

THE COMMON LAW OF CONTRACT IN 1993: WILL THERE BE A GENERAL DOCTRINE OF GOOD FAITH?

DR MALCOLM CLARKE



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Editorial Committee

Albert Chen
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Linda Johnson

About the author

Dr. Malcolm Clarke is a Fellow of St John's College, Cambridge and specialises in Comparative Commercial law, particularly insurance law. He has contributed to a number of books and is the author of "The Law of Insurance Contracts" (1989), "The International Carriage of Goods by Road: CMR" (1982) and "Aspects of the Hague Rules" (1976). He is also editor and part author of "Shipbuilding Contracts" (1982). He participated in our distinguished visitors programme in January 1993.

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THE COMMON LAW OF CONTRACT IN 1993: WILL THERE BE A GENERAL DOCTRINE OF GOOD FAITH ? 1/

BY DR. MALCOLM CLARKE
ST. JOHN'S COLLEGE, CAMBRIDGE

1. 1766 And All That. A General Duty ?

In the summer of 1992, the 18,000 spectators at a cricket match between England and Pakistan were refused a return of their ticket money because, according to the terms of the contract (which have since been changed), refunds would be made only if the entire day's play was cancelled. The play, however, had been cancelled on account of rain and bad light after play had occurred - two balls taking less than five minutes. In a contest in the Small Claims Division of the Birmingham County Court, which took rather longer but was unaffected by the weather, some spectators got the return of their ticket money and costs. What is clear is that play in court has not ended. What is not clear is the ground of decision.

If the case had come before Lord Mansfield In 1766 Lord Mansfield spoke of good faith as the "governing principle ... applicable to all contracts and dealings".^{2/} In 1974, however, the Court of Appeal refused to enforce an agreement to negotiate, in a decision ^{3/} approved by the House of Lords in 1992,^{4/} on the ground of uncertainty. At the same time and for the same reasons, an argument that such an obligation might be based on a duty of good faith was rejected.^{5/} In England, the general answer, therefore, appears to be that there is no overriding principle of good faith.^{6/} However, the reality is less simple.

1/ Paper presented at a seminar in the Faculty of Law, University of Hong Kong, 12 January 1993. The author wishes to express his appreciation of the helpful observations of those who were present.

2/ Carter v Boehm 1766 3 Burr 1905 (emphasis added).

3/ Courtney & Fairbairn Ltd v Tolaini Bros (Hotels) Ltd [1975] 1 All ER 716 (CA).

4/ Walford v Miles [1992] 1 All ER 453 (HL).

5/ The decision of Kerr J on that basis ([1975] 1 Lloyd's Rep. 229)

was reversed in Malozzi v Carapelli SpA [1976] 1 Lloyd's Rep. 407 (CA).

6/ In this sense, for example, Cartwright, Unequal Bargaining (Oxford 1991) 224-225; The Hon. Mr Justice Steyn, he Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy? [1991] Denning L. J. 131. Each writer cites Interfoto Picture Library v Stiletto Visual Programmes Ltd [1989] QB 433, 439 (CA). Idem: Burrows, (1968) 31 MLR 392, 405. Cf USA: Burton 94 Harv L R 369, 404 (1980) and references cited; Summers 67 Cornell L R 810 (1982); Lucke, Good Faith and Contractual Performance: ch 5 of P Finn (ed.) Essays on Contract (North Ride 1987). Germany: BGB art 242, and commentaries such as Staudinger, Kommentar zum BGB

In England after Lord Mansfield "[c]ommon lawyers retreated to the familiar territory of strict precedent, concrete categories, precise rules, literalist interpretation and conservative legalism in which good faith cannot flourish. In the inescapable and perennial search, common to all legal systems, for the right balance between fairness and justice on the one hand, and certainty and predictability on the other, the scales tipped strongly against fairness and in favour of predictability".1/

