insurance contract. And that is the effect of the relatively recent English cases on the point, which I discussed in *Lomsargis*. In this reference to them, I wish to emphasise the keen search by some judges for an appropriate remedy against an insurer which they thought had acted in bad faith. Nevertheless, it is to be noted that in those cases the answer was not said to lie in the imposition of a tortious liability.

There are two cases in particular which warrant discussion here. The first is *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd*.<sup>4</sup> The second is *Banque of Nova Scotia v Hellenic Mutual Law Risks Association (Bermuda) Ltd (The “Good Luck”)*.<sup>5</sup> In *Banque Keyser*, the plaintiff banks won at first instance, where they were awarded damages for breach of their insurers’ duty of good faith. The banks had made loans to certain companies on the security of credit insurance policies. An employee of the broker was unable to procure all of the insurance required by the loan agreements. But so that the loans could proceed, he misrepresented to the banks that the insurance was complete and he issued false cover notes to that effect. The relevant employee of the insurers became aware of this deception but did not inform his employers or the insured banks. Instead the insurer’s employee simply continued to underwrite further loans knowing that they were not the complete cover which the banks were expecting, and knowing that the broker was deceiving the banks about that. The borrowers defaulted and the person who had

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<sup>3</sup> 60-683 at 74-060

<sup>4</sup> Reported at first instance and in the Court of Appeal at [1990] 1 QB 665 and in the House of Lords at [1991] 2 AC 249

<sup>5</sup> Reported at first instance at [1988] 1 Lloyd’s Rep 514 and on appeal at [1990] 1 QB 818

controlled the borrower companies absconded. So the banks claimed against the insurers for their losses from the borrowers' default. The problem for the banks in claiming indemnity was that the fraud exception in their policies operated: the losses had been caused by the absconder's fraud, as the banks were forced to concede. But then the banks argued that the insurers were liable for damages arising out of their employee's failure to disclose to the banks the deceit being practised upon them by their broker. Had the employee spoken up, the banks would not have continued to make loans, because the loans would have been relatively unprotected by insurance.

The banks claimed those damages on the basis of alleged negligence or, alternatively, breach of the insurers' duty of good faith. The trial judge, Steyn J (as his Lordship then was) upheld the claim on each basis. As to the duty of good faith, he held that the duty was not the subject of a contractual term (even an implied term) but that nevertheless there was a distinct obligation or set of obligations, long recognised by judges, which had their source from somewhere outside the contract and, in effect, from the relationship of insurer and insured. In his conclusion, the law should not allow a breach of that duty to go unremedied, and a remedy limited to the avoidance of a policy and a claim for return of the premium would be "wholly ineffective" in a case such as this.<sup>6</sup>

His decision was reversed by the Court of Appeal which held that the insurers had not been in breach of a duty of care and that although they had breached their duty of utmost good faith, damages were not recoverable for such a breach. Slade LJ was critical of Steyn J's judgment for not identifying the source of a remedy in damages for breach of the duty of good faith. He observed that Steyn J "clearly did not regard the right as being one which existed in tort, because he considered that any claim for damages for its breach would not fall to be reduced by virtue of (the contribution legislation)." Slade LJ said that "if the banks' right to full disclosure of material facts is founded neither on tort nor on contract, nor in the existence of a fiduciary duty, nor on statute, we find it difficult to see how as a matter of legal analysis it can be said to found a claim for damages".<sup>7</sup>

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<sup>6</sup> [1990] 1 QB at 705-706

