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Law – all in good faith

Honourable Mr Justice T R H Cole

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The twin towers of contract and conduct loom larger and larger. Underpinning both are the concepts of reasonableness and the doctrine of good faith. The former is the subject of the learned article by the Honourable Mr Justice Cole at p 7 of this issue. Now his Honour sets out, with similar depth of learning, the doctrine of good faith in contractual obligations.

Introduction

There has been much recent debate about the role of good faith in the area of contractual obligations. Good faith has been regarded as implied in many types of contract in the United States and many civil law systems in Europe. However, it has yet to gain explicit general recognition in Australia in contract law. Unlike the position in Germany¹ and the United States,² there is no positive duty to perform contracts in good faith in Australian law, or at least enforcement of contracts has not been stated to be in pursuance of an obligation of good faith. The Australian courts have stopped short of imposing expressly any general duty to act in good faith on parties to a contract, apart from fiduciaries, but increasing judicial and academic attention is being focused on the concept of good faith and its role in Australian contract law.

Sir Anthony Mason, in July 1993, gave a glimpse of the likely trend in Australian law:

Good faith and fair dealing concepts are already substantially in place under our general law, though in some areas, such as contract negotiation and contracts of guarantee, the application of specific good faith duties, based on the reasonable expectations of the parties, might advance the interests of justice. Moreover, recognition of good faith and fair dealing concepts would bring greater coherence and unity to the varied array of principles which are presently available. Some commentators suggest that the United States experience shows that there good faith and fair dealing doctrines have generated ambiguity and uncertainty.³ Even if this be true, the experience does not appear to have been unduly detrimental to commerce in that country. Finally, the criticism of those doctrines may be no more than the reluctance to accept unconscionability as a basis of relief; in other words, the reluctance is in truth an objection to the application by courts of generalized concepts and standards instead of rigid rules.⁴

Good faith is not a concept alien to the common law. As early as 1766, Lord Mansfield stated that "good faith was the governing principle ... applicable to all contracts and dealings".⁵ Yet the development of the classical theory of contract throughout the 19th and first half of the 20th century denied a general concept of good faith in favour of the paramountcy of freedom of contract. Parties not subject to a disability were believed to understand and to seek to advance by contract the primacy of their self interest. Contracts freely entered into were enforced by the law because they expressed that which the parties had agreed, and they conferred the advantages of "predictability

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and certainty"⁶ although these were sometimes found to be illusory. As Sir Anthony Mason said:

The law of contract proceeded on the footing that a person who entered into a contract did so at his or her own risk and that that person was the best judge of his or her own interests. So a contracting party who acted in the exercise of his or her own will had to accept all the consequences, no matter that they entailed hardship because they differed sharply from the parties' expectations at the time of the contract.⁷

In 1991, 230 years after Lord Mansfield spoke, Steyn J in a lecture delivered at Oxford University expressed the view that:

The aim of any mature system of contract law must be to promote the observance of good faith and fair dealing in the conclusion and performance of contracts. The first imperative of good faith and fair dealing is that contracts ought to be upheld.⁸

It is useful to distinguish any application of good faith doctrine in pre-contractual relationship from any application to post-contractual performance. It is first necessary, however, to endeavour to define what is meant by good faith. That is not an easy task. For instance, Professor Goode has pointed out that the reason for the failure of English law to adopt a general concept of good faith is because "we do not know quite what it means".⁹

The meaning of "good faith"

The concept of good faith derives from the obligation to keep agreements – *pacta sunt servanda* (contracts must be observed).¹⁰ There is no shortage of possible definitions for the term "good faith" but there does not appear to be one universally accepted definition. As Professor Lucke has observed "good faith has not just one but many meanings, as well as an unusual capacity to acquire expanded and altogether new meanings".¹¹ Literature in this area indicates that it is not merely impossible to give a single definition of good faith, but impossible also to formulate a single theory of good faith.¹² There has been intense debate about its meaning in the United States, yet the Americans still have not settled on one definition. Some definitions which have found support include fairness, fair conduct, reasonable standards of fair dealing, decency, reasonableness, to name but a few. The good faith debate has also prompted much discussion about what the concept does not mean—

evasion of the spirit of the deal; lack of diligence and slacking off; wilful rendering of only substantial performance; abuse of a power to determine compliance; and interference with, or failure to co-operate in, the other party's performance.¹³

Most recently in Australia, Priestley JA of the New South Wales Court of Appeal has expressed the view that there is a "considerable degree of interchangeability between the expressions fairness and good faith"¹⁴ and that further, there is a close association of ideas between the terms unreasonableness, lack of good faith, and unconscionability. Although they may not be always co-extensive in their connotations, partly as a result of the varying senses in which each expression is used in different contexts, there can be no doubt that in many of their uses there is a great deal of overlap in their content.¹⁵

Lucke is of the opinion that good faith will remain closely associated with notions such as fairness, honesty and reasonableness which are already well-established in the law. He has been influenced by developments which have occurred in the American good faith debate: notions such as altruism, social solidarity and loyalty to the contract.¹⁶ Lucke is inclined towards the view that good faith as loyalty to the contract deserves to become one of the central values which informs and remoulds our law of contract:

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Many rules of our existing contract law can quite plausibly be seen as manifestations of good faith as loyalty. Examples are those rules of construction, and those rules providing for the implication of terms and for the severance of ineffective terms, which serve to give business efficacy to contracts. Good faith as loyalty finds an even simpler and more fundamental expression in the recognition of a legal duty to perform contractual undertakings: *pacta sunt servanda*. Once the law takes the large step of demanding performance of contractual promises, why should it not also take the much smaller step of requiring that such promises be performed with the kind of fullness, and enforced with the kind of restraint, which good faith as loyalty requires?¹⁷

Defining the parameters of good faith as loyalty is not an easy task but essentially it means that in a contractual setting the parties must be loyal to or committed to the contract, and committed to each others purpose and to the objective of the contract. It is to be noted that Sir Anthony Mason in his recent paper was prepared to use good faith "mainly in the sense of loyalty to the promise itself and as excluding bad faith behaviour".¹⁸

Notwithstanding the difficulties inherent in defining the concept, the experience overseas suggests that good faith is a concept that has independent meaning and substance.

The experience overseas

(a) The principle of good faith in Civil Law Systems – The European Civil Codes

There are many instances of an obligation of good faith in civil law systems. The civil law doctrine of culpa in contrahendo recognises that there is a duty for contracting parties to negotiate in good faith. In German law, for instance, it is classified as a contractual duty, breach of which entitles the innocent party to reliance damages.¹⁹

J F O'Connor has observed that the inclusion of good faith both in specific Code provisions and as a blanket concept of importance for entire fields of law has given good faith an "institutional" or formal role in codified civil law systems, which it lacks in common law systems.²⁰ The civil law position was outlined in *Interphoto Picture Library Ltd v Stilleto Visual Programs Ltd*.²¹

In many civil law systems ... the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps more aptly conveyed by such metaphorical colloquialisms as "playing fair", "coming clean" or "putting one's cards face upwards on the table". It is in essence a principle of fair and open dealing.²²

One example is the Treu und Glauben principle embodied in s 242 of the German Civil Code:

The debtor is bound to effect performance according to the requirements of good faith, giving consideration to common usage.

As a result of interpretation by courts and legal writers the good faith obligation has been turned into a principle of great importance. It is considered to have a dual role. It operates positively by imposing on a contracting party ancillary obligations to remove obstacles to performance, and it also operates negatively in prohibiting a contracting party from abusing his strict contractual legal rights.²³ In these ways the German courts have

adjusted contractual obligations in a manner considered to be just and equitable, according to the individual circumstances of the parties involved, with the result that the requirements of good faith have transformed the law of contracts and have penetrated deeply throughout the whole of German private law.²⁴

There are a vast array of cases which have applied Art 242, but one of the well-known applications of the principle is illustrated in the landmark decision of the Reichsgericht of 21 September 1920²⁵ where the judge was required to interfere with existing

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contractual relations "if an unbearable condition in which good faith and every requirement of justice and fairness are ignored is not to be created".²⁶

Similar in many respects is the Swiss Civil Code which binds every person to exercise her or his rights and fulfill her or his obligations according to the principles of good faith.²⁷

(b) The United Kingdom

The English law of contract does not contain any general concept of good faith in the making or enforcement of contracts or in their performance. This is in marked distinction to the situation existing in many civil law countries, where an obligation of good faith is prominent. Lord Wilberforce has commented that:

English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration.²⁸

Whilst there is not an explicit recognition of the duty of good faith in England, the obligation of good faith has manifest itself in other ways. O'Connor has observed that instead of a general obligation to observe good faith, there is "a technical and schematic approach to contract which often produces specific rules to deal with breaches of good faith".²⁹ Like the position in the United States, there is no generally accepted definition of good faith. For this reason O'Connor has adopted a provisional or working definition of good faith:

The principle of good faith in English law is a fundamental principle derived from the rule pacta sunt servanda and other legal rules distinctively and directly related to honesty, fairness and reasonableness, which supplements or supersedes normally applicable rules when this is necessary to ensure that the standards of honesty, fairness and reasonableness which prevail in the community also prevail in English law.³⁰

Professor Goode, who has closely examined the concept of good faith in England has commented that the English have found it difficult to expressly adopt a concept of good faith,³¹ despite the fact that its role in early English legal history is well-recognised. Lord Mansfield gave it early recognition in 1766 when he recognised that "good faith was the governing principle ... applicable to all contracts and dealings".³² Originally good faith was a concept which formed part of the law merchant, an uncodified body of the law wholly separate from the ordinary common law. Merchant law was a relatively uniform commercial law based on commercial custom and practice which the merchants would carry with them and one of these customs was good faith. However, when the common law courts took over the jurisdiction of the old merchant courts, the principle of good faith disappeared. English law took an extreme position on the right and duty of parties to look after themselves. Today in English the concept of good faith is limited, and judicial developments relating to it have been rather cautious. Rather than recognising the existence of a general concept of good faith as has the United States, English law requires good faith in particular situations. For instance, positive disclosure is required in contracts *uberrimae fidei*, such as insurance contracts. Duties of good faith have also been implied in contracts of employment,³³ but even more importantly, English law imposes a general duty of good faith in particular types of relationship. For example, an agent owes a duty to subordinate his own interests to those of his principal, a trustee owes a duty of good faith to his beneficiary and a company director owes a duty of good faith to the company he directs. The English courts have resisted adopting a general concept of good faith because of the rigorous approach English law adopts towards the observance of contractual undertakings. This is illustrated in the stance the House of Lords has taken in relation to contracts to negotiate. English law does not recognise that the opening of

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negotiations for a contract by itself creates any sort of duty relationship.³⁴ In *Walford v Miles*³⁵ the House of Lords upheld the traditional principle that agreements to negotiate are unenforceable. There the Court refused to enforce a "lock-out" arrangement made by the defendant as part of an agreement to sell part of its business to the plaintiff (that is, agreeing not to negotiate for a fixed period or reasonable time with a third party).

The case follows the reasoning of the English Court of Appeal in *Courtenay & Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd*³⁶ where Lord Denning MR and Lord Diplock rejected as bad law the dictum of Lord Wright in *Hillas & Co Ltd v Arcos Ltd*.³⁷ there is ... no bargain except to negotiate, and negotiations may be fruitless and end without any contract ensuing; yet even then, in strict theory, there is a contract ... to negotiate, though in the event of repudiation by one party the damages may be nominal.³⁸ Lord Denning MR did not uphold agreements to negotiate, on the basis that if an agreement to agree is unenforceable so must be an agreement to negotiate.³⁹ Likewise the House of Lords in *Walford* declined to uphold the agreement.

The House of Lords was concerned with determining "whether subjectively, a proper reason existed for the termination of the negotiations".⁴⁰ The answer suggested depends upon whether the negotiations have been determined in "good faith". However the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate to threaten to withdraw from further negotiations or to withdraw in fact, in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms.... A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies ... while negotiations are in existence either party is entitled to withdraw ... at any time and for any reason.⁴¹

The emphasis in this case was on the practical difficulties associated in specifying the content of good faith and the potential unfairness in requiring a party to bargain.⁴²

There has been sharp criticism of this decision. Buckley⁴³ has commented that the decision in *Walford* shows how the overturning of the dictum of Lord Wright in *Hillas* may severely limit the courts in giving effect to a commercial promise intended to have binding legal effect.⁴⁴ Sir Anthony Mason has commented that the area of contract negotiation is an area where an "infusion of good faith doctrine may be desirable".⁴⁵

The position which the House of Lords has adopted can perhaps be explained by comments recently made by Professor Goode.⁴⁶ The Professor has suggested that one reason for the rigorous approach adopted by English law towards the observance of contractual undertakings is that "the predictability of the legal outcome of a case is more important than absolute justice".⁴⁷ He claims that the judiciary has been motivated by a fear that:

if the courts become too ready to disturb contractual transactions, then commercial men will not know how to plan their business life. The last thing that we want to do is to drive business away by vague concepts of fairness which make judicial decisions unpredictable, and if that means that the outcome of disputes is sometimes hard on a party we regard that as an acceptable price to pay in the interest of the great majority of business litigants.⁴⁸

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For this reason Professor Goode submits that:

the English do not find it necessary to require good faith because we impose a duty which does not depend on good faith. For example, if a party is induced by a wrong statement to enter into a contract, then he can rescind it even if the other party made the statement entirely honestly: good faith does not matter, we have a different route to a remedy.⁴⁹

Another compelling explanation for the English hesitancy to recognise a general duty of good faith is offered by Steyn J who has contrasted the English position with that existing in civil law jurisdictions.

In England there is an objective theory of the interpretation of contracts, with a rigid exclusion of evidence of prior negotiations and subsequent conduct as an aid to interpretation. In civil law jurisdictions the approach is more subjective, and evidence of prior negotiations and subsequent conduct is treated as part of the logically probative material.⁵⁰

He suggests that the emphasis of English law on an objective approach to contractual issues "tends to make England somewhat infertile soil for the development of a generalised duty of good faith in the performance of contracts".⁵¹

In the absence of a general principle of contractual good faith to resolve problems that arise in unfair and unconscionable contractual situations, the English courts have responded by extending the range of their "technical and schematic doctrine". O'Connor asserts that the increased manifestations of good faith in the sense of fair dealing and reasonableness, together with recent legislation such as the Unfair Contract Terms Act 1977, have brought the substance of the English law of contract more into line with the good faith orientated law of contract in civil law systems and the United States.⁵² Examples of these increased manifestations of good faith include the extension of the doctrine of undue influence,⁵³ extension of the narrow scope of duress at common law from actual or threatened violence to the person to compulsion or coercion in other circumstances, and the development of economic duress.⁵⁴

(c) The United States

Good faith has been the subject of extensive scholarly examination in the United States as the duty to perform in good faith has become a general principle of American contract law. According to the *Uniform Commercial Code* (UCC),⁵⁵ the Restatement of Contracts,⁵⁶ and judicial opinion, good faith is required in both the performance and the enforcement of contracts.

The modern formulation of good faith in contractual obligations in the United States is derived, it is said, from Cardozo J's opinion in *Wood v Lucy, Duff-Gordon* ⁵⁷ where he said that the contract at issue was "instinct with an obligation, imperfectly expressed" of good faith in performance. Since then the good faith doctrine has been given a very broad effect, it generally being recognised that:

In every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing.⁵⁸

H O Hunter cites examples of where good faith has been applied in relation to the performance of contracts. For instance, requirements and outputs contracts are common examples of contracts which require good faith performance, as courts have considered disputes about what are the reasonable demands by one party or the other.⁵⁹ Other instances where good faith performance is required include where a contract contains an open quantity or price term, or is subject to conditions in the control of one party,⁶⁰ and contracts that contain a provision which requires performance to the satisfaction of one party or the other. In such cases the obligation of good faith is frequently the means by which courts find sufficient certainty in such contracts to enforce them.⁶¹

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Hunter suggests that good faith in the United States has become a means for securing performance and for protecting against onerous enforcement of the provisions of a contract.⁶² He is of the view that the strength of the good faith principle is consistent with the idea that contracting parties exchange promises with the intention that each will perform. There are many indications in the vast array of American cases that good faith is closely associated with notions such as fairness, honesty and reasonableness. For instance, the Court in *Carrico v Delp*⁶³ stated that: good faith between the contracting parties requires the party vested with contractual discretion to exercise it reasonably and he may not do so arbitrarily, capriciously or in a manner inconsistent with the reasonable expectations of the parties. Notwithstanding there being overwhelming support for a good faith approach to contract, the general requirement of good faith has generated considerable commentary in relation to its meaning.

Good faith and the Uniform Commercial Code

The UCC constitutes the statutory basis for the good faith requirement. It is said to be one of the greatest influences in the development of the doctrine of good faith in the United States.⁶⁴ UCC, s 1-203 provides that "every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement". Good faith is then defined in UCC, s 1-201(19) as meaning "honesty in fact in the conduct or transaction concerned". In the case of a merchant UCC, s 2-103(1)(b) provides that good faith means "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade". There exists numerous references throughout the Code to good faith. It is evident that the UCC incorporates both subjective and objective standards. The general definition of good faith deals only with "honesty in fact" (s 1-201(19)). There is little doubt that this is a subjective test.⁶⁵ However, supposedly objective tests of reasonableness have been implemented in specific provisions of the Code, primarily Art 2. Article 2 contains numerous references to an obligation of "commercial reasonableness".⁶⁶ For example, section 2-103(b) of the Code defines good faith in the case of a merchant to mean "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade".

Good faith and its definition in Section 205

The Restatement of Contracts, Second which is headed, Duty of Good Faith and Fair Dealing states: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement". The Restatement extends the good faith principle in UCC, Art 2. This section is said to recognise and conceptualise a general duty of good faith and fair dealing in the performance and enforcement of contracts in American law.

The general requirement of good faith recognised in s 205 is based on many judicial opinions imposing a duty of good faith, several major statutory developments and the academic writings of several professors of law. The section was adopted by the American Law Institute in 1979. It does not have any statutory force but has greatly influenced judicial opinion.

Some interesting observations have been made about this provision (s 205) by Professor Bridge.⁶⁷ First, good faith is not defined, except to the extent that it refers to "fair dealing". However, the Official Comment does state that the phrase "good faith" is used in a variety of contexts, and its meaning varies somewhat with the context. It also stresses the underlying ethic to be "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party". Secondly, s 205 does not specify a remedy for bad faith behaviour, the Comment merely stating that the remedy will vary according to the circumstances. Thirdly, the provision only operates in the areas of performance and enforcement.⁶⁸ Nothing is said

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about the scope of good faith in the formation of contracts.⁶⁹ However, it should be noted that bad faith in negotiation may attract sanctions. Specific Restatement provisions exist which deal with particular forms of bad faith in bargaining such as rules relating to capacity to contract, mutual assent and consideration, and rules as to invalidating clauses such as fraud and duress.

Finally it should be noted that good faith in s 205 ought to be contrasted with the good faith purchase doctrine. Good faith purchase is a term used to refer to the situation where a good faith purchaser of property for value can acquire better rights in the property than his transferor had. In this context good faith focuses on the honesty of the purchaser, as distinguished from his care or negligence. Good faith performance on the other hand, emphasises faithfulness to an agreed common purpose and consistency with the justified expectations of the other party. The focus on honesty is less appropriate when good faith in contractual performance is considered.

Academic analysis

Despite a statutory definition of good faith preferred by the UCC, there has been widespread debate about the meaning of good faith. Whilst there is no shortage of commentary about good faith it is apparent that the views of three academics have gained prominence in the debate. First, Professor Summers has exerted much influence in the debate, so much so that his opinions have been very influential in the drafting of the Restatement of Contracts. Rather than attempt to affirmatively define good faith, Summers approached the issue by highlighting what does not constitute good faith. Thus his approach is to describe good faith in negative terms as an excluder of bad faith behaviour. His view is that in cases of doubt, a lawyer will determine more accurately what the judge means by using the phrase "good faith" if he does not ask what good faith itself means, but rather asks: what in the ... situation, does the judge intend to rule out by this use of the phrase.⁷⁰

Professor Summers isolates those decisions in which judges have recognised and ruled out a number of general types of bad faith in performance (that is, examples of what is excluded by the phrase "good faith")—evasion of the spirit of the deal; lack of diligence and slacking off; wilful rendering of only substantial performance; abuse of a power to determine compliance; and interference with, or failure to cooperate in, the other party's performance.⁷¹

Secondly, the views of Professor Burton have also attained a prominent position in the good faith debate. His theory is narrower in its scope than Professor Summers. Burton has argued that good faith performance "generally seems to effectuate the intentions of the parties, or to protect their reasonable expectations", although he also recognises that good faith is not limited to this function.⁷² The main premise of Burton's argument is that the courts have generally construed the good faith performance obligation as a limitation on discretion in performance. In his words

a discretion-exercising party may rightfully deprive the other of its anticipated benefits for any purpose that was within the reasonable contemplation of the parties at formation.⁷³

Thus Burton frames the existence of good faith in terms of discretion.

Lucke favours Burton's approach. He regards it as the most valuable because it represents "a legitimate and important application of the good faith concept".⁷⁴ However, he also recognises that Burton's analysis is narrow in its scope and "should not be understood as a comprehensive attempt to delimit the boundaries of good faith".⁷⁵ Lucke has commented that the crux of Burton's approach is to limit such a discretion in a way that is similar to the way in which Australian administrative law limits the powers of administrative authorities: such discretion must be exercised for the kinds of motives which the contract contemplates and not for those which, by virtue of contractually created expectations or moral standards, are reprehensible.⁷⁶

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Finally, the views of Professor Farnsworth provide yet another alternative approach in the good faith debate. Farnsworth has observed that the duty of good faith performance can be the source of what common lawyers would call an implied term. He has speculated that the duty of good faith performance in the United States might serve as a basis for implying a wide range of terms.⁷⁷

Farnsworth also adds another dimension to the good faith debate by distinguishing between "objective" and "subjective" conceptions of good faith. He has queried whether good faith is purely subjective – requiring that a party "honestly" believe that it is acting properly, or whether it is objective – requiring that a party act in a reasonable manner, or a combination of both. Put another way, is good faith to be judged by the traditional subjective standard of honesty or by a more objective standard of reasonableness?

"Subjective" good faith is used to describe a state of mind: a party is advantaged only if he acted with innocent ignorance or lack of suspicion.

This meaning of "good faith" is very close to that of lack of notice.⁷⁸ "Objective" good faith on the other hand, has nothing to do with a state of mind – with innocence, suspicion, or notice. Here the inquiry goes to decency, fairness or reasonableness in performance or enforcement.⁷⁹

The distinction between an objective and subjective test is important because, as Farnsworth highlights, an objective test means that the issue of good faith in terms of reasonableness goes to a tribunal of fact, not law, for a decision.

However, the choice between the objective or subjective standard has been difficult to make.⁸⁰ As Farnsworth has commented, "the definitions of good faith indorsed by some courts are so abstract and sweeping as to be of little help in determining the proper standard".⁸¹ However, despite such uncertainty, Farnsworth is of the view that "it is certain that the standard is not as demanding as the standard of good faith imposed on agents and other fiduciaries".⁸²

The concept of "good faith" in Australian Statutes and Case Law

Although the Australian courts have not pronounced a separate doctrine of good faith in contract, the notion has manifest itself in a number of situations.

Context in which good faith has arisen in Australia

(a) Legislation

Notice should be taken of the increasing recognition of the concept of good faith in legislation. For example, s 13 of the Insurance Contracts Act 1984 ; ss 51 and 52 of the Trade Practices Act 1974 ; s 22(2) of the Commercial Arbitration Act 1984 and s 232(2) of the Corporations Law.

(b) Insurance contracts

Good faith has played an important role in contracts uberrimae fidei, in particular contracts of insurance.⁸³ The duty of utmost good faith is implied in the contracts of insurance by the common law and by s 13 of the Insurance Contracts Act 1984 . Section 13 states:
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 act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.
This is an extremely broad section requiring that everything that is done by each party to the contract, insurer or insured, as required by the contract or in relation to it, must be done with the utmost good faith.⁸⁴

(c) More particularised uses of good faith

Professor Lucke suggests that a duty to perform in good faith may be implicit in our jurisprudence,

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"particularly in those innumerable rules of our contract law which are palpably designed to bring about just and fair results".⁸⁵ He cites examples such as the doctrine of promissory estoppel, the rule which provides for relief against forfeiture, the rule which invalidates penalty clauses and some of the established rules of construction such as the contra proferentum rule and the presumption that exemption clauses in contracts are not intended to confer immunity from the consequences of fundamental breach.⁸⁶

(d) Fiduciaries – the role of good faith in equity

The existence of fiduciary obligations is based on the existence of a specific relationship which creates an obligation upon one party to act in the interests of another. Sir Anthony Mason commented:

Of all the principles of equity, the fiduciary principle comes closer perhaps than any other to approximating a duty of good faith.⁸⁷
There has been some suggestion that the fiduciary notion can be extended to cover commercial relationships, although speaking generally, the majority in *Hospital Products Ltd v United States Surgical Corp and Ors* ⁸⁸ did not accept that approach. For instance, it has been suggested that the fiduciary expression is not inapt to describe a duty of fair dealing, reasonable co-operation and discussion imposed on parties to a joint venture.⁸⁹ The standard imposed by a duty of good faith is lower than that arising in a fiduciary relationship. The distinction in contract law between any good faith duty and a fiduciary duty flows from the basis upon which the relationship arises. As Sir Anthony Mason made clear: The good faith doctrine presupposes parties who contract on a footing of equality and are pursuing their own interests. By way of contrast, the fiduciary's fundamental duty:

- (i) not to use his or her own position to his or her own advantage or that of another party; and
- (ii) not to place himself or herself in a position in which his or her interest would conflict with his or her fiduciary duty arises when the relationship between the parties is such that, whether by reason of undertaking, vulnerability, dependence, the reposition of trust

and confidence or otherwise, one person (the beneficiary) has a legitimate expectation that the other (the fiduciary) will act in the beneficiary's interest.⁹⁰

The difficulty in reconciling self interest with the fiduciary duty to others explains the reason for the courts reluctance to impose general fiduciary duties in commercial transactions.