1/ Lucke 157. By literalist interpretation, the writer refers (177) to the golden rule whereby "the grammatical and ordinary sense of the words is to be adhered to" - Grey v Pearson (1857) 6 HLC 61, 106; K. Lewison, The Interpretation of Contracts (London 1989), 4.01. However, this view of English law does less than justice to judges who seek extrinsic evidence and the search for evidence of the purpose of the transaction with concomitant inference of implied terms: see Prenn v Simmonds (below 3.2E)

The general theme of this paper is that the foundations of a general rule of good faith can be discerned in the common law dust: that the particular rules already in place may be used as the piles or supports for a broader construction of principle. "Scattered throughout the law are more particularised uses of good faith or, at least, of ideas which could readily be couched in such terms".1/ Perhaps we can say that in England and hence in Hong Kong, like Moliere's Monsieur Jourdain, we have been talking the prose of good faith all along without the dangerous habit of self-

conscious extrapolation and theory.^{2/} "The breaking down of a general principle and its confinement to certain categories may in the end produce much the same result as the categorization of exceptions, though the two processes start from opposite extremes." ^{3/}

1/ Lucke 159. See also Bridge 9 Can Bus L J 385, 409 ff. (1984); Dawson [1990] NZRLR 112, 120 ff. In Germany there was a similar stage of development prior to the recognition of a general principle: Kessler and Fine 77 Harv. L. Rev 401, 403 (1964). Idem in the USA: Holmes, 39 U Pittsburgh L Rev 381, 389 (1978). Cf also the principle of 'responsibility' contended for by Beck Ch 2 in Borrowdale and Rowe (ed) Essays in Commercial Law (Canterbury NZ, 1991).

2/ Cf O'Connor, Good Faith in English Law (Aldershot 1990) 32: "These rules, although reflecting the general object of the law to do justice and ensure fairness, do not qualify as good faith rules. They are 'normal' rules of law ..." And cf Bridge (loc cit) who dismissed the exercise as an attempt "to stitch ... various case law developments into an ethical backcloth setting off modern Anglo-Canadian contract law".

3/ P. Devlin, The Enforcement of Morals (Oxford, 1965), 46.

2. The Winds of Change

In England the prevailing wind is from across the seas, usually from the west and hence from the USA, but the development of a doctrine good faith in the USA has had little apparent effect in England. There is force in the view of Bridge, published in 1984,^{1/} that we don't need it. In 1993, however, it seems that it is coming into England anyway. More recently the prevailing legal wind has been from continental Europe and the EC. It is from here perhaps that a doctrine of good faith will cross the Channel. Indeed, it is from there that to some extent it has crossed already, as follows.

1/ Above.

2.1. The Vienna Convention 1969

England and its courts must increasingly apply statutes which have their origin in treaties and take their colour from the law of treaties. In such cases, as the United Kingdom is a signatory of the Vienna Convention on the Law of Treaties 1969, the courts are obliged (by Article 31.1) to seek the ordinary meaning of the text "in good faith".

In the case of a treaty between states in the realm of public law,^{1/} "good faith" may well take on a character removed from our context. However, in the case of the multilateral conventions which establish uniform private commercial law, such as the Geneva Convention on Bills of Exchange and Promissory Notes, the Hague Rules and Hague/ Visby Rules for carriage by sea and the Warsaw Convention for carriage by air,^{2/} we find uniform terms of contract - to be interpreted in accordance with the Vienna Convention ^{3/} and hence with reference to good faith.

In the 1969 Convention, good faith means that the courts should "draw inspiration from the good faith which should animate the parties if they were themselves called upon to seek the meaning of the text".^{4/} It is notorious that, once a dispute has arisen, parties are unlikely to agree, so any serious attempt to ascertain the will of the parties must be placed at the time that the agreement came into existence. If so, then the exercise begins to look like the familiar search for the implied contractual term to which we return below.^{5/}

1/ See, for example, Rosenne, Developments in the Law of Treaties, 1945-1986, (Cambridge 1989) ch. 3

2/ And others: the EC (Brussels) Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1968; the EC (Rome) Convention on the Law applicable to Contractual Obligations, 1980.