<sup>7</sup> [1990] 1 QB at 776

Slade LJ considered whether there could be a liability in tort for acting in bad faith in this context. He gave four reasons why the court should not create what he described as “a novel tort of this nature”.<sup>8</sup> The first was that the good faith principle within insurance law could be traced to the courts of equity, for which similar conduct, such as undue influence or duress, provided a remedy of rescission, not of damages.<sup>9</sup> Secondly, it was in his view inconsistent with the notion that an insured seeking avoidance of the policy need not prove the effect on *his* mind from the insurer’s breach of duty (as distinct from that of the hypothetical insured) that the insured should recover damages for the same breach by proof of what effect it did have upon him. Thirdly, there was an inference to be drawn from the provisions of the *Marine Insurance Act 1906* (UK), which provided for a right of avoidance of the insurance contract for breach of the obligation of good faith, that no other remedy was available. And fourthly, there was a concern from the fact that the obligation to disclose a known material fact was an absolute one, attaching with equal force whether the failure was attributable to anything from fraud to an innocent failure to appreciate the materiality of the fact to be disclosed, so that the suggested tort was one “effectively of absolute liability”.

An appeal to the House of Lords was dismissed where it was held that there had been no breach of the insurers’ duty of good faith because the insurers’ employee had not been obliged to disclose to the insured what he knew of the broker’s fraud. But two members of the House added that they agreed with the Court of Appeal’s analysis of why there would be no remedy in damages had the breach been established.<sup>10</sup>

As should appear from my reasons in *Lomsargis*, those four points made in *Banque Keyser* are not so compelling in the Australian context. Here we do have, by the *Insurance Contracts Act*, a remedy in damages for breach of the duty of good faith. It cannot be said, either from the equitable origin of the duty or from the terms of a statute which provide a remedy of rescission, that there is an implication that

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<sup>8</sup> [1990] 1 QB at 780-781

<sup>9</sup> But subsequently, it has been held in England in *Mahoney v Purnell* [1996] 3 All ER 61 that equitable compensation is available for undue influence, a decision which I followed in *Smith v Glegg* [2004] QSC 443

<sup>10</sup> [1991] 2 AC 249 at 280 and 281

damages are not available for a breach of the duty. And with respect to Slade LJ's fourth point, what is being discussed here is a breach of a duty of good faith: not a mere innocent error of judgment.

The second of these cases concerns the ill named ship "Good Luck", which was struck by a missile whilst in the Persian Gulf in 1982. The problem was that the vessel had been insured on terms that the defendant insurer was entitled to reject a claim arising out of an event occurring while the vessel was in certain areas, which included the Gulf. The plaintiff was a bank to which the ship was mortgaged. The insurer had been informed of the mortgage and undertook to inform the mortgagee if the insurance ceased. The insured became aware that the ship was undertaking voyages in the Gulf but did not tell the bank before it renegotiated a loan to the owner. The insurer rejected the claim for the loss of the ship on the basis that it was in the Gulf at the time. The bank sued for damages, arguing that the insurer had breached its undertaking to keep it informed or, alternatively, that the insurer was liable to it in tort. The bank won at first instance but lost on appeal. The trial judge held that there had been a breach of the undertaking and negligence by the insurer's not informing the bank of the movements of the ship, as known to it, which were affecting the insurance. But he held that there was no duty of good faith owed to the bank, only to the insured which was the bank's mortgagor. The Court of Appeal held that there was no breach of the undertaking or of a duty of care. It also held that had there been an obligation of good faith owed to the bank, its breach would not have been compensable by an award of damages, essentially for the reasons which Slade LJ had given in *Banque Keyser*.

Each of these judgments was confirmed by a later decision of the English Court of Appeal in *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2001] 2 Lloyd's Rep 483. These English cases correspond with the Australian authorities I have mentioned in relation to the common law duty of good faith: at common law, there is no right to damages for not acting in utmost good faith, and specifically no claim in tort. But as I have said, the position in England is quite different because of the absence of a contractual obligation under English law. So take the facts of *Banque Keyser*, at least as they had been found before the House of Lords reversed the finding of bad faith. The breach of duty found by the trial judge

would be compensable in Australia by damages for breach of contract. Why then, in this country, would the common law impose a concurrent tortious liability? What is the gap insofar as appropriate remedies are concerned which that would fill? After all the contractual duty cannot be displaced by a contrary agreement. The gap, if there be one, is in relation to exemplary damages, which is the evident reason for the alternative claim in tort in *Lomsargis*.