However, for the most part, the law has stopped short of extending fiduciary duties to commercial relationships. In general, the law has sought to distinguish commercial relationships from fiduciary relationships on the basis that in most commercial relationships, the parties occupy equal bargaining positions⁹¹ and further that parties to a commercial arrangement are usually able, or expected to, protect their own interests. This raises the wider question of whether equitable principles have a role to play within the sphere of commercial law. Mason CJ in *Hospital Products*⁹² said:

it is altogether too simplistic, if not superficial to suggest that commercial transactions stand outside the fiduciary regime as though in some way commercial transactions do not lend themselves to the creation of a relationship in which one person comes under an obligation to act in the interests of another. The fact that in the great majority of commercial transactions the parties stand at arm's length does not enable us to make a generalisation that is universally true in relation to every commercial transaction. In truth, every such transaction must be examined on its merits with a view to ascertaining whether it manifests the characteristics of a fiduciary relationship.⁹³

It is of interest that Sir Anthony Mason suggests that *Hospital Products* may be the "high water mark of the fiduciary tide in commercial relationships".⁹⁴

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(e) The tort connection

One issue that is interesting in the Australian context are the developments in the United States regarding the tort duty of good faith.

The American law imposes a covenant of good faith in every contract but, where there is a special relationship between the parties, the breach of the duty of good faith may give rise to liability in tort. For example, the Supreme Court of California has recognised in a series of insurance cases that a duty of good faith and fair dealing is implied in every contract and breach of the duty gives rise to a remedy not in contract, but in tort as the duty is one imposed by law and not by agreement. Generally the acceptance of this doctrine has been limited to the area of insurance, the Courts having resisted an extension of the bad faith tort doctrine into general commercial contracts, because it would allow parties to convert actions in contract into actions in tort.⁹⁵

However, there has been an intrusion into the commercial contract area. In *Seamans Direct Buying Service v Standard Oil*⁹⁶ although the majority would not apply a bad faith tort doctrine fully, it did hold that one party to a commercial contract could make itself liable to the other in tort, if it denied the existence of a contract between them, if the denial was made in bad faith and without probable cause.⁹⁷ In a strong dissenting judgment Bird CJ indicated a desire for the bad faith tort doctrine to be recognised as fully applicable to all contracts, including commercial contracts. In her opinion there was an implied covenant of good faith and fair dealing in every contract requiring the parties to "act reasonably in light of the justified expectations of the other".

In Australia this tortious duty was discussed in *Gibson v Parkes District Hospital*.⁹⁸ The issue that Badgery-Parker J was concerned with was whether the plaintiff was entitled to leave of the Court to rely on an amended statement of claim which pleaded the defendants were under a duty to deal fairly and in good faith with the plaintiff's claim under the Workers' Compensation Act 1926. Badgery-Parker J acknowledged that there was no case in any Australian jurisdiction in which the cause of action pleaded had been acknowledged, but he allowed the plaintiff leave. He ultimately decided that a worker's compensation insurer and employer have a duty to act in good faith in the processing of a worker's compensation claim, and breach of the duty attracts liability for damages in tort.

Badgery-Parker J expressed the view that in New South Wales there was not any general principle by which a duty of good faith is implied into every contract.⁹⁹ His Honour stated:

the American insistence that although the duty exists as a contractual term in every contract, the tort arises from the breach of that duty only in the presence of a special relationship supports, in my view, the proposition that the tort may arise where the nature of the relationship brought about by the contract, as distinct from the terms of the contract, is such as to impose a duty to act in good faith. On that basis, the duty is a true tort duty, not a contractual duty and the existence of the contractual term is not a necessary foundation for it.¹⁰⁰

Although the discussion on the American position is obiter, it shows judicial recognition for the doctrine of good faith. It may very well foreshadow the imposition of a tort duty of good faith by Australian courts.

Good faith in pre-contractual negotiations

It is necessary to distinguish between concepts of good faith that arise in contractual performance on the one hand, and good faith that arises between parties in negotiations that occur pre-contract, on the other.

There is no recognised duty of good faith in negotiations pre-contract in the United States¹⁰¹ and the decision in *Walford v Miles* (discussed earlier) makes it clear that good faith has no role to play in pre-contractual negotiations in England. So even if a general duty of good faith was to apply to contracts in Australia, the experience in England and the United States may influence Australian

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courts in denying an extension of the duty to the pre-contract stage.

However, the judgment of Kirby P in *Coal Cliff Collieries and Anor v Sijehama Pty Ltd and Anor*¹⁰² should be noted. Kirby P in the New South Wales Court of Appeal expressed the view that in some circumstances a promise to negotiate may be enforced by a court. He was unperturbed by English authority which had established that a contract to negotiate was unenforceable.¹⁰³ He was of the view that provided there was consideration for the promise, in some circumstances a promise to negotiate in good faith will be enforceable, depending upon its precise terms. Kirby P then suggested the proper approach to be taken in resolving such an issue:

I believe that the proper approach to be taken in each case depends upon the construction of the particular contract.... In many contracts it will be plain that the promise to negotiate is intended to be a binding legal obligation to which the parties should then be held. The clearest illustration of this class will be cases where an identified third party has been given the power to settle ambiguities and uncertainties.... But even in such cases, the court may regard the failure to reach an agreement on a particular term as such that the agreement should be classed as illusory or unacceptably uncertain.... In that event, the court will not enforce the arrangement.

...