3/ Fothergill v Monarch Airlines [1981] A.C. 251 per Lord Diplock, 290 per Lord Scarman. See also F.A. Mann Uniform Statutes in English Law, 99 L.Q.R. 376, 377 ff. (1983).

4/ Sinclair, The Vienna Convention on the Law of Treaties (2nd ed., Manchester 1984) 120.

5/ 3.2E and 7.3.

2.2 EC Draft Directive

The proposed Council Directive on unfair terms in consumer contracts clauses 1/ is intended to approximate laws "relating to unfair terms in contracts concluded between a seller or supplier 2/ and a consumer" (Article 1.1). According to a recent draft (Article 3.1):

"A contractual term which has not been individually negotiated 3/ shall be regarded as unfair if ..., contrary to the requirements of good faith:

- it causes to the detriment of the consumer a significant imbalance in the parties' rights and obligations arising under the contract, or
- it causes the performance of the contract to be significantly different from what the consumer could legitimately expect."

The Annex to the Directive contains a "non-exhaustive list of terms which shall always be regarded as unfair if they have not been individually negotiated" (Article 3.3).4/

"Prohibiting unfair terms", it has been rightly said,5/ "and creating a positive duty of good faith in the performance of contracts, are very different things." Nonetheless, once a law like this in place, it contributes significantly to a legal climate in which a positive duty can be cultivated.

1/ 92/C 73/05, Official Journal of the European Communities 24 March 1992. It is to apply to all contracts concluded after 31 December 1992 (Article 10.1).

2/ It can be inferred from clauses in the Annex that the Directive is to apply to suppliers of financial services.

3/ Further, under certain circumstances, a term shall be regarded as unfair "whether or not individually negotiated": Article 4.1.

4/ Note that recent reports suggest that this provision has been diluted and that the final form of the Directive remains to be seen.

5/ Steyn 136. In an earlier draft, fairness was to be judged by what a consumer could legitimately expect, however, this was removed.

2.3. The Vienna Convention 1980

As soon as the government can find Parliamentary time, England will ratify the United Nations Convention on Contracts for the International Sale of Goods,^{1/} signed at Vienna in 1980, which has a rule of good faith. According to article 7(1), in the "interpretation" of the Convention, "regard is to be had to ... the observance of good faith in international trade".^{2/}

1/ The Convention is in force inter alia in Argentina, Australia, Austria, Canada, Chile, China, Czechoslovakia, Denmark, France, Germany, Hungary, Italy, Netherlands, Norway, Spain, Sweden, Switzerland, USA, and the Russian Federation.

2/ Honnold, Uniform Law for International Sales (2nd ed., 1991) 146. This is referred to as a rule of interpretation, because some delegates considered that the original draft, which bore expressly on the conduct of the parties to a contract of sale and required them to observe principles of "fair dealing" and to act in "good faith", was too vague and loose. Although described as a rule of "interpretation", it is significant that a leading commentator considers that good faith "would be promoted by a liberal application of provisions [such as those] which require a party to inform another who is known to be subject to a misapprehension" (Honnold 147). So, good faith is regarded here as a principle of interpretation. Nonetheless, it is clear that a rule of interpretation can and will be applied in a way that impacts their conduct.

In this provision we see the influence of German Law (BGB Art. 242), which has also influenced the law in Austria and Switzerland,^{1/} whereby "The debtor is bound to effect performance according to the requirements of good faith, giving consideration to common usage".^{2/} Article 7 of the Convention, however, was intended to apply not only to the performance of contracts but also to their formation.^{3/} The Convention itself is considered to contain a number of provisions which are applications of the (more general) duty of good faith.^{4/} However, although German law may be at the back of minds, Germany is not the only state to have a rule of good faith,^{5/} and, from reference to good faith "in international trade" (article 7), Bonