CONTRACT, GOOD FAITH AND EQUITABLE STANDARDS IN FAIR DEALING

In 1766, Lord Mansfield made his famous reference to good faith as

> "the governing principle ... applicable to all contracts and dealings".[1]

Despite Lord Mansfield's endeavours to raise good faith to the level of a general principle, the common law as it subsequently developed rejected his initiative. The traditional law of contract, as it became established in England in the second half of the nineteenth century, did not impose or recognise a general duty of good faith.

However, in recent years, judges in Canada, Australia and New Zealand have asserted that the concept of good faith is part of our law or that there is a strong case for recognising that good faith obligations are part of our law. In the Supreme Court of Nova Scotia, Kelly J. held in apparently general terms that contracting parties are obliged to exercise their rights under an agreement honestly, fairly and in good faith.[2] A party breaches this obligation if, without reasonable justification, he or she acts in relation to the contract in a manner which substantially nullifies the bargained for benefits or defeats the legitimate expectations of the other party.[3]

Earlier, the Ontario Law Reform commission in its *Report on Amendment of the Law of Contract*[4] stated:

> "While good faith is not yet an openly recognised contract law doctrine, it is very much a factor in everyday contractual transactions. To the extent that the common law of contracts, as interpreted and developed by our courts, reflects this reality, it is accurate to state that good faith is a part of our law of contracts.
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> In this vein, a great many well-established concepts in contract law reflect a concern for good faith, fair dealing and the protection of reasonable expectations, creating a legal behavioural baseline."

The Commission recommended that the proposed statutory good faith provision should take the form of section 205 of the *Restatement of Contracts, Second*, to which I shall shortly refer.

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[1] *Carter v. Boehm* (1766) 3 Burr. 1905 at p. 1909 (97 E.R. 1162 at p. 1164); note also *Mellish v. Motteux* (1792) Peake 156 at 157 (170 E.R. 113 at pp. 113–114) where Lord Kenyon said "In contracts of all kinds, it is of the highest importance that courts of law should compel the observance of honesty and good faith".

[2] *Gateway Realty Ltd v. Arton Holdings Ltd (No. 3)* (1991) 106 Nova Scotia Rep. (2d) 180 at p. 192.

[3] *ibid.*, at p. 197.

[4] (1987), p. 166.

In the New South Wales Court of Appeal, in *Renard Constructions (ME) Pty Ltd v. Minister for Public Works*,[5] Priestley J. (with whom Handley J.A. generally agreed on much of what Priestley J.A. had written), after reviewing the law in the United States and Australia and referring to developments in the United Kingdom and Canada, considered that there was a strong case in Australia for accepting a good faith obligation similar to that prevailing in Europe and the United States. His Honour was presumably directing his remarks to good faith in the performance and enforcement of a contract, as the obligation does not extend in the United States to the making of a contract. In *Renard Constructions*, a clause in a building contract authorised the principal to take over the whole or any part of the work or to cancel the contract if the contractor neglected to comply with any direction given by the principal, however minor or accidental that might be, regardless of the importance or otherwise of the subject matter. Priestley and Handley JJ.A. held that the power must be exercised reasonably.

Since then, the approach advocated by Priestley J.A. has been applied twice by the New South Wales Court of Appeal and by Finn J. in the Federal Court of Australia. In *Hughes Bros Pty Ltd v. Trustees of the Roman Catholic Church for the Archdiocese of Sydney*,[6] Kirby P. and Priestley J. applied *Renard Constructions*. Kirby P. considered that he was bound by that decision.[7]

In *Hughes Aircraft Systems International v. Airservices Australia*,[8] Finn J. concluded that a duty of good faith and fair dealing is implied by law in all contracts.[9] Apart from that general implication, His Honour considered that a term should be implied as a matter of law as a legal incident of the particular class of contract which was in question in that case. The contract was a competitive tender process contract by which a public body was obliged to consider tenders for a project involving the expenditure of public funds. It was a necessary incident of such a contract that the public body would deal fairly with the tenderers in the performance of the contract.[10]

In considering that a general duty of good faith and fair dealing is to be implied in all contracts, Finn J. declined to follow a contrary view which had been expressed by Gummow J. as a judge of the Federal Court. In *Service Station Association Ltd v. Berg Bennett & Associates Pty. Ltd*,[11]

[5] (1992) 26 N.S.W.L.R. 234 at pp. 263–269. See also *Coal Cliff Collieries Pty. Ltd v. Sijehama Pty. Ltd* (1991) 24 N.S.W.L.R. 1, where the New South Wales Court of Appeal held by majority that a promise to negotiate in good faith may, in particular circumstances, be enforceable; see esp. per Kirby P. at pp. 21–27. Contrast *Walford v. Miles* [1992] 2 A.C. 128 at pp. 136–138.

[6] (1993) 31 N.S.W.L.R. 91.

[7] *ibid.*, at p. 93.

[8] (1997) 146 A.L.R. 1.

[9] *ibid.*, at pp. 36–37.

[10] *ibid.*, at pp. 37–41.

[11] (1993) 117 A.L.R. 393.

Gummow J. asserted that Anglo-Australian contract law had developed differently from American contract law, saying:

> "Anglo-Australian contract law as to the implication of terms has . . . developed differently, with greater emphasis upon specifics, rather than the identification of a genus expressed in wide terms."[12]

After referring to various equitable remedies, grounds for relief, defences and doctrines and noting that in some of these instances notions of good conscience play a part, His Honour observed:

> "But it requires a leap of faith to translate these doctrines and remedies into a new term as to the quality of performance, implied by law."[13]

His Honour's comments may be seen as the exhibition of a preference for precise rules rather than for the expression of overarching principles which call for the application of general concepts or standards.

Most importantly, the New South Wales Court of Appeal, in *Alcatel Australia Ltd v. Scarcella*,[14] followed its earlier decisions in *Renard Constructions and Hughes Aircraft*, despite the reservations of Gummow J. The court held that an implied duty of good faith, both in performing obligations and in exercising rights, may form part of a contract and that such a duty was implied in the lease in that case. By the lease, the lessee covenanted that it would ensure that the demised premises complied with lawful requirements relating to the premises. The court went on to hold that the lessor (owner) was not acting unconscionably or in breach of the implied duty of good faith in the lease by taking steps to press for more stringent requirements in relation to fire safety if it thought that the Council's existing requirements were insufficient.

In New Zealand, Thomas J. has stated that, in general, the concept that "the parties to a contract must act in good faith in making and carrying out the contract" is part of the law of that country.[15] As will appear, that statement, so far as it relates to the making of a contract, may go too far. The statement is not consistent with the decision of the House of Lords in *Walford v. Miles*.[16] And it is not without significance that, in England, Steyn J. (now Lord Steyn), who foresees a future for good faith doctrine in English law, has spoken with some circumspection.[17] On the other hand, Bingham L.J. (now Lord Bingham of Cornhill), speaking with reference to the incorporation of conditions in contracts, said[18]:

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[12] *ibid.*, at p. 406.
[13] *ibid.*
[14] (1998) 44 N.S.W.L.R. 349.
[15] *Livingstone v. Roskilly* [1992] 3 N.Z.L.R. 230 at p. 237.
[16] [1992] 2 A.C. 128 at pp. 136–138; see my comments upon it later in this paper.
[17] "The Role of Good Faith and Fair Dealing in Contract Law: a Hair-Shirt Philosophy?" [1991] Denning L.J. 131.
[18] *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd* [1989] Q.B. 433 at p. 445.

> "The tendency of the English authorities has . . . been to look at the nature of the transaction . . . and the character of the parties to it; to consider what notice the party . . . was given of the particular condition . . . ; and to resolve whether in all the circumstances it is fair to hold him bound by the condition. This may yield a result not very different from the civil law principle of good faith, at any rate so far as the formation of contract is concerned."

THE CONCEPT OF GOOD FAITH

Section 1–203 of the United States Uniform Commercial Code ("the UCC") provides:

> "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."

Section 1–201(19) defines "good faith" as "honesty in fact in the conduct or transaction concerned". Section 2–103(1)(b) defines "good faith", in the case of a merchant, as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade". Section 205 of the *Restatement of Contracts, Second* provides:

> "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."

The duty of good faith imposed by the UCC and recognised by the *Restatement* relates to the performance and enforcement of a contract, not to its making.

It is by no means clear what "good faith" in the context of these provisions means. But it is probable that the concept embraces no less than three related notions: (1) an obligation on the parties to co-operate in achieving the contractual objects (loyalty to the promise itself); (2) compliance with honest standards of conduct; and (3) compliance with standards of conduct which are reasonable having regard to the interests of the parties.

Criticism that "good faith" is an obscure and uncertain concept is sometimes countered by the claim that, in substance, "good faith" is no more than an excluder of "bad faith" behaviour.[19]

In what follows I use "good faith" mainly in the sense of loyalty to the promise itself and as excluding bad faith behaviour. I shall avoid becoming enmeshed in the American arguments about what "good faith" means.[20]

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[19] Belobaba, "Good Faith in Canadian Contract Law" in Law Society of Upper Canada, *Commercial Law: Recent Developments and Emerging Trends*. (1985), p. 73 at pp. 79–80.

[20] For a brief summary of the debate, see Farnsworth, "The Concept of Good Faith in American Law", Centro di Studi e Ricerche di Diritto Comparato e Straniero, Rome, 1993; see also Farnsworth, "Good Faith in Contract Performance" in J. Beatson and D. Friedmann (eds.), *Good Faith and Fault in Contract Law* (1995), pp. 153 *et seq.*

These arguments do not seem to trouble the United States courts to any significant extent.[21]

The Classical Theory of Contract and the Seeds of its Decline

The classical theory of contract, which was a legal reflection of the economic theory of *laissez-faire*, was hostile to the emergence of a general doctrine of good faith. The great virtue of the classical theory of contract[22] was that it seemingly offered the parties the opportunity to become the architects of their own legal destiny. Whether they flourished or failed, their rights, obligations and liabilities were largely determined by the nature of the contract which they chose of their own free will to make. Sir George Jessel M.R. spoke with religious conviction of the paramount public interest in maintaining this notion of freedom of contract when he said[23]:

> "If there is one thing which more than another public policy requires it is that men of full and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."

A party to a contract could, with some confidence, expect that the contract would be enforced according to its terms, notwithstanding that the terms might be unfair, perhaps even oppressive, and that their operation, as circumstances fell out, might cause unexpected and severe hardship to the other party.

A Canadian commentator has said[24] that "the common law doctrines relating to contract performance all assume that the parties are in an adversarial relationship". That assumption provided a hostile environment for the reception of a general good faith doctrine. Furthermore, the classical theory of contract offered predictability and certainty, though it later emerged, as is the case with many legal concepts rooted in formalism, that the element of certainty was illusory. However, until the second half of the twentieth century, a general doctrine of good faith would have been seen as

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[21] *ibid.*

[22] For present purposes, I make no distinction between the classical theory and the liberal theory, a distinction made by Professor Fried and Professor Atiyah: see Friedmann, *Contract as Promise, A Theory of Contractual Obligation* (1981); Atiyah, *Essays on Contract* (1986) p. 121.

[23] *Printing and Numerical Registering Co. v. Sampson* (1875) L.R. 19 Eq. 462 at p. 465.

[24] Girard, " 'Good Faith' in Contract Peformance: Principle or Placebo?" (1983) 5 Supreme Court Law Rev. 309 at p. 326.

a threat to the predictability and certainty apparently offered by the law of contract.

The maxim *caveat emptor* expresses a notion that pervaded the traditional law of contract—a contracting party must look to the protection of his or her interests because the law imposed no obligation on the other party to protect those interests.[25] 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 free 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 contract.

Hence, it has often been said that there is no general good faith requirement in the exercise of contractual rights. In conformity with this traditional approach, Lord Reid denied that a promisee must act reasonably in electing to enforce rights, asserting that it has never been

> "the law that a person is only entitled to exercise his contractual rights in a reasonable way".[26]

That statement, though literally correct, may tend now to convey a misleading impression.

It was in 1974 that Professor Grant Gilmore announced *The Death of Contract*. He thought that the classical theory was in steep decline. Gilmore's view was that contract and tort were converging in such a way that contract was collapsing into tort.[27] He regarded the development of quasi-contract and promissory estoppel as evidence of the inadequacy and decline of contract which rested perhaps more than any other branch of English law on pure doctrine.

Professor Atiyah in his *The Rise and Fall of Freedom of Contract*[28] took much the same view; he ascribed the fall principally to the fading role of freedom of contract and the free market. He thought also that there had been a decline in promise-based liabilities and an increase in benefit-based and reliance-based liabilities and replacement of contractual exchanges by exchanges on terms which were open to continuous adjustment. The decreasing vitality of the classical theory has undermined some of the factors which inhibited the emergence of a general doctrine of good faith.

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[25] The rise of economic rationalism has recently renewed emphasis on individual responsibility: see *Economics and Law*, New Zealand Law Society Seminar (1990), p. 31.

[26] *White & Carter (Councils) Ltd v. McGregor* [1962] A.C. 413 at p. 430; see also *China & South Sea Bank v. Tan* [1990] 1 A.C. 536; *Wood Hall Ltd v. Pipeline Authority* (1979) 141 C.L.R. 443.

[27] See *Hawkins v. Clayton* (1988) 164 C.L.R. 539 esp. at p. 585; *Day v. Mead* [1987] 2 N.Z.L.R. 443.

[28] P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (1979), Chap. 22, pp. 716 *et seq.*

The Movement away from the Adversarial Concept of Contract Towards a Good Faith Concept

Despite the repudiation of Lord Mansfield's endeavour to make good faith a fundamental doctrine of English contract law, it is evident that our general law specifically incorporates some aspects of good faith doctrine. Moreover, in very recent times, the general law, as it affects contracts, influenced by traditional equitable notions of equity, good conscience and bona fides, has been moving away from the adversarial emphasis on the freedom of the parties to pursue in an uninhibited fashion their own interests. Instead, it is moving towards a conception of contract which places more emphasis, if not on co-operation, at least on conduct which takes account of the interests of the other party to the contract.[29] This movement is associated with a new focus on the reasonable expectations of the parties[30] and it has led to the comment that the law of contract now has a "real concern with *substantive* fairness" (my emphasis).[31]

The role of "reasonable expectations" in the modern law of contract was eloquently expressed by Steyn L.J. (now Lord Steyn) in *First Energy (U.K.) Ltd v. Hungarian International Bank Ltd*[32] in these terms:

> "A theme that runs through our law of contract is that the reasonable expectations of honest men must be protected. It is not a rule or principle of law. It is the objective which has been and still is the principal moulding force of our law of contract . . . if the prima facie solution to a problem runs counter to the reasonable expectations of honest men, this criterion sometimes requires a rigorous examination of the problem to ascertain whether the law does indeed compel demonstrable unfairness."[33]

In the light of that statement, it is instructive to identify aspects of good faith doctrine, reflected in general law duties imposed on parties to a contract.

Particular Aspects of Good Faith Doctrine Reflected in General Law Duties to Take Account of the Interests of Others

There are well-recognised unrelated situations in which a party is required to take account of the interests of another party, notwithstanding that the initial foundation of their relationship is that each is pursuing his or her own interests.

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[29] Finn, "Statutes and the Common Law" (1992) 22 U.W.A.L. Rev. 7 at p. 17.

[30] According to Sir Robin Cooke (now Lord Cooke of Thorndon), "giving effect to reasonable expectations . . . is a prime object of the law in almost all fields": book review, (1992) 108 L.Q.R. 334 at p. 336.

[31] Atiyah, "Contract and Fair Exchange" (1985) 35 U. Toronto L.J. 1 at p. 17.

[32] [1993] 2 Lloyd's Rep. 194.

[33] *ibid.*, at p. 196.

1. Insurance contracts. The common law imposed a duty of good faith in insurance contracts. For reasons which do not carry much conviction, they were singled out as contracts *uberrimae fidei*. The requirement of utmost good faith required disclosure by the insured of any fact material to the risk and abstention from misrepresentation. Because the courts took a very broad view of what was material, the good faith requirement not infrequently worked an injustice to insured persons. The apparent justification for the creation of the duty is that only the insured knows the material facts and the insurer has no reasonable means of discovering them.[34]

Another aspect of good faith arising out of insurance contracts is the rule that an insurer settling claims under a limited liability policy must act in good faith towards the insured and must have regard to his or her interests both in the defence of actions against the insured and in their settlement.[35]

2. Contracts for the sale of land. The vendor of land is under a duty to disclose material matters relating to the title which are known to the vendor but which the purchaser has no means of discovering.[36]

3. The mortgagee's exercise of a power of sale.

4. Majority shareholders *vis-à-vis* minority shareholders.[37]

5. The directors of an insolvent company or one verging on insolvency in disposing of assets to the detriment of creditors.[38]

6. The doctor who advises a patient in relation to proposed treatment.[39]

7. The principles of equity governing fiduciaries, undue influence and unconscionable conduct and estoppel, including promissory estoppel.

8. The duty to refrain from making misrepresentations.[40]

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[34] But there are other situations in which a party has exclusive knowledge of material facts, yet the law imposes no duty of good faith or duty of disclosure, *e.g.* sale of goods where the guiding rule is *caveat emptor*.

[35] The proposition, as I have stated it, is taken from the judgment of Stephen J. in *Distillers Co. Bio-Chemicals (Aust) Pty. Ltd v. Ajax Insurance Co. Ltd* (1974) 130 C.L.R. 1 at p. 31. See also *Fredrikson v. Insurance Corp. of British Columbia* (1990) 69 D.L.R. (4th) at 431, where Esson C.J.S.C. stated it in somewhat similar terms. His Lordship said the duty, though resembling the fiduciary duty, differed from it. He went on to make the point that the duty arose from the particular circumstances of insurance contracts and was not necessarily a consequence of the classification of such contracts as contracts *uberrimae fidei* (at pp. 431–432). See also *Gibson v. Parkes District Hospital* (1991) 26 N.S.W.L.R. 9 (a workers' compensation insurer and an employer have a duty to act in good faith in the processing of a workers compensation claim and a breach of the duty attracts liability in tort).

[36] *Carlish v. Salt* [1906] 1 Ch. 335. Failure to disclose will disentitle the vendor to specific performance though it may leave the contract on foot: *Beyfus v. Lodge* [1925] Ch. 350 at p. 359; *In re Scott and Alvarez's Contract* [1895] 2 Ch. 603 at p. 612. Contrast *caveat emptor* in the sale of goods. The difference is referable to equity's jurisdiction to grant specific performance, a jurisdiction exercised only exceptionally in relating to contracts for the sale of goods.

[37] They must act honestly having regard to the interests of the company: *Peters' American Delicacy Co. Ltd v. Heath* (1938) 61 C.L.R. 457; *Greenhalgh v. Arderne Cinemas Ltd* [1951] Ch. 286 at p. 291.

[38] *Walker v. Wimborne* (1976) 137 C.L.R. 1 at p. 7; *Kinsela v. Russell Kinsela Pty Ltd* (1986) 4 N.S.W.L.R. 722; *Nicholson v. Permacraft (N.Z.) Ltd* [1985] 1 N.Z.L.R. 242.

[39] *Reibl v. Hughes* (1980) 114 D.L.R. (3d) 1; *Rogers v. Whitaker* (1992) 67 A.L.J.R. 47; but *cf. Sidaway v. Governors of Bethlem Royal Hospital* [1985] A.C. 871.

[40] For my part, I do not regard this duty as a strong reflection of good faith notions.

A Common Law Duty to Co-operate in Achieving the Objects of the Contract?

More significant than any of the good faith instances which I have mentioned so far is the suggestion, sometimes made, that the common law imposes a duty on the parties to a contract to co-operate in achieving the objects of the contract. The implication of a term in order to give "business efficacy" to a contract is one illustration of the importance attached by the common law to the attainment of the contractual objects. But the common law went further. Where the parties have agreed that something shall be done which cannot effectively be done unless both parties agree in doing it, there is an implied obligation on each party to do all that is necessary to be done on his or her part for the carrying out of the thing.[41] That rule was a manifestation of a broader principle that each party agrees, by implication, to do all things as are necessary on his or her part to enable the other party to have the benefit of the contract[42] or to secure performance of the contract.[43]

In Canada, as in Australia, there is a long line of cases on contracts for the sale of land where the courts have held that the vendor must use his or her best efforts to obtain subdivision approval[44] and take all reasonable steps to obtain it.[45] The same principle applies to other contracts in which performance is subject to the issue of a licence such as an export licence.[46]

In Australia, that principle has been applied to a contract for the sale of land, performance of which was made conditional on the purchasers selling their existing home. So, in *Perri v. Coolangatta Investments Pty. Ltd*,[47] the purchasers were held to be under a duty to use their best endeavours to sell their existing house. In the result, in consequence of the purchasers' delay in arranging for the sale of their property, the vendor was entitled to give notice requiring completion of the contract and subsequently, on non-compliance with that notice, to rescind the contract.

Even more significant was *Meehan v. Jones*,[48] where performance of the contract was conditional on the purchaser receiving approval for finance on satisfactory terms. Wilson J. and I considered that there was an obligation

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[41] *Mackay v. Dick* (1881) 6 App. Cas. 251 at p. 263; *Devonport Borough Council v. Robbins* [1979] 1 N.Z.L.R. 1 at pp. 28–29.

[42] *Secured Income Real Estate (Australia) Ltd v. St Martins Investments Pty. Ltd* (1979) 144 C.L.R. 596 at p. 607.

[43] *Dynamic Transport Ltd v. O. K. Detailing* (1978) 85 D.L.R. (3d) 19 at p. 27; *Ludlow v. Beattie* (1978) 87 D.L.R. (3d) 561.

[44] *ibid.*

[45] *Butts v. O'Dwyer* (1952) 87 C.L.R. 267 at p. 280; *McWilliam v. McWilliams Wines Pty. Ltd* (1964) 114 C.L.R. 656 at pp. 661, 662.

[46] *Brauer & Co. (Great Britain) Ltd v. James Clark (Brush Materials) Ltd* [1952] 2 All E.R. 497 at pp. 500, 501.

[47] (1982) 149 C.L.R. 537.

[48] (1982) 149 C.L.R. 571.

on the purchaser to make reasonable efforts to obtain finance on such terms, though we doubted that the purchaser was required to do more than act honestly in deciding whether to accept or reject an offer of finance.[49] That approach to the situation gave effect to the expectations of the parties and achieved a fair and sensible balance of their interests. The decision satisfied the purchaser's expectation that he would not be forced to complete unless he obtained finance on satisfactory terms. And it satisfied the vendor's expectation because it bound the purchaser to make reasonable efforts to obtain that finance. The same approach has been taken in Canada to a provision in a lease for an option to renew at a rent "the market value prevailing at the commencement of [the] renewal term as mutually agreed between the landlord and the tenant".[50] In New Zealand, it has long been accepted that ordinarily a "subject to finance" clause in a contract for the sale of land will impose an implied obligation to take reasonable steps to obtain finance, though the making of the implication will depend upon the nature and the express terms of the contract.[51]

Once it is accepted that the common law implies an obligation of the kind just discussed and that the obligation extends to the situations described, then the Australian (and the Canadian) law of contract comes very close to recognising that aspect of the good faith doctrine to which I have referred as "loyalty to the promise itself". Of course, the implied obligation does not override the express provisions of the contract so every case depends to a significant extent on the intention of the parties as manifested in the particular contract.[52]

In this context, it may be going too far to say that the implied obligation results in a duty to co-operate to achieve the contractual objects. The implied obligation does no more than spell out what, on the true construction of the contract, is the effect of promises and undertakings entered into by the party. In reaching that construction, it will be relevant to take account of the legitimate or reasonable expectations of the parties when they make the contract.

There is a corresponding obligation not to prevent or hinder fulfilment of the objects of the contract.[53] In this respect, interesting questions arise,

[49] *ibid.*, at pp. 591, 597–598. For a similar Canadian example, see *North End Investments Inc. v. Alsman* (1989) 4 W.W.R. 545 (where performance of a contractual obligation by one party to a contract is expressed to be subject to the satisfaction of the other party, the other party can only rely on his or her lack of satisfaction if that party acts bona fide, honestly, and in good faith).

[50] *Empress Towers Ltd v. Bank of Nova Scotia* (1990) 73 D.L.R. (4th) 400 (where it was held that the agreement carried an implied term that the lessor would negotiate in good faith and that agreement would not unreasonably be withheld; the court followed Mason J. in *Meehan v. Jones* (1982) 149 C.L.R. 571 at pp. 597–598 and Goff J. in *Lee-Parker v. Izzet* [1971] 3 All E.R. 1099 at p. 1105).

[51] *Gardner v. Gould* [1974] 1 N.Z.L.R. 426 (where the New Zealand Court of Appeal held that, on the true construction of the particular contract, no such term could be implied); *Barber v. Crickett* [1958] N.Z.L.R. 1057; *Mulvena v. Kelman* [1965] N.Z.L.R. 656.

[52] *Secured Income Real Estate (Australia) Ltd v. St Martins Investments Pty. Ltd* (1979) 144 C.L.R. at pp. 607–608.

[53] *Shepherd v. Felt and Textiles of Australia Ltd* (1931) 45 C.L.R. 359 at pp. 372, 378.

often in the context of "best endeavours" clauses,[54] in the application of which the reasonable expectations of the parties may prove to be the surest guide.

Whether the concept of good faith embraces subjective or objective standards is a question commonly raised. In the context of performance, good faith signifies honest performance. But, in addition, it will, in an appropriate context, signify an objective standard. In that respect, the notion of good faith tends to extend beyond honesty to fairness, an extension which gathers added force when "good faith" is coupled with "fair dealing".[55]

Good Faith and the Interpretation and Exercise of Contractual Powers

Just as the scope of a party's obligations under the contract will be defined by reference to the attainment of the objects of the contract, so also contractual powers will be defined by reference to that benchmark. A contract may confer power on a contracting party in terms wider than are necessary for the protection of the legitimate interests of that party. In such a case, the courts will interpret the power as not extending to action proposed by the party in whom the power is vested when that action exceeds what is necessary for the protection of the party's legitimate interests. Alternatively, the courts may conclude that the power is being exercised in a capricious or arbitrary manner or for an extraneous purpose. The courts have taken this approach in Australia and Canada in dealing with the clauses in contracts for the sale of land entitling a vendor to rescind the contract if unable or unwilling to comply with or remove objections or requisitions made by the purchaser.[56]

Another approach which has been taken is to refuse to allow a vendor to exercise a contractual power where it would be unconscionable in the circumstances to do so.[57] As this approach is based on the application of equitable standards and remedies to contractual powers, I leave it for later discussion.

Another illustration of the tendency to construe contractual powers in such a way as to require the party exercising the power to take account of the interests of the other party is provided in the case of the form of contract into which Australian governmental agencies have sometimes entered. The form of contract is one which confers on a senior public

[54] See, for example, *Transfield Pty. ltd v. Arlo International ltd* (1980) 144 C.L.R. 83; *Hospital Products Ltd v. United States Surgical Corp.* (1984) 156 C.L.R. 41 at pp. 64–65.

[55] See Farnsworth, *op cit., supra*, n. 20.

[56] *Mason v. Freedman* (1958) 14 D.L.R. (2d) 529 at pp. 532–533; *Le Mesurier v. Andrus* (1986) 25 D.L.R. (4th) 424 at p. 430; *Godfrey Constructions Pty Ltd v. Kanangra Park Pty Ltd* (1972) 128 C.L.R. 529 at pp. 548–549. Compare *North End Investments Inc. v. Alsman* [1989] 4 W.W.R. 545; *Greenberg v. Meffert* (1985) 18 D.L.R. (4th) 548.

[57] *Pierce Bell Sales Pty Ltd v. Frazer* (1973) 130 C.L.R. 575 at p. 587.

servant—the Secretary of a Department—a very wide power to cancel a contract, subject to the observance of a "show cause" procedure, so long as the public servant is "satisfied" of a failure to carry out the contract or comply with a condition of it. The decision-making function under such a clause "call[s] for something more . . . than a mere pursuit of what was to the advantage, or in the interests of", the government.[58]

Hence, in the interpretation of contractual powers, there is a developing tendency to tie them closely to the objects of the contract[59] and, more than that, to ensure that, within reason and in conformity with the express provisions of the contract, the exercise of power is not capricious, arbitrary, unconscionable or unreasonable, even to the extent of insisting upon, in an appropriate case, taking account of the interests of the other party.[60]

GOOD FAITH STANDARDS IN CONTRACT NEGOTIATION AND CONTRACT PERFORMANCE

Although the law of contract has generated principles which promote that element of good faith known as loyalty to the promise, the law of contract has not so far prescribed, in a comprehensive way, standards of conduct to be observed in contract negotiation and contract performance. For the most part, the standards applicable are those prescribed by the common law of torts (to which I have referred), the developing law of restitution and the principles of equity.

1. *Contract negotiation*

The English decisions

Traditionally, the law of contract denied the existence of any obligation until negotiation crystallised in the formation of contract. A party to negotiations could terminate them at any time and for any reason at all without incurring any liability. The theory was, and still is, that a party who incurs expense in negotiating does so with a view to the profit that will result from the contract and is prepared to hazard the pre-contractual expense in pursuit of that possible gain. English law still sets its face against a duty to negotiate in good faith. In *Walford v. Miles*,[61] the House of Lords rejected the proposition that an agreement to negotiate is

[58] *The Commonwealth v. Amann Aviation Pty Ltd* (1991) 174 C.L.R. 64 per Mason C.J. and Dawson J. at 96.

[59] See *Cehave NV v. Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] Q.B. 44 *per* Roskill L.J. at p. 71 ("Where there is a free choice between two possible constructions I think the court should tend to prefer that construction which will ensure performance, and not encourage avoidance of contractual obligations").

[60] See *Greenberg v. Meffert* (1985) 18 D.L.R. (4th) 548 (where commission to be paid to an agent on a sale made before, but not completed until after, termination of his contract was expressed to be "at the sole discretion" of the employer, the discretion must be exercised reasonably, honestly and in good faith).

[61] [1992] 2 A.C. at pp. 136–138.

enforceable and held that a duty to negotiate in good faith is unworkable.

In 1932, Lord Wright in *Hillas & Co. Ltd v. Arcos Ltd*,[62] had considered that a contract to negotiate, if for good consideration, was enforceable though the damages might be nominal only. However, later judges, including Lord Denning and Lord Diplock, rejected this approach, holding that an agreement to negotiate was unenforceable.[63] In *Walford v. Miles*, relying on United States decisions, in particular *Channel Home Centres v. Grossman*,[64] the appellants argued that an agreement to negotiate in good faith is enforceable like a best endeavours clause. The House of Lords rejected the argument on the ground that such an agreement lacks certainty. Their Lordships questioned how a court could determine whether *subjectively* a proper reason existed for termination of negotiations, *i.e.* whether they have been terminated "in good faith" and not arbitrarily. The concept of a duty to carry on negotiations in good faith is, so it was said, inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party is entitled to pursue his or her own interest, so long as misrepresentations are avoided. A party is entitled to withdraw or threaten to withdraw in order to improve his or her bargaining position. So the House of Lords reasoned.

The approach taken in *Walford v. Miles* was in conformity with earlier decisions of the Court of Appeal in *Courtney & Fairbairn Ltd v. Tolaini Bros. Ltd*,[65] (an agreement to agree which stood by itself) and *Mallozzi v. Carapelli*[66] (an agreement to negotiate a provision in a contract which was otherwise valid). No distinction was drawn between an agreement to agree which stands by itself and a term in an agreement otherwise valid providing for the parties to negotiate on a material matter.

Related to the English approach to an agreement to negotiate in good faith is the approach to a best endeavours clause. An undertaking for good consideration to use one's best endeavours to achieve a stated object, such as a planning permission or an export licence, is valid and enforceable.[67] On the other hand, an undertaking to use one's best endeavours in relation to an indefinite object is uncertain and unenforceable.[68] So, it has been said, an undertaking to use one's best endeavours to agree, to try to agree or to negotiate with a view to reaching agreement, is uncertain and unenforceable.[69]

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[62] (1932) 147 L.T. 503.
[63] *Courtney & Fairbairn Ltd v. Tolaini Bros Ltd* [1975] 1 W.L.R. 297 at pp. 300–301, 302.
[64] 795 F 2d 291 (1986).
[65] [1975] 1 W.L.R. 297.
[66] [1976] 1 Lloyd's Rep. 407.
[67] *Little v. Courage Ltd* (1994) 70 P. & C.R. 469 at p. 476 *per* Millett L.J.
[68] *Bower v. Bantam Investments Ltd* [1972] 1 W.L.R. 1120, explained in *IBM United Kingdom Ltd v. Rockwall Glass Ltd* [1980] F.S.R. 335 at p. 348; *Little v. Courage Ltd* (1994) 70 P. & C.R. 469 at p. 476.
[69] *Little v. Courage Ltd, supra, per* Millett L.J. (as his Lordship then was).

Definition of the object of a best endeavours or reasonable endeavours clause is not an onerous requirement. In *Queensland Electricity Generating Board v. New Hope Collieries Pty Ltd*,[70] the Privy Council had little difficulty in concluding that the parties undertook implied primary obligations to make reasonable endeavours to agree on the terms of supply of coal beyond the initial five-year period agreed upon and, failing agreement, to do everything reasonably necessary to procure the appointment of an arbitrator. Sir Robin Cooke (as he then was), writing for the Judicial Committee said:

> "Further, it is implicit in a commercial agreement of this kind that the terms of the new price structure are to be fair and reasonable as between the parties. That is the criterion by which the arbitrator is to be guided."

Sir Robin Cooke went on to point out that the contractual provisions for the initial five-year period supplemented the ordinary implication of a fair and reasonable test. They laid down broad guidelines as to the object to be achieved. The decision demonstrates that there are circumstances in which an agreement to make reasonable endeavours to agree terms will give rise to an obligation and that the courts will view uncertainty arguments with something less than enthusiasm.

The cross-currents at play in the cases on agreements to negotiate and reasonable endeavours clauses were well-illustrated by the Court of Appeal judgment in *Phillips Petroleum Co. United Kingdom Ltd v. Enron Europe Ltd*.[71]

A complex Gas Sales Agreement relating to the production of natural gas from "J-Block" in the North Sea provided that the parties "shall use reasonable endeavours to agree" on certain matters, including a "Commissioning Date" before September 25, 1996. The buyer declined to reach agreement on such a date against the background of a severe fall in the short term market price of gas, to the extent that the contract price payable by the buyer under the Agreement would, if payable, exceed the market resale price of gas, resulting in substantial loss to the buyer. The majority (Kennedy and Potter L.JJ.) held that, on its true construction, the Agreement left the parties at liberty to take into account their own financial position, at any rate short of bad faith or in breach of an express term of the Agreement.

Although Kennedy L.J. did not expressly conclude that the reasonable endeavours clause was unenforceable, the reasoning of Potter L.J. inevitably pointed in that direction. His Lordship said:

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[70] [1989] 1 Lloyd's Rep. 204.
[71] [1997] CCH C.L.C. 329.

> "the unwillingness of the courts to give binding force to an obligation to use 'reasonable endeavours' to agree, which seems to me to be sensibly based on the difficulty of policing such an obligation, in the sense of drawing the line between what is to be regarded as reasonable or unreasonable in an area where the parties may legitimately have different views or interests, but have not provided for any criteria on the basis of which a third party can assess or adjudicate the matter in the event of dispute".

His Lordship went on to draw a distinction between applying the standard of fairness and reasonableness as an objective criterion when a price or other sum is readily assessable by reference to market rates and prices and the case in hand where no specific criteria were specified and there was a variety of legitimate considerations which might operate on the minds of the parties.

On the other hand, Sir John Balcombe (dissenting), invoking the approach commended by Steyn L.J., upheld the decision of Colman J. at first instance on the footing that the contract contained sufficient objective criteria to enable that which was to be agreed or calculated to be arrived at by the parties.

Critique

An agreement to make reasonable endeavours to agree may be inherently more difficult to sustain than an agreement to negotiate in good faith. Ordinarily an agreement to negotiate in good faith would simply exclude bad faith conduct whereas a reasonable endeavours undertaking raises questions about what is to be agreed as well as the relevance of the considerations which might influence a party in refusing to agree. Where the undertaking is a provision in an agreement which is otherwise valid, the relevance of the considerations which can legitimately influence a party in refusing to agree will be determined as a matter of construction of the agreement. That is how the matter was approached in *Queensland Electricity* and it was the issue on which Kennedy L.J. (supported by Potter L.J.) and Sir John Balcombe disagreed in *Phillips Petroleum*. If those considerations can be determined as a matter of construction, the difficulties in the way of unenforceability disappear. And, in responding to the question of construction, the courts will favour certainty and give weight to the expectations of the parties.

Without more, an agreement to negotiate in good faith would not disentitle a party from having regard to commercial self-interest in its conduct of the negotiations except in so far as its conduct involved bad faith. The nature and subject matter of the agreement might, however, qualify that general statement.

The strong policy arguments against the imposition of a general duty of good faith, namely the adversarial position of the parties and the freedom

to pursue one's own interest lose much of their force in the case of an express agreement to negotiate in good faith. There remains the problem for the court in determining the cause of termination and whether it is a breach of such an agreement. The magnitude of that problem cannot be underestimated.[72] But the making of the agreement is a manifestation of the parties' intention that neither party can terminate the negotiations for any reason at all. There will be situations in which a party withdraws from negotiations arbitrarily, capriciously and for bad faith conduct, notwithstanding that the party complaining of breach may find it very difficult to establish it. Even if particular agreements to negotiate may be void for uncertainty, it does not follow that all such agreements should meet the same fate.

It is generally thought that, if the law were to impose a general duty to negotiate in good faith, the existence of that duty would enable the courts to enforce an agreement to negotiate. This view, which seems to be correct, proceeds on the footing that the scope of such a duty would enable the courts to spell out more readily the content of any contractual obligation to negotiate in good faith. But if we assume that the law were to impose in general terms a duty to negotiate in good faith, the courts would be confronted with the task of spelling out the content of that duty, just as it would in the case of a contractual obligation.

It seems to be going a very long way indeed to assert that a contract to negotiate in good faith is unnecessarily unworkable and too uncertain to be enforced. That is why in Canada and Australia a less rigid view has been taken. In Canada, over a strong dissenting judgment, a majority of the British Columbia Court of Appeal held that an agreement to negotiate in good faith was enforceable.[73] In another case, it was accepted that there was no general duty to negotiate in good faith,[74] though the possibility of enforcement on a reliance basis of non-bargain promises has been suggested[75] and the possibility of relief based on promissory estoppel should not be overlooked. In Australia, the New South Wales Court of Appeal has recognised that a promise to negotiate in good faith may, in particular circumstances, be enforceable.[76]

For some time it has been thought that the classical law of contract made inadequate provision for the protection of parties who undertook work in the belief that an inchoate agreement or agreement in principle would result

[72] See the discussion in N. Cohen, "Pre-Contractual Duties: Two Freedoms and the Contract to Negotiate", J. Beatson and D. Friedmann (eds.), *Good Faith and Fault in Contract Law*, (1995), pp. 36 *et seq.*; see also P. Neill, "A Key to Lock-out Agreements" (1992) 108 L.Q.R. 405; J. Cumberbatch, "In Freedom's Cause: the Contract to Negotiate" (1992) O.J.L.S. 586.

[73] *Empress Towers Ltd v. Bank of Nova Scotia* (1990) 73 D.L.R. (4th) 400.

[74] *Cineplex Corp. v. Viking Rideau Corp.* (1985) 28 B.L.R. 212 at pp. 216–218.

[75] See Waddams, *The Law of Contracts* (2nd ed., 1985), pp. 156–157.

[76] *Coal Cliff Collieries Pty. Ltd v. Sijehama Pty. Ltd* (1991) 24 N.S.W.L.R. per Kirby P. at pp. 21–27 (one of the particular circumstances mentioned was whether there was consideration for the promise).

in an enforceable contract. However, the remedies available to an injured party have expanded as a result of the emergence of a cause of action for negligent misrepresentation, the recovery of economic loss and the development of promissory estoppel and the modern doctrine of breach of confidence. In addition, the new emphasis given to the law of restitution, in particular the acknowledgement in Canada[77] and Australia[78] that unjust enrichment affords an independent cause of action, gives further protection to a plaintiff who has conferred benefits on a defendant in purported pursuance of an inoperative contract or in anticipation of entry into a contract which does not eventuate.

Even so, it is in the area of contract negotiation perhaps more than anywhere else that a positive infusion of good faith doctrine may be desirable. This is particularly so in the case of letters of intent and heads of agreement which fall short of a binding contract. Neither contractual nor restitutionary remedies are entirely satisfactory.[79] Estoppel can provide a solution in some[80] but not all cases.[81] It may be that the developing law of unjust enrichment, which has been refined to a greater extent in the United States than in other common law jurisdictions, will overcome most problems. But there are situations in which work is done in the expectation of a contract arising where the work done yields no benefit to the other party who withdraws from the negotiation for arbitrary reasons.

Should a remedy be provided in such a case? Traditionalists would say no. But this may not be the right answer. The imposition in such a situation on the parties of a limited duty of good faith in the bargaining process could be a step forward, so that neither is at liberty to withdraw for arbitrary reasons. In Australia, the decision of Sheppard J. in *Sabemo Pty. Ltd v. North Sydney Municipal Council*[82] supports such an approach. The decision accepts the proposition that, where two parties proceed upon the

[77] *Pettkus v. Becker* (1980) 117 D.L.R. (3d) 257; *Hunter Engineering Co. Inc. v. Syncrude Canada Ltd* (1989) 57 D.L.R. (4th) 321; *Air Canada v. British Columbia* (1989) 59 D.L.R. (4th) 161.

[78] *Pavey & Matthews Pty. Ltd v. Paul* (1987) 162 C.L.R. 221; *David Securities Pty. Ltd v. Commonwealth Bank of Australia* (1992) 175 C.L.R. 353. See also *Woolwich Equitable Building Society v. Inland Revenue Commissioners* [1993] A.C. 70; *Lipkin Gorman v. Karpnale Ltd* [1991] 2 A.C. 548; *Westdeutsche Landesbank Girozentrale v. Islington L.B.C.* [1996] A.C. 669; *Kleinwort Benson Ltd v. Lincoln C.C.* [1998] 4 All E.R. 513.

[79] *British Steel Corp. v. Cleveland Bridge and Engineering Co. Ltd* [1984] 1 All E.R. 504; but *cf. Pavey & Matthews, supra.* And see the illuminating discussion by Professor Farnsworth in "Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations", (1987) 87 Col.L.Rev. 217. He takes the view that the available remedies in the United States are adequate.

[80] *Waltons Stores (Interstate) Ltd v. Maher* (1988) 164 C.L.R. 387; and see the famous case of *Hoffman v. Red Owl Stores* 133 N.W. 2d 267 (1965) (where reliance damages were recovered on the basis of a promissory estoppel arising from a specific promise made in the course of pre-contractual negotiations which was not honoured).

[81] Contrast *Austotel Pty. Ltd v. Franklins Self Serve Pty. Ltd* (1989) 16 N.S.W.L.R. 582 (where the plaintiff deliberately took a chance that a contract would eventuate). As Professor D. W. McLauchlan points out in his perceptive and instructive article "The 'New' Law of Contract in New Zealand" (1992) N.Z. Recent Law Rev. 436 at pp. 452–453, there is a clear distinction between such a case and one where a party has encouraged the other to act as if a contract has eventuated. In *Red Owl Stores*, the defendant had encouraged the plaintiff to incur expenditure on the assumption that there was a firm commitment.

[82] [1977] 2 N.S.W.L.R. 880 at pp. 902–903.

joint assumption that a contract will be entered into and one party does work in the interests of both parties which the party would not be expected to do gratuitously, each is subject to a duty of good faith and neither is at liberty to withdraw for reasons other than bona fide disagreement with the terms of the contemplated contract. The plaintiff recovered in quasi contract not for unjust enrichment.

If a duty of good faith is to be imposed in such a situation, it will need to be confined to particular situations in which the relationship of the parties is such as to generate a reasonable expectation that a party will not withdraw for capricious, arbitrary or bad faith reasons.

Although adequate protection could be achieved by the imposition of a common law duty of care, the extension of a duty of care into this troublesome area would be an unattractive prospect. Alternatively, it might be achieved by holding that a preliminary and collateral contract to that effect was reached along the lines of the reasoning employed by Bingham L.J. in *Blackpool and Fylde Aero Club Ltd v. Blackpool Borough Council*.[83] Such an outcome would, in appropriate situations, bring the rights and obligations of the parties into line with their commercial expectations.

2. *Contract performance*

Due partly to the absence of good faith doctrine regulating contract performance, it has become the subject of statutory regulation.[84] What is more important is that, in various jurisdictions, the courts have had recourse to equitable principle to fill the void. This movement in the law of contract is not as visible in the United Kingdom as it is in Canada, Australia and New Zealand. There is no doubt that the United Kingdom's isolation from this movement is associated with the importance that United Kingdom judges and lawyers attach to London's position as a centre of international commerce and finance. The contrast between the modern spirit of the common law (using that term to include equity) as it exists in Australia and the English approach is vividly seen in the recent decisions on unconscionable conduct and relief against forfeiture. Contrast *Commercial Bank of Australia Ltd v. Amadio*,[85] *Taylor v. Johnson*,[86] *Legiohe v. Hateley*[87] and *Bridgewater v. Leahy*[88] with *National Westminster Bank Plc*

[83] [1990] 1 W.L.R. 1195 at pp. 1201–1202 (where Bingham L.J. said that to hold that there was no contract at all until a tender was accepted would create an unacceptable discrepancy between the law of contract and the confident assumptions of commercial parties").

[84] In Australia, apart from statutory regulation of money-lending contracts, hire-purchase agreements, credit-sale agreements and the Contracts Review Act 1980 (N.S.W.), the Trade Practices Act 1975 (Cth) which prohibits a corporation, in trade or commerce, from engaging in conduct that is unconscionable in connection with the supply of goods or services (s.51AB(1)) and from engaging in conduct that is likely to mislead or deceive (s.52(1)). See also ss.52A, 52AA, 52AB.

[85] (1983) 151 C.L.R. 447.

[86] (1983) 151 C.L.R. 422.

[87] (1982) 152 C.L.R. 406.

[88] [1998] 194 C.L.R. 457.

v. Morgan,[89] *Scandinavian Trading Tanker Co. AB v. Flota Petrolera Ecuatoriana*[90] and *Union Eagle Ltd v. Golden Achievement Ltd*.[91] There are Canadian counterparts to the Australian cases.[92]

I turn now to review the various means by which the courts have sought to fill the void caused by the absence of a general good faith doctrine.

The Fiduciary Principle

Of all the principles of equity, the fiduciary principle comes closer perhaps than any other to approximating a duty of good faith. The principle calls for disclosure of material matters and it requires the fiduciary to subordinate his or her interests to the legitimate interests of another by reason of the relationship which subsists between the two parties. But the fiduciary principle is stronger than the good faith doctrine in that it gives primacy to the interests of the party to whom the fiduciary obligation is owed. 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:

(1) not to use his own position to his own advantage or that of another party; and
(2) not to place himself in a position in which his or her interest would conflict with his 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.[93] That is the definition favoured by Professor Finn (now Justice Finn).[94] It comes closer than any other to an acceptable definition of the undefinable.

The fiduciary duty is a severe standard to apply in the absence of circumstances establishing a legitimate expectation of the kind just mentioned. Although it is well accepted that a fiduciary relationship can arise out of contract, the fiduciary relationship, if it is to exist at all, must

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[89] [1985] A.C. 686; *Barclays Bank Plc v. O'Brien* [1994] 1 A.C. 180 and the discussion of that case in *Garcia v. National Australia Bank Ltd* (1998) 194 C.L.R. 395; see also *Hart v. O'Connor* [1985] A.C. 1000; *Boustany v. Pigott* (1993) 69 P. & C.R. 298 at pp. 302–303.

[90] [1983] 2 A.C. 694.

[91] [1998] 4 All E.R. 513.

[92] See, for example, *A. & K. Lick-a-Chick Franchisees Ltd v. Cordiv Enterprises Ltd* (1981) 119 D.L.R. (3d) 440; *Bertolo v. Bank of Montreal* (1986) 33 D.L.R. (4th) 610; *Bank of Montreal v. Featherstone* (1987) 35 D.L.R. (4th) 626; *Stott v. Merit Investment Corp.* (1988) 48 D.L.R. (4th) 288.

[93] The relationship extends to partnership cases and thus where a person is bound to act in the joint interests of himself or herself and another or others: see the discussion in *Hospital Products Ltd v. United States Surgical Corp.* (1984) 156 C.L.R. 51 *per* Mason J. (dissenting) at pp. 96–99.

[94] Finn, "The Fiduciary Principle" in Youdan (ed.), *Equity, Fiduciaries and Trusts* (1989), 1 at pp. 46–47.

accommodate itself to the terms of the contract so that it conforms to them. A fiduciary relationship, with its attendant obligation, cannot be superimposed upon the contract in such a way as to alter the operation which that contract was intended to have according to its true construction.[95] The imposition of a fiduciary relationship in a commercial situation has been sternly resisted in the United Kingdom and, to a lesser extent, in Australia on the ground that it is undesirable to allow equitable interests to penetrate commercial transactions. That line of thinking played a part in the majority decision in *Hospital Products Ltd v. United States Surgical Corporation*[96] to deny the existence of a fiduciary relationship between a distributor in Australia marketing the products of its principal, a United States manufacturer, when the distributor satisfied orders for the principal's products by supplying products of its own manufacture, thereby seeking to capture the principal's local product goodwill. The true position, it seems to me, is that, though in the vast majority of commercial transactions the parties stand at arm's length, that is not universally so. Accordingly, there will be cases in which the essentials of the fiduciary relationship emerge. In Canada, there has been a greater willingness to recognise such a relationship in a commercial setting than in other jurisdictions.[97] The same comment applied to New Zealand before the Privy Council reversed the decision of the New Zealand Court of Appeal in *Liggett v. Kensington*.[98]

We appear to have witnessed the high water mark of the fiduciary tide in commercial relationships. Just as in *Hospital Products* halted the advance in Australia, my impression is that *LAC Minerals Ltd v. International Corona Resources Ltd*[99] represented the end of the advance in Canada. There is no doubt that the desire to achieve a proprietary remedy has partly been responsible for the expansion in the fiduciary relationship. With justification, Professor Birks[100] and Professor Finn[101] have argued against over-extension of this concept.

Nonetheless, the Supreme Court of Canada has found that such a relationship exists in two situations that are novel, at least outside the United States. In *Guerin v. The Queen*,[102] the Supreme Court held that the Crown was a fiduciary in relation to Indian reserve lands and owed

[95] *Supra*, at p. 97, *Kelly v. Cooper* [1993] A.C. 205 at p. 215.
[96] (1984) 156 C.L.R. 41.
[97] But compare *Litwin Construction (1973) Ltd v. Pan* (1988) 52 D.L.R. (4th) 459; 29 B.C.L.R. (2d) 88 (*sub nom. Litwin Const. (1973) Ltd v. Kiss*).
[98] [1993] 1 N.Z.L.R. 257 (where a bullion trader keeping bullion in safe custody on behalf of purchasers was held to be a fiduciary—reversed on appeal *sub nom. In re Gold Corp. Exchange Ltd* [1995] 1 A.C. 75); but contrast *Watson v. Dolmark Industries Ltd* [1992] 3 N.Z.L.R. 311 (where the respondent was entrusted with dies on the footing that it deal with them for the benefit of the appellant and the respondent or for purposes authorised by the appellant and not otherwise—the respondent was held not to be a fiduciary).
[99] (1989) 61 D.L.R. (4th) 14.
[100] Birks, "Restitutionary Damages for Breach of Contract: *Snepp* and the Fusion of Law and Equity" [1987] L.M.C.L.Q. 421 at pp. 438–439.
[101] Finn, in Youdan, *op. cit., supra*, at p. 56.
[102] (1984) 13 D.L.R. (4th) 321.

consequential duties to the Indian Band. According to Dickson J., the origin of the fiduciary relationship lay in the Royal Proclamation of 1763 which provided that any disposition by the Indians of their lands to third parties could only take place after a surrender had been made to the Crown, the Crown in effect to act in the interests of the particular Indian Band. The Indian Act made similar provision. The Chief Justice considered that the essentials of the fiduciary relationship consisted in (1) the inalienability of the Indian interest in the lands except upon surrender to the Crown; (2) the surrender requirement and the obligations which it generated; and (3) the discretion given to the Crown to act in the best interests of the Indian Band. The consequence was that the Crown was in breach of its fiduciary duty when the Crown agreed to lease the lands to a golf club on terms less advantageous to the Indian Band than the terms to which the Bank had consented.

In the landmark Aboriginal title case in Australia, *Mabo v. Queensland (No. 2)*,[103] the plaintiffs strongly relied upon *Guerin*. Only Toohey J. held that the Crown was under a fiduciary obligation with respect to the lands of the Meriam people. And his conclusion rested not on *Guerin* but on the vulnerability of those people arising from the Crown's power to alienate their traditional lands, the extinguishment of their title resulting from such alienation and their inability to alienate except to the Crown.[104] Toohey J. also distinguished *Delgamuukw v. British Columbia*[105] on the ground that the nature of the protected rights and the source of the Crown's obligations there differed from the position in Australia.[106] The Indians' title had been extinguished before Confederation; that extinguishment was partly the source of the Crown's obligations; and the protected rights of the Indians were those invoked by promises made by the Crown *after* extinguishment to permit the Indians to use land not used for other purposes.

The second of the novel situations is that of fundamental human and personal interests. In *Norberg v. Wynrib*,[107] at least three justices took the view that the physician-patient relationship was fiduciary,[108] in part at least. McLachlin J. (with whom L'Heureux Dubé J. concurred) stated[109] that fiduciary principles

> "are capable of protecting not only narrow legal and economic interests, but can also serve to defend fundamental human and personal interests".

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[103] (1992) 175 C.L.R. 1; see also *Wik Peoples v. Queensland* (1996) 187 C.L.R. 1 at pp. 96–97.
[104] *ibid.*, at p. 203.
[105] (1991) 79 D.L.R. (4th) 185; revsd. on appeal (1997) 153 D.L.R. (4th) 193 (S.C.Can.).
[106] (1992) 175 C.L.R. at p. 205.
[107] (1992) 92 D.L.R. (4th) 449.
[108] See also *McInerney v. MacDonald* (1992) 93 D.L.R. (4th) 415 which the High Court of Australia in *Breen v. Williams* (1996) 186 C.L.R. 71 declined to follow.
[109] (1992) 92 D.L.R. (4th) at p. 499.

Here, the principles were applied to protect the interest of a female patient in receiving medical care free from sexual exploitation by her physician. Their Honours awarded damages, including punitive damages, by way of equitable compensation, for trauma caused to her by the defendant's sexual acts.

McLachlin J. drew a distinction between negligence and contract on the one hand, where the parties are taken to be independent and equal actors concerned primarily with their own interests, and the fiduciary relationship, where one party exercises power on behalf of another.[110] McLachlin J. stated that imbalance of power was a necessary but not a sufficient condition to establish a fiduciary relationship.[111] There must also be potential for interference with a legal interest or a non-legal interest of "vital and substantial 'practical' interest" as well as an assumption or undertaking to "look after" the interest of the beneficiary exclusively for the good of the beneficiary.[112]

On the other hand, the High Court of Australia in *Breen v. Williams*[113] took a narrower view of the fiduciary relationship and fiduciary duties and rejected the view that a doctor is under a fiduciary duty to provide access to his patient's medical records, refusing to follow the Canadian decision in *McInerney v. MacDonald*.[114]

UNCONSCIONABLE BARGAINS

Here relief is granted when a transaction, considered in the light of the circumstances in which it was entered into, is so unconscionable that it cannot be allowed to stand. Historically, relief on this ground was largely confined to cases in which the party seeking relief was a person suffering from special disability or disadvantage, *e.g.* the expectant heir, the inebriated plaintiff in *Blomley v. Ryan*,[115] who was incapable of forming a rational judgment. But the principle according to which relief is granted cannot be limited to these particular situations. What is required is that there be an unconscientious taking advantage of the serious disability or disadvantage of the person in the inferior bargaining position by procuring or retaining the benefit in question in a way that is both unreasonable and oppressive. Implicit in this statement is the requirement that the defendant knew or ought to have known of the acceptance of the disability or disadvantage.

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[110] *ibid.*, at p. 487.
[111] *ibid.*, at p. 501.
[112] *ibid.*
[113] (1996) 186 C.L.R. 71.
[114] (1992) 93 D.L.R. (4th) 415.
[115] (1956) 99 C.L.R. 362.

In *Commercial Bank of Australia Ltd v. Amadio*,[116] the bank was held to have procured the execution of a guarantee by unconscionable conduct. The plaintiffs, elderly Italian migrants unfamiliar with written English, the wife with no experience of business and the husband with only limited experience, gave a mortgage and guarantee to support an increase in the overdraft accommodation to their son's company which, unbeknown to them, was insolvent as the son and the bank well knew. The plaintiffs thought their liability under the guarantee was limited as to amount and time. The bank knew that they were misinformed in these respects and the bank stood to derive a commercial advantage from keeping the company in business, a matter of which the plaintiffs were unaware. In passing, I note that a guarantee is not a contract *uberrimae fidei*, though the principal is under a limited duty of disclosure. That duty, according to authority, does not extend to matters affecting the credit of the debtor unless there is a special arrangement between creditor and debtor which the surety would not expect.

Another example is *Louth v. Diprose*,[117] where the female appellant took unconscientious advantage of the male respondent's infatuation with her by manufacturing a crisis, involving threats of suicide, and inducing him to enter into a improvident transaction whereby he purchased a house which was conveyed to her. In so doing, he expended a large part of his assets.

In Australia, unconscionability has been relied upon as a ground in relieving a purchaser from forfeiture of his equitable interest under a contract of sale pursuant to a notice making time of the essence of the contract leading to rescission of the contract.[118] Once relief against forfeiture was available specific performance of the contract could be ordered. The purchaser had gone into possession under the contract and erected a house on the land but was unable to pay the balance of the purchase price on the due date. This approach was taken further in the case of an instalment contract for the sale of land under which the purchasers had been let into possession, though they were not entitled to possession until completion, and had built a house on the land.[119] Again, the contract had been rescinded, this time for non-payment of an instalment. In this instance the majority likened a terms contract to a mortgage, the forfeiture provision being by way of security for the payment of the purchase price so that there was no need to establish unconscionable behaviour of an exceptional kind. In *Union Eagle Ltd v. Golden Achievement Ltd*,[120] the Privy Council showed no disposition to follow this Australian initiative.

[116] (1983) 151 C.L.R. 447. Compare *Barclays Bank Plc. v. O'Brien* [1994] 1 A.C. 180 (where in a similar situation the case was regarded as one of undue influence). Contrast *Garcia v. National Bank of Australia Ltd* (1998) 194 C.L.R. 395 with *Barclays Bank Plc v. O'Brien*.

[117] (1992) 175 C.L.R. 621; see also *Bridgewater v. Leahy* (1998) 194 C.L.R. 457.

[118] *Legione v. Hateley* (1983) 152 C.L.R. 406.

[119] *Stern v. McArthur* (1988) 165 C.L.R. 489.

[120] [1997] A.C. 514.

In Australia, the emergence from the shadows of this ground of equitable relief has relegated the doctrine of undue influence to a position of relative unimportance. Unconscionability and undue influence overlap, the latter being more limited in scope, concerned as it is with the exercise by the contracting party of an independent and voluntary will.

So far, Australia's enthusiasm for unconscionable conduct as a ground for relief has not been reciprocated elsewhere except in New Zealand.[121] Indeed, this use of unconscionable conduct has been criticised because it does not lend itself to precise definition and offers no precise test to be applied. The problem is that unconscionability is "better described than defined".[122] It is then argued that the concepts and principles based on unconscionability, such as the constructive trust and estoppel, are also afflicted with uncertainty. The force of this criticism is exaggerated. In other, sometimes related, fields, we have become accustomed to dealing with concepts that do not lend themselves to precise definition—fraud, undue influence, the duty of care in negligence. Like these concepts, unconscionability involves matters of fact, degree and value judgment so that, to the extent necessary, greater guidance will come from an array of decisions in particular situations. As we strive for the formulation of principles which are predominantly directed to the attainment of justice in particular cases, we are compelled to express principles in broad terms. Or, to put it another way[123]:

> "The ever-increasing complexity and diversity of society appears to lead inevitably to a reduction in the number of generalised contract rules that can be stated, or alternatively to the couching of those rules only in the broadest of terms."

Criticism of that trend sometimes reflects nostalgia for the old rigid rule-based system in preference to a system of broad principles and concepts more attuned to the attainment of justice in particular cases.

And, in the ultimate analysis, to take up two points made by Kelly J. in *Gateway Realty Ltd v. Arton Holdings Ltd (No. 3)*,[124] why are not good faith and fair dealing superior objects to obsessive insistence on total clarity and certainty in contract? And why is emphasis on the need for good faith and fair dealing not likely to lead to the resolution of business disputes?

For the future, there is the question whether the traditional notion of unconscionability which was thought to signify conduct which "shocked the conscience" or was "unscrupulous" or "harsh" now signifies conduct

[121] But *cf. Hart v. O'Connor* [1985] A.C. 1000; *Boustany v. Pigott* (1993) 69 P. & C.R. 298.
[122] *Antonovic v. Volker* (1986) 7 N.S.W.L.R. 151 *per* Mahoney J.A. at p. 165.
[123] Mason and Gageler, "The Contract" in Finn (ed.), *Essays on Contract* (1987), p. 33.
[124] (1991) 106 Novia Scotia Rep. (2d) 180 at p. 198.

which is "unfair".[125] Already one can detect the balance inclining towards the less strict standard—note the use of the word "unconscientious" and the emphasis given to "equity" and "good conscience" which may develop into synonyms for "good faith" and "fair dealing".

Estoppel

In Australia, more so than in Canada and New Zealand, estoppel has been applied in a considerable number of cases to give effect to good faith standards. It has been said, rightly in my view, that the "underlying rationale of [estoppel is] good conscience and fair dealing".[126] Estoppel, with its various subdivisions, each entailing its own criteria and legal consequences, testifies to the historical and piecemeal fashion in which the principles of judge-made law have developed over the centuries. In Australia, we have eliminated some of the distinctions and brought greater unity to the law of estoppel.

Here again the concept of unconscionability has been the driving force. The concept played a large part in the acceptance of the doctrine of promissory estoppel and its application to a voluntary promise.[127] In cases where there is an executory promise to do something, the unconscionable conduct may have its origin in the encouragement of an assumption that the promise will be fulfilled and reliance by the promisee to his or her detriment to the knowledge of the promisor. Or it may have its origin in the reasonable expectation on the part of the promisor that the promise will induce action or forbearance in circumstances where injustice can only be avoided by holding the promisor to the promise.

In Australia, we eliminated the difference between the attitude of equity (promissory estoppel) and that of the common law towards a representation or mistaken assumption as to future conduct. That difference was resolved by saying that a representation or mistaken assumption as to future as well as to present conduct will found an estoppel.[128] Moreover there is no compelling reason to confine the mistaken assumption to an assumption of fact. Although there have been suggestions that there must be a pre-existing contractual relationship between the parties, the doctrine applies in appropriate cases where there is a pre-existing legal relationship or where the promise affects a legal relationship or where the promise affects a legal relationship which will arise in the future or where the promisor and the promisee have interests in the same subject-matter.[129]

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[125] See *Stern v. McArthur* (1988) 165 C.L.R. 489 at p. 505 (where I said that "to grant relief against forfeiture on the basis of unconscionability . . . would be to drain unconscionability of any meaning"—the majority did not agree).

[126] *Cf. Waltons Stores (Interstate) Ltd v. Maher* (1988) 164 C.L.R. 387 *per* Deane J. at p. 434.

[127] *ibid.*, at pp. 406, 423.

[128] *Foran v. Wight* (1989) 168 C.L.R. 385 at pp. 411–412, 435.

[129] *Burberg Finance v. Hindsbank Ltd* [1989] 1 N.Z.L.R. 356 *per* Richardson J. at p. 361.

These developments were taken further in *The Commonwealth v. Verwayen*,[130] where the Commonwealth was precluded from disputing its liability to the plaintiff for damages for negligence arising out of a collision between warships, the Commonwealth having previously admitted liability on the pleadings and having stated both before and after the institution of proceedings that its policy was not to contest liability. It later obtained leave to amend its defence so as to rely on a contention that it owed no duty of care and upon a limitation defence.

There was support for the view that an estoppel, certainly an equitable estoppel, does not necessarily entitle the party in whose favour the estoppel operates to the making good of the assumption on which the estoppel is founded. The remedy may be the minimum equity needed to avoid the detriment occasioned by reliance on the promise. In some cases there may be a need for proportionality between the remedy and the detriment which the estoppel seeks to avoid.

Verwayen may well be a staging post along the way towards the recognition of an over-arching unity embracing the various classes of estoppel.[131] Apart from history and the forces of precedent and tradition, there is no essential reason why we should not move towards one concept of estoppel common to, or straddling, common law and equity, which seeks to avoid detriment to a party who has acted upon the correctness of an assumption or state of affairs which the party estopped has encouraged or expected or ought reasonably to have expected. Such a unity should allow for the inevitable differences in the nature of some estoppel-based claims and defences. Promissory estoppel and proprietary estoppel call for some difference in treatment. Thus, unjust enrichment may have a greater role to play in proprietary than promissory estoppel.[132] Unity might have the effect of terminating the debate—yet another arid exercise—over estoppel as a shield or sword. What is the point of denying use of estoppel as a basis for a cause of action?[133] That question would acquire an extra dimension if consideration were to cease to be an essential element in contract formation.[134]

It may not be correct to say that estoppel is entirely based on unconscionability. *Verwayen*[135] contains references to the judgments of Dixon J. in *Thompson v. Palmer*[136] and *Grundt v. Great Boulder Pty Gold*

[130] (1990) 170 C.L.R. 394.

[131] See, however, the discussion in *Giumelli v. Giumelli* (1999) 73 A.L.J.R. 547 at pp. 554–556 (where the trend towards unity, the nature of the detriment and the making good of assumptions were discussed).

[132] See Lunney, "Towards a Unified Estoppel—the Long and Winding Road" [1992] Conv. 239 at p. 244.

[133] (1990) 170 C.L.R. at pp. 411–413.

[134] See *Trident General Insurance Co. Ltd v. McNiece Bros Pty. Ltd* (1988) 165 C.L.R. 107; *cf. London Drugs Ltd v. Kuehne & Nagel International Ltd* (1992) 97 D.L.R. (4th) 261.

[135] (1990) 170 C.L.R. 394 at pp. 431 *et seq.*, 443 *et seq.*

[136] (1933) 49 C.L.R. 507 at p. 547.

Mines Ltd,[137] in which his Honour, in the context of discussing estoppel by conduct, spoke of the object of estoppel of that kind being "to prevent an unjust departure by one person from an assumption adopted by another as the basis of some act or omission which, unless the assumption be adhered to, would operate to that other's detriment".[138] Dixon J. went on to say in *Thompson v. Palmer*[139]:

> "Whether a departure by a party from the assumption should be considered unjust and inadmissible depends upon the part taken by him in occasioning its adoption by the other party."

We must ask whether there is any difference, in this context, between "unjust" and "unconscionable" and that brings me back to my comments on the standards which that expression denotes. In the ultimate analysis, "unjust departure" in the context of estoppel must mean a departure which is unconscientious in the sense of being in bad faith or unfair. In other words, it is an illustration of unfair dealing. And, in determining whether it is bad faith or unfair in that sense, the departure will be assessed in the light of the legitimate or reasonable expectations generated by the assumption.

Restitution

In Australia, England and even more so in Canada, we have been moving towards a law of restitution which transcends the traditional common law causes of action and equitable grounds for relief. General principles are being articulated and refined which may apply indifferently, whether the basis of the claim has its origins at common law or in equity. In *Lipkin Gorman v. Karpnale Ltd*,[140] it was acknowledged that the underlying principle governing the recovery of money had and received at common law in restitution is unjust enrichment. Here again unconscionability in the sense explained above underlies the claim for unjust enrichment. In *Clarke v. Shee and Johnson*,[141] a case referred to by Lord Goff of Chieveley in which the plaintiff sought to recover as money had and received money paid for tickets in a lottery which was illegal, Lord Mansfield said[142]:

> "This is a liberal action in the nature of a bill in equity; and if, under the circumstances of the case, it appears that the defendant cannot *in conscience* retain what is the subject-matter of it, the plaintiff may well support this action." (emphasis added)

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[137] (1937) 59 C.L.R. 641 at pp. 674–677.
[138] *Thompson v. Palmer* (1933) 49 C.L.R. at p. 547. Compare *Grundt v. Great Boulder Pty. Ltd Gold Mines* (1937) 59 C.L.R. at p. 674.
[139] (1933) 49 C.L.R. at p. 547.
[140] [1991] 2 A.C. 548 at p. 572.
[141] (1774) 1 Cowp. 197.
[142] *ibid.*, at pp. 199–200.

We see here the parallel between what is unconscionable and "inequitable", to use Lord Goff's expression,[143] and the notion of unjust enrichment. In *Lipkin Gorman*, Lord Goff said that, in such a case, the plaintiff, if he can show that the money is his legal property, can recover against the third party but not if the third party received the money in good faith and for valuable consideration.[144]

The same points had been made earlier by the High Court of Australia in *Australia and New Zealand Banking Group Ltd v. Westpac Banking Corporation* where the court stated[145]

> "that contemporary legal principles of restitution or unjust enrichment can be equated with seminal equitable notions of good conscience".

Once a doctrine of restitution or unjust enrichment is recognised, the distinction between mistake of fact and mistake of law serves no useful purpose.[146] In conformity with that view, the High Court of Australia has held that the rule precluding recovery of moneys paid under mistake of law does not form part of the law of Australia.[147] The law in England has moved to a similar position, following *Woolwich Equitable Building Society v. Inland Revenue Commissioners*[148] and *Kleinwort Benson Ltd v. Lincoln City Council.*[149]

In Canada, the essential elements of a cause of action in unjust enrichment are:

(i) an enrichment of the defendant;
(ii) a corresponding deprivation of the plaintiff; and
(iii) an absence of juristic reason for the enrichment.[150]

However, in England (and Australia) the second and third elements are stated thus:

(ii) that the enrichment is at the expense of the plaintiff; and
(iii) that the enrichment is unjust.[151]

But the reference in the Canadian statement to an absence of juristic reason for the enrichment has raised the question: what does it mean? It probably means that the enrichment is unjust but is intended to indicate that what is unjust is not merely "unfair" and must be determined in accordance with

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[143] [1991] 2 A.C. at p. 578.
[144] *ibid.*, at p. 572.
[145] (1988) 164 C.L.R. 662 at p. 673.
[146] *Hydo Electric Commission of Nepean v. Ontario Hydro* (1982) 132 D.L.R. (3d) 193 *per* Dickson J. at p. 209.
[147] *David Securities Pty. Ltd v. Commonwealth Bank of Australia* (1992) 175 C.L.R. 353.
[148] [1993] A.C. 70.
[149] [1998] 4 All E.R. 513.
[150] *Pettkus v. Becker* (1980) 117 D.L.R. (3d) at p. 274.
[151] *Lipkin Gorman v. Karpnale Ltd* [1991] 2 A.C. at p. 578; *David Securities Pty. Ltd v. Commonwealth Bank of Australia* (1992) 175 C.L.R. at p. 379.

legal principle.[152] Thus, payment made under mistake or duress or illegally can make an enrichment unjust but change of position may constitute a defence.[153] In this respect, the third element in the Canadian formulation is probably intended to embrace the need to show that the enrichment is unjust—because it is made under mistake, duress or illegally—and the absence of a defence such as change of position. The interesting element in the *Woolwich* case is the identification of what was an unjust element—it seems to have been the retention by the State of taxes unlawfully exacted—yet the House of Lords denied the existence of a general right of recovery of money paid for *ultra vires* tax. The cause of action in unjust enrichment may also be described as a reflection of good faith and fair dealing standards.

Conclusion

Good faith and fair dealing concepts are already substantially in place under our general law, though not in contract negotiation. In that area, the application of specific good faith and fair dealing 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 in the area of contract performance. Some commentators suggest that the United States experience shows that there good faith and fair dealing doctrines have generated ambiguity and uncertainty.[154] Even if there is a measure of truth in this statement, 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 for relief; in other words, the reluctance is in truth an objection to the application by courts of generalised concepts and standards instead of rigid rules.

A. F. Mason.*

[152] Smith, "The Province of the Law of the Restitution" (1992) Can. Bar Rev. 672 at pp. 676–677.

[153] *Kleinwort Benson Ltd v. Lincoln County Council* [1998] 4 All E.R. 513; *David Securities Pty. Ltd v. Commonwealth Bank of Australia* (1992) 175 C.L.R. at pp. 384–386.

[154] Girard, *op. cit. supra*, n. 24.

* Chancellor, University of New South Wales; National Fellow, Research School of Social Sciences, Australian National University formerly Chief Justice of Australia. This paper is based on an address given at the University of Cambridge on July 8, 1993 at a conference organised by the Canadian Institute of Advanced Legal Studies entitled "The Cambridge Lectures."