Finally, in many cases, the promise to negotiate in good faith will occur in the context of an "arrangement" (to use a neutral term) which by its nature, purpose, context, other provisions or otherwise makes it clear that "the promise is too illusory or too vague and uncertain to be enforceable".¹⁰⁴

Sir Anthony Mason appears to be of the view that where negotiations cease unjustifiably causing loss to one party there should be a remedy, at least if the expectations of the parties were that negotiations would result in an agreement. Whether the law develops to provide any such remedy, and whether it be grounded upon unjust enrichment, the existence of an enforceable preliminary contract to negotiate, a common law duty of care, or a duty to act in good faith, remains to be seen.¹⁰⁵

The role of good faith in contractual performance

Apart from good faith being recognised in particular situations, there may be support for recognising a general obligation to act in good faith in contract. McLelland J in *United States Surgical Corp v Hospital Products International Pty Ltd*¹⁰⁶ observed that the duty to perform in good faith did not diverge materially from the implied business efficacy principle stated by Griffith CJ in *Butt v M'Donald* :¹⁰⁷ It is a general rule applicable to every contract that each party agrees, by implication, to do all things as are necessary on his part to enable the other party to have the benefit of the contract.¹⁰⁸

Griffith CJ's dictum was approved by the High Court in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd*¹⁰⁹ although Mason J (as he then was) expressed some reservation about the applicability of the dictum in certain circumstances. He stressed that in many cases the correct interpretation would depend not so much on the application of the general rule as on the intention of the parties as manifested by the contract itself.¹¹⁰

Nevertheless, Priestley JA has commented extra-judicially that it seems very arguable that the ideas behind the use of Mason J of the dictum of Griffith CJ in the circumstances of the *Secured Income* case is that Australian law has reached the point where terms may readily be implied into contracts, having substantially the same effect as the good faith formulation in the United States.¹¹¹

It is arguable that the decision in *Renard Constructions v Minister for Public Works*¹¹² has established the concept of good faith in contracts in, at least, New South Wales. Priestley JA

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expressed the view that although the implication of good faith has not been accepted to the same extent in Australia as it has in many of the civil law systems of Europe and the United States, there are many indications that the time may fast be approaching when the idea, long recognised as implicit in many of the orthodox techniques of solving contractual disputes, will gain explicit recognition in the same way as it has in Europe and in the United States.¹¹³ Priestley JA's analysis of the situation in the United States led him to the conclusion that the developments in the United States were important for Australian purposes chiefly because:

- (i) they grew out of the same common law background as that of Australian law;
- (ii) under the stimulus initially of academic systemisation of the accumulation of good faith cases and later the interaction of that with the Uniform Commercial Code, general contract law came quickly to recognise the pervasive principle of the good faith obligation;
- (iii) despite the difficulties in precise statement of the obligation, its use seems to have been generally accepted in a highly commercial country – throughout the period of the modern revival of the obligation the business of America has largely been business; and
- (iv) there has been little if anything to indicate that recognition of the obligation has caused any significant difficulty in the operation of contract law in the United States.

Priestley JA then concluded:

When the broad similarity of economic and social conditions in Australia and the United States is taken into account the foregoing matters all seem to me to argue strongly for recognition in Australia of the obligation similar to that in the United States.¹¹⁴

Priestley JA observed a continuing trend in Australian case law of recognising the good faith obligation. He cited *Commonwealth v Amann Aviation Pty Ltd*,¹¹⁵ in which both in the Full Federal Court and in the High Court, there seems to have been approval of the basic ideas of the good faith obligation. The judgments in *Amann* also seem indicative of the trend noticed by Steyn J.

Priestley JA concluded his discussion of good faith by stating that:

the ideas of unconscionability, unfairness and lack of good faith have a great deal in common. The result is that people generally, including judges and other lawyers, from all strands of the community, have grown used to the courts applying standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance. In my view this is in these days the expected standard, and anything less is contrary to prevailing community expectations.¹¹⁶

However, it is evident that Priestley JA's enthusiasm for recognising an implied obligation to act in good faith is not shared by all judges for all contracts. With great respect it goes too far to suggest the existence in "all contracts" of a duty upon the parties of good faith and fair dealing in its performance is the expected standard.

Rogers CJ, Comm D (as he then was) recently expressed his doubt at implying a duty of good faith in all contracts. His Honour expressed the view that an obligation of good faith is not appropriate in the circumstance where large commercial entities were dealing with one another. In *GSA Group Ltd v Siebe*¹¹⁷ his Honour was not persuaded to accept that commercial interests should be required to act in good faith towards each other. Indeed, he queried "why should commercial entities each with strong bargaining power, not be permitted to drive the best bargain they can, provided that they act within the law?"¹¹⁸ His Honour noted that against a trend towards a general obligation of good faith, there have been judicial comments to the effect that the courts should be slow to intrude into the commercial dealings of parties who are quite able to look after their own interests.

The courts should not be too eager to interfere in the commercial conduct of the parties,

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especially where the parties are all wealthy, experienced, commercial entities able to attend to their own interests.¹¹⁹

Rogers CJ, Comm D was of the view that consumer contracts and commercial contracts were to be distinguished:

In the context of consumer contracts, there is certainly an increasing expectation that the stronger party in the transaction will behave fairly. This expectation is fostered, or enforced, by legislation such as the Credit Act 1984 (NSW) and the Contracts Review Act 1980 (NSW). The situation of two commercial parties, in positions of equal bargaining power is very different and the law should reflect this difference.¹²⁰

Nonetheless, his Honour said:

It is likely that, ultimately, Australian courts will embrace the American and civil law concept of the obligation that each contracting party should show good faith in the performance of contractual obligations. However the present case is not one where, even if such an obligation is implied, in the usual course of events, it should be implied, or even if implied would have the effect sought by the plaintiffs.¹²¹

The distinction between commercial and consumer contracts is an important one to draw in the context of good faith. In a commercial relationship the parties to the contract are in the best position to assess the relative risks and benefits of entering into an agreement. The express terms of the contract allocate risks in a way commercially acceptable to the parties at date of contract. By overriding the express terms of the contract, the courts upset this risk allocation, restricting freedom of contract and substituting a judicial view of what is fair and reasonable for the realities of the marketplace. This imposition causes an inefficient allocation of costs and benefits.¹²²

Steyn J has expressed a similar view to Rogers CJ, Comm D in his Oxford lecture. Whilst he mentioned several reasons why English law might in the future be more receptive to the principle of good faith performance, he does not advocate a generalised duty of good faith. In his opinion such a duty is not appropriate in many commercial contracts:

Moreover, I am not persuaded that generalised duties of good faith are useful across the spectrum of contractual relations. There are so many varieties of contract. In some contexts good faith and fair dealing have no significant role to play. Such is the case, for example, in many commercial contracts where one is not concerned with fault but simply with the allocation of the risks of a particular undertaking or enterprise.¹²³

Like Rogers CJ, Comm D, Steyn J does recognise that principles of good faith and fair dealing may find a role in consumer law, although he qualifies this by stating that if such principles are to gain wider acceptance in consumer law, "it will be important not to give to such principles too abstract a moral content".¹²⁴

It has been suggested that the duty of good faith is consistent with the reasonable expectations of contracting parties in a commercial setting who rely on the development of long term relationships of trust and predictability in performance.¹²⁵ The parties enter a contractual relationship with the expectation that the agreement will be performed and such relationships entitle one to expect that a certain standard of conduct will be observed. There is an indication in Rogers CJ, Comm D's judgment in *GSA v Siebe* that the most important determinant in contractual performance is the relationship of the parties to each other. His Honour closely scrutinised the relationship of the parties. His decision not to import a duty of good faith into the contract was influenced by the fact that the parties were clearly taking an adversarial stance during the period in which they were negotiating the agreement. In such a circumstance, Rogers CJ, Comm D was of the view that it should not be implied that the parties would have intended to be subject to an overriding duty of good faith. He was further influenced by the fact that: the history of the parties' negotiations for the distribution agreement shows that both the parties were concealing relevant information from the other. The parties were almost hostile to each other. There was very little good faith displayed by either party at any time. After the agreement was concluded and within a matter of

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weeks Tonville and GSA acted in a way which was impossible to reconcile with obligations of good faith.¹²⁶

It may well be that, in time, good faith will be recognised as an obligation applicable to all contracts. It seems to me, however, that any general adoption of such a duty must always be subject to a consideration of the position and attitude of both parties to the contract for that may make apparent that the contract is to be given its literal interpretation unencrusted by any overriding duty of good faith.