### **The claims in *Lomsargis***

The plaintiff claimed under a disability policy, which entitled him to a weekly payment if he became totally disabled. He claimed that he was so disabled but the insurer refused to pay and, moreover, alleged that his claim was fraudulent. He sued, seeking declaratory and monetary relief. He sought orders for payment of the weekly sum, but he also sought damages, both for breach of contract and in tort. Each of those damages claims involved an allegation of a breach of the insurer's duty of good faith. The insurer applied to strike out each of the damages claims and the paragraphs of the pleading upon which they were based.

This was not a challenge to the allegations of bad faith in themselves, but only to their ultimate relevance. The insurer did not argue that the damages claims should be summarily dismissed because the plaintiff had no prospect of proving a breach of the insurer's duty of good faith in dealing with this claim. Its point was that the breach of the duty, if ultimately established, would have no consequence. The damages claimed for breach of contract effectively consisted of the weekly payments to which the insured was entitled if he was totally disabled together with a claim for a loss of the use of that money. I struck out that claim because it added nothing to the case. The insured could not make out that damages case without establishing his entitlement to the weekly payments, in which case, without having to prove bad faith, he would be awarded the weekly sum and interest on arrears as prescribed for the *Insurance Contracts Act* which was at a rate higher than that sought within this damages claim.

His claim for damages in tort had a significant difference, in that he claimed exemplary damages. He relevantly pleaded that the defendant had rejected his claim

in bad faith, and knowing “that the plaintiff’s financial circumstances were becoming increasingly desperate with the reduction in the absence of income from employment”. And he pleaded that the defendant had a corporate policy or practice “to arbitrarily reject or attempt to frustrate the processing and payment of about 30 per cent of all claims on disability policies in order to obviate or diminish the need for it to pay benefits under such policies” and that this policy happened to fall within that 30 per cent. Those allegations of fact, if proved, would establish a breach of the duty of good faith. The question was whether there was a concurrent liability in tort for breach of that duty, given the plaintiff’s concession that exemplary damages could not be claimed for that breach as a breach of contract.

The plaintiff’s argument heavily relied upon the judgment of Badgery-Parker J in *Gibson v Parkes District Hospital* (1991) 26 NSWLR 9. That case, like *Lomsargis*, was not a trial but a strike-out hearing. Badgery-Parker J did not ultimately conclude that there was a tortious duty of good faith in Australia, but only that it was sufficiently arguable that there was such a duty in the particular context of that case. It was not a case governed by the *Insurance Contracts Act*, and it was not a case in which there was a remedy available against an insurer which acted in bad faith, as there is in cases under the Act. In my judgment, those differences were important. Whilst Badgery-Parker J stopped short of holding that there was a liability in tort in the case before him, he appeared to be strongly inclined to that conclusion and persuaded by a line of cases in the United States, which he extensively discussed. He was not concerned with the issue of exemplary damages, but rather whether there was an arguable claim for compensatory damages in the circumstances of that case.

The plaintiff Mrs Gibson had commenced an action in the Supreme Court of New South Wales against the defendant hospital as first defendant and GIO, the hospital’s workers’ compensation insurer, as second defendant. She alleged that she was injured during the course of her employment at the hospital and that she was entitled to workers’ compensation payments. She alleged that the defendants had failed “to deal fairly and in good faith” with her in processing and paying her claim. On her behalf it was conceded that there was no case in any Australian jurisdiction in which her cause of action had been acknowledged. As to that, Badgery-Parker J cited

the statement by Glass JA<sup>11</sup> that “it is no longer appropriate to react without outraged dignity when a litigant propounds a novel theory judiciously constructed from elements of received doctrine”. His Honour then turned to the body of American case law for the proposition “that in every contract there is an ‘implied covenant’ of good faith and fair dealing, the breach of which in some circumstances will give rise to an action of tort”.<sup>12</sup> In particular he referred to some Californian decisions which upheld a tort liability for a breach of a contractual duty of good faith and fair dealing in the context of an insurance contract. According to those cases, whilst it was well settled that in California the law implies in every contract (of insurance or otherwise) a covenant of good faith and fair dealing, it is not every contract where breach of that covenant would give rise to a cause of action in tort. Insurance contracts gave rise to such a tort liability because of what the courts there had described as the “special relationship” between insurer and insured, characterised “by elements of public interest, adhesion and fiduciary responsibility”. In particular Badgery-Parker J cited the case of *Seaman’s Direct Buying Service Inc v Standard Oil Co of California*<sup>13</sup> as establishing the proposition in that jurisdiction “that a party to a contract may incur tort remedies when, in addition to breaching the contract, it seeks to shield itself from liability by denying, in bad faith and without probable cause, that the contract exists” and that where there is conduct which “offends accepted notions of business ethics ... acceptance of tort remedies in such a situation is not likely to intrude upon the bargaining relationship or upset reasonable expectations of the contracting parties”. Badgery-Parker J summarised the effect of the cases as being that in the law of California, where there is a special relationship between the parties, such as that of insurer and insured, breach of the usually implied covenant of good faith and fair dealing is itself a tort.

In the view of Badgery-Parker J, this Californian authority was relevant in the Australian context and perhaps even where the duty of good faith had force as an implied term of the insurance contract. This was because, as he saw it, the “tortious duty arose from the special relationship of the parties, the nature of which could be brought about by the contract, as distinct from the terms of the contract” so that “the

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<sup>11</sup> In *Champtaloup v Thomas* [1976] 2 NSWLR 264, 271

<sup>12</sup> (1991) 26 NSWLR 9 at 17

<sup>13</sup> 36 Cal 3 d 752

duty is a true tort duty, not a contractual duty and the existence of a contractual term is not a necessary foundation for it". So the existence of a contractual term requiring good faith largely might not matter; it is the nature of this special relationship which would warrant the imposition of a tortious liability. Although that relationship exists in fact because the parties have made a contract, its particular nature as a 'special relationship' does not depend upon the terms of that contract. In Mrs Gibson's case, there was a tenable claim, his Honour held, because of the special relationship between Mrs Gibson, her employer, and its insurer, which he explained as follows:<sup>14</sup>

"Having regard to the nature of the relationship between an employer and its insurer on the one hand and an injured worker on the other with the aspects of dependence and vulnerability to which I have referred, and the inadequacy of the statutory scheme to provide a remedy for the kind of damage which the plaintiff alleges, being damage going beyond the losses for the compensation of which the workers' compensation scheme is devised, I am of the opinion that it is just and reasonable to impose on the 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."

In essence then, Badgery-Parker J was persuaded to all but except a tortious duty in that case by the nature of the relationship and the particular vulnerability of a worker whose claim for workers compensation is rejected by an exercise of bad faith. The critical difference in the *Lomsargis* case was that the insured there had a right to be compensated if there was bad faith. If he could establish a breach of the duty, and some loss which he would suffer as a result if, at the same time, he received payment from the insurer, then he would be compensated. That is not to say that he was not in a position of some vulnerability (on his case at least); but there is a difference between a person who does have a right to be compensated in damages and one, such as Mrs Gibson, who had not.

I cited *Ilievska-Dieva v SGIO Insurance Ltd* [2000] WASCA 161, which was another case in which there was a claim for damages for loss brought about as a result of a defendant's delay in authorising payments of workers' compensation.<sup>15</sup> There are some statements made there which might be thought to provide some

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<sup>14</sup> (1991) 26 NSWLR at 34

<sup>15</sup> [2005] 2 Qd R at 310-311

encouragement for the tort liability theory. But again, that was a case like Mrs Gibson's, in which the plaintiffs did not have the protection of a right to compensatory damages.

### **Exemplary damages**

The difference which the recognition a tort liability could make where, by the operation of s 13, there is a contractual liability, is, of course, in the potential for exemplary damages. In effect, the argument for a liability in tort was an argument for the availability of exemplary damages. I concluded that this difference did not justify the recognition of a concurrent liability in tort. I referred to recent decisions showing a trend against the recognition of concurrent liability, and to the potential complications from that recognition in this context from differences in rules for the assessment of damages and in limitation periods as well as the engagement of the operation of legislation permitting claims between tortfeasors.<sup>16</sup>

Exemplary damages are punitive and not compensatory. They are awarded to punish and deter and “they can apply only where the conduct of the defendant merits punishment, which is only considered to be so where his conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like, or, as it is sometimes put, where he acts in contumelious disregard of the plaintiff's rights”.<sup>17</sup> If the suggested need for a liability in tort was a suggested need for a remedy which would punish and deter insurers in this context, this was not explained by the argument in *Lomsargis*. As I noted there was no argument along the lines of a need to punish the wrongdoer and deter others from like conduct and nor was it said that the statutory regimes under which insurers carry on their businesses do not provide the means of such punishment and deterrence.<sup>18</sup> Instead, as I have said, the plaintiff's argument heavily relied upon *Gibson v Parkes District Hospital*, but that was not a claim for exemplary damages and accordingly did not discuss the need or otherwise for this remedy.

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<sup>16</sup> [2005] 2 Qd R at 314

<sup>17</sup> *Mayne & McGregor on Damages*, 12<sup>th</sup> ed (1961), p 196 cited in *Uren v John Fairfax & Sons Pty Ltd* (1965-1966) 117 CLR 118, 122; *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 12

<sup>18</sup> [2005] 2 Qd R at 315

### **Exemplary damages against insurers?**

And now to what was not decided in *Lomsargis*. As I have mentioned, the plaintiff made no claim for exemplary damages for breach of contract and as I noted in the judgment,<sup>19</sup> the plaintiff's submissions conceded that under Australian law, exemplary damages could not be recovered for breach of contract. I was not asked to decide whether this context, a breach of the insurer's contractual duty of good faith, at least arguably should be recognised as a further exception to the common law's general disallowance of exemplary damages for breach of contract. In a sense, that argument might have had a more substantial footing than the tort liability argument which I rejected. If the common law of Australia is to develop so as to recognise the availability of exemplary damages for breach of the insurer's duty of good faith, it would seem more appropriate that it do so by allowing for an exception to the rule against exemplary damages in contract than by the creation of new tort with the other consequences of that. Indeed, there is direct support in Canadian and New Zealand law for it. In those countries, insurers are exposed to exemplary damages for acting in bad faith, as an incident of their contractual liability, as I noted in *Lomsargis*.<sup>20</sup> The Supreme Court of Canada held in 2002 that an insurer was liable for exemplary damages for denying, in bad faith, an insured's claim to indemnity under a fire policy, in *Whiten v Pilot Insurance Company* (2002) 209 DLR (4<sup>th</sup>) 257.

The availability of exemplary damages against an insurer almost arose in *Moss v Sun Alliance Australia Ltd* (1990) 93 ALR 592, in the Supreme Court of South Australia, but the trial judge was unconvinced that the defendant had been guilty of the conduct upon which exemplary damages had been claimed. Interestingly there, the plaintiff's argument was that exemplary damages were available for breach of contract, not for an independent tort.