Conclusion

Much controversy surrounds the issue of whether a doctrine of good faith should become part of the law of contract. Angel J has commented that

it may be that commercial life could only profit from an infusion of "good faith", maybe not. The point is that to introduce "good faith" as part of the law of contract is to impose a new morality.¹²⁷

There is an indication in some recent decisions that the time may soon be approaching where a requirement for performance of contracts in good faith will be given express recognition. Such recognition has the potential to radically change the law of contract.

The fact that good faith may be the basis of decisions in different areas of the law of contract does not mean that there is a corresponding duty to observe good faith in all contractual undertakings. Nor does it mean that there should be an express recognition of such an overriding contractual duty. Such a duty should only be recognised if the nature or circumstances of the contract make clear that the parties to the contract

so intended. However, if that be clear, there is no need for such an overriding duty because a term to similar effect would usually be implied in accordance with established principles.

Footnotes | [Top](#)

- 1 BGB, par 242.
- 2 *Uniform Commercial Code*, Art 1–203 .
- 3 Girard, "Good Faith in Contract Performance: Principle or Placebo?" (1983) 5 *Supreme Court Law Review* 309 at 326.
- 4 Sir Anthony Mason, *Contract and its Relationship with Equitable Standards and the Doctrine of Good Faith* Paper delivered at the Cambridge Lectures 1993, 8 July 1993, pp 62–63.
- 5 *Carter v Boehm* (1766) 3 *Burr* 1905.
- 6 Sir Anthony Mason, *op cit* n 4, p 8.
- 7 *Ibid*, p 9.
- 8 Steyn J, "The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy?" (1991) *Denning Law Journal* 131.
- 9 R Goode, *The Concept of "Good Faith" in English Law* (1992) Paper delivered at the Centro di Studi e Ricerche di Diritto Comparato e Straniero, Rome, p 3.
- 10 JF O'Connor, *Good Faith in English Law* (Dartmouth Publishing Co Ltd, 1990), p 11.
- 11 See H K Lucke, "Good Faith and Contractual Performance" in Finn (Ed), *Essays on Contract* (The Law Book Co Ltd, 1987), p 160.
- 12 See M G Bridge, "A Doctrine of Good Faith?" (1984) 9 *Canadian Business Law Journal* 385, 404.
- 13 R S Summers, "The General Duty of Good Faith – Its Recognition and Conceptualisation" [1982] 67 *Cornell Law Review* 810, 813.
- 14 [Renard Constructions v Minister for Public Works](#) (1992) 26 *NSWLR* 234^[PDF].
- 15 *Ibid*.
- 16 See Lucke, *op cit* n 11, p 162.
- 17 *Ibid*, p 181.
- 18 *Op cit* n 4, p 6.
- 19 For the purpose of this article it may be useful to compare this civil law doctrine with the position at common law. See the article by F Kessler and E Fine, "Culpa In Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study" (1964) 77 *Harvard Law Review* 401.
- 20 See O'Connor, *op cit* n 10, p 85.
- 21 [1988] 1 *All ER* 348.
- 22 *Ibid* at 352.
- 23 See Goode, "Some Concepts of English Commercial Law: A Reappraisal" (1982) 13 *Cambrian Law Review* 13, 15.
- 24 See J P Dawson, "Unconscionable Coercion: the German Version" (1976) 89 *Harvard Law Review* 1041, 1045. This quote is cited in O'Connor, *op cit* n 10, p 86.
- 25 RGZ 100, 129.
- 26 See further the discussion by O'Connor, *op cit* n 10, p 87.

- 27 See O'Connor *ibid*, p 90, who provides a comprehensive discussion of the Swiss position. A similar principle is to be found in the Codes or case law of many other civil law countries. See O'Connor, Ch 8.
- 28 *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154.
- 29 O'Connor, *op cit* n 10, p 48.
- 30 *Ibid*, p 11.
- 31 See Goode, *op cit* n 9, p 3.
- 32 See Lord Mansfield in *Carter v Boehm* (1766) 3 Burr 1905.
- 33 See the discussion by Steyn J, *op cit* n 8, at 137.
- 34 See Goode, *op cit* n 9, p 8.
- 35 [1992] 2 WLR 174, 181; All ER 453.
- 36 [1975] 1 WLR 297.
- 37 (1932) 147 LT 503 at 515.
- 38 *Ibid*.
- 39 [1975] 1 WLR 297 at 301.
- 40 [1992] 2 WLR 174 at 181F.
- 41 *Ibid*.
- 42 See J Cassels, "Good Faith in Contract Bargaining: General Principles and Recent Developments" [1993] 15 Advocates Quarterly 56, 90.
- 43 R P Buckley, "Walford v Miles: False Certainty about Uncertainty – An Australian Perspective" (1993) 6 Journal of Contract Law 58.
- 44 *Ibid*, pp 61–62. For further elaboration of this case see P Neill, "A Key to Lock-out Agreements" (1992) 108 The Law Quarterly Review 405 at 408ff.
- 45 *Op cit* n 4, p 30. See also, his Honour's comments on *Walford v Miles*, pp 26–33.
- 46 *Op cit* n 9.
- 47 *Ibid*, p 9.
- 48 *Ibid*.
- 49 *Ibid*.
- 50 Steyn J, *op cit* n 8, at 132.
- 51 *Ibid*.
- 52 See O'Connor, *op cit* n 10, p 21.
- 53 *Lloyd's Bank Ltd v Bundy* [1975] QB 326.
- 54 See *Pao On v Lau Yiu Long* [1980] AC 614.
- 55 UCC, s 1-203 (1977).
- 56 Restatement of Contracts (Second), s 205 (1979).
- 57 222 NY 88, 118 NE 214 (1917).

- 58 Kirk La Shelle Co v Paul Armstrong Co , 263 NY 79; 188 NE 163 (1993). This statement is recognised as a fundamental formulation of the good faith doctrine.
- 59 See H Hunter, "The Duty of Good Faith & Security of Performance" (1993) 6 Journal of Contract Law 19, 23.
- 60 See M Snyderman, "What's So Good About Good Faith? The Good Faith Performance Obligation in Commercial Lending" (1988) University of Chicago Law Review 1335, 1339.
- 61 See Hunter, op cit n 59, at 23.
- 62 Ibid at 23.
- 63 141 Ill App 3d 684 (1986).
- 64 See Hunter, op cit n 59, at 19.
- 65 See Synderman, op cit n 60, at 1341.
- 66 Note that the drafters of the Code explicitly rejected application of reasonable commercial standards to good faith in all commercial agreements. See Synderman, ibid at 1340.
- 67 See Bridge, op cit n 12, at 387.
- 68 Much of the debate in the United States has focused on good faith in performance, or has assumed that the meaning of good faith in the performance and enforcement contexts must be identical. However, E G Andersen, "Good Faith in the Enforcement of Contracts" (1988) 73 Iowa Law Review 299 argues that contract performance is distinct from contract enforcement, and that good faith in enforcement warrants separate examination and development.
- 69 Nor is there any mention in the UCC concerning good faith in the formation of a contract.
- 70 R S Summers, "Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code" (1968) 54 Va L R 195, 200, 232–233.
- 71 Summers, op cit n 13, at 813.
- 72 See Burton, "Good Faith Performance of A Contract Within Article 2 of the UCC" (1981) 67 Iowa Law Review 1, 3.
- 73 Burton, ibid at 6. For a good summary of Burton's approach see the article by Bridge, op cit n 12, at 401.
- 74 Lucke, op cit n 11, p 161.
- 75 Ibid.
- 76 Ibid.
- 77 See Farnsworth, The Concept of Good Faith In American Law Paper delivered at the Centro di Studi e Ricerche di Diritto Comparato e Straniero, Rome, p 9.
- 78 Farnsworth, "Good Faith Performance and Commercial Reasonableness Under the UCC" (1963) 30 University of Chicago Law Review 666, 668.
- 79 Ibid at 668.
- 80 The choice is usually left to the courts. This is because the parties usually neglect to determine the standard themselves even though they are free to determine the standard if they use clear language. See Farnsworth, op cit n 77, p 9.
- 81 Ibid.
- 82 Ibid, p 10.
- 83 For a summary of the common law position relating to the insure's duty of utmost good faith see the article by T Scotford, "The Insurer's Duty of Good Faith" (1988) 1 Insurance Law Journal 83.
- 84 See Scotford, ibid at 102. His discussion provides a comprehensive analysis of the implications of this section and other parts of the Act. See also, Sir Anthony Mason's comments, op cit n 4, p 13.

- 85 Lucke, op cit n 11, p 158.
- 86 See Lucke, *ibid*.
- 87 Op cit n 4, p 35.
- 88 (1984) 156 CLR 41.
- 89 See *Offshore Mining Co Ltd v Attorney General* (unreported, Court of Appeal, NZ, Cooke P, 28 April 1988).
- 90 Op cit n 4, p 36.
- 91 See the judgment of Dawson J in *Hospital Products* (1984) 156 CLR 41 ^[PDF].
- 92 (1984) 156 CLR 41.
- 93 *Ibid*, at 100. Note that Deane J in the same case considers the existence of a "more restricted fiduciary relationship" in a commercial context (at 123).
- 94 Op cit n 4, p 39.
- 95 See L J Priestley, "Contract – The Burgeoning Maelstrom" (1988–1989) 1 *Journal of Contract Law* 15, 29.
- 96 36 Cal 3d 752 (1984).
- 97 See Priestley, op cit n 95, at 29.
- 98 (1991) 26 NSWLR 9.
- 99 *Ibid* at 35.
- 100 *Ibid*.
- 101 See Farnsworth, op cit n 77 and also note that there is some authority in Canada for the view that there may be an obligation to bargain in good faith. See the discussion by J Cassels, "Good Faith in Contract Bargaining" (1993) 15 *Advocates Quarterly* 56 which discusses the decision in *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 2 *SCR* 574.
- 102 (1991) 24 NSWLR 1.
- 103 See Lord Denning in *Courtney & Fairbairn Ltd v Tolaini Bros (Hotels) Ltd* (1976) 1 *WLR* 297 and *Walford and Ors v Miles and Anor* [1992] 1 *All ER* 435 discussed above.
- 104 (1991) 24 NSWLR 1 at 26. See also, *Sabemo Pty Ltd v North Sydney Municipal Council* (1977) 2 *NSWLR* 880 ^[PDF].
- 105 Op cit n 4, pp 30–33.
- 106 [1982] 2 NSWLR 766 at 800.
- 107 (1896) 7 *QLJ* 68.
- 108 *Ibid* at 70–71.
- 109 (1979) 144 CLR 596.
- 110 *Ibid* at 607–608.
- 111 See L J Priestley "A Guide to a Comparison of Australian and United States Contract Law" 12 *UNSWLJ* 4, 23.
- 112 (1992) 26 NSWLR 234; 9 *BCL* 40.
- 113 *Ibid* at 264; 61. In commenting on the role of good faith in Australian contract law, Priestley JA relied on comments made extra-judicially by Justice Steyn of the High Court, *Queens Bench Division*. Steyn J was of the persuasion that the position in England was likely to change because of a number of factors. These have been summarised by Priestley JA in his judgment in *Renard*, *ibid* at 264–265; 61–63.

- [114](#) Ibid at 268; 64.
- [115](#) See (1991) 66 ALJR 123 per Mason CJ, Dawson J at 135 and (1990) 22 FCR 527 per Davies J at 532.
- [116](#) (1992) 26 NSWLR 234 at 268; 9 BCL 40 at 65.
- [117](#) Unreported, Supreme Court, NSW, 27 April 1993.
- [118](#) Ibid, p 13.
- [119](#) Ibid, p 14.
- [120](#) Ibid.
- [121](#) Ibid, p 15.
- [122](#) See Snyderman, op cit n 60, at 1335.
- [123](#) See Steyn J, op cit n 8, at 140.
- [124](#) Ibid at 21.
- [125](#) See Hunter, op cit n 59, at 19.
- [126](#) Ibid at 15–16.
- [127](#) D N Angel, "Some Reflections on Privity, Consideration, Estoppel and Good Faith" (1992) 66 ALJ 484, 491.

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