The authorities in Australia on exemplary damages for breach of contract are hardly encouraging for the recognition of a new exception to the general rule of disallowance. The most recent reference to the point in the High Court is in *Gray v*

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<sup>19</sup> [2005] 2 Qd R at 300  
<sup>20</sup> [2005] 2 Qd R at 312

*Motor Accident Commission* (1998) 196 CLR 1, where the joint judgment, in *obiter* referred to what their Honours described as “the apparent rule excluding an award of exemplary damages, even in cases of intentional or malicious breach of contract”. In *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157, the Full Court of the Federal Court seemed in no doubt that exemplary damages could not be recovered for breach of contract. The subject was also considered in the judgments of Spigelman CJ and Heydon JA (as he then was) in *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298.<sup>21</sup> Heydon JA there referred to *Addis v Gramophone Co Ltd* [1909] AC 488, where Lord Atkinson<sup>22</sup> said that damages for breach of contract were in the nature of compensation, not punishment, but added that there were three “well known exceptions”, the first of which were “actions against a banker for refusing to pay a customer’s cheque when he has in his hands funds of the customer’s to meet it”. Is that not analogous to an insurer’s arbitrary decision to refuse a certain proportion of claims, with the intention of discouraging further claims? Is it not arguable that the common law should now afford a new exception to the rule against exemplary damages in contract, which would be an insurer’s breach of the contractual obligation of good faith? After all that contractual obligation is relatively recent and still does not exist in England, so the absence of an authority which permits exemplary damages for a breach of that contractual obligation is not so telling.

*Harris v Digital Pulse*, of course, was not a claim for breach of contract: it was a claim for breach of fiduciary duty and the question was whether the Supreme Court of New South Wales could and should make a punitive monetary order for breach of such a duty. The majority of the Court of Appeal held that it could not, at least where that duty arose in the context of a contractual relationship. Mason P held that there was such a power and that in an appropriate case, where a fiduciary’s default is deserving of punishment, for example, because it was deliberate and/or motivated by greed, exemplary damages could be awarded. The trial judge had held to the same effect.<sup>23</sup> The case seems a fair way from the present question, but it does demonstrate the potential for difference amongst judges as to the availability of what might seem

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<sup>21</sup> At 307, 361

<sup>22</sup> At 494-495

<sup>23</sup> (2002) 166 FLR 421

an exceptional remedy, where the remedy is sought in a case of serious misconduct by a defendant. If there can be such a division amongst such distinguished judges as to the availability of exemplary damages as a remedy for a breach of an equitable remedy, what is so unrealistic about a claim for exemplary damages for breach of a contractual term, where that term is of the particular kind that its breach will necessarily involve bad faith?

These are unanswered questions. In the United States, or at least in some jurisdictions there, the right to exemplary damages comes from the tort discussed by Badgery-Parker J, because American law is firmly against exemplary damages for breach of contract. That is why American courts had to search for another source of liability and they found tort. Yet Canadian and New Zealand courts would hold insurers liable for exemplary damages, and the High Court of Australia has not yet said that the class of exceptions to the general disallowance of such damages for breach of contract is a class which is closed. My impression is that exemplary damages, in general, are unlikely to be favourably viewed in Australia, as Heydon JA extensively discussed in *Harris v Digital Pulse*.<sup>24</sup> And in the relevant context, in its report which led to the *Insurance Contracts Act* 1984, the Australian Law Reform Commission expressly rejected the availability of exemplary damages for breach of the duty of good faith, as I noted in *Lomsargis*.<sup>25</sup> Ultimately, the recognition or otherwise of a right to exemplary damages for breach of this duty will turn upon matters of policy. My observation, which perhaps is of the obvious, is that such a question can often be affected by the facts of the case at hand. Faced with a serious enough breach of an insurer's duty of good faith, a judge may well be persuaded that there is a need for an extraordinary remedy. In that context, there is not yet an authority which precludes exemplary damages, because regardless of the correctness of my judgment in *Lomsargis*, its basis need not be in the tort which I declined to recognise.

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<sup>24</sup> 56 NSWLR at 360-361  
<sup>25</sup> [2005] 2 Qd R at 314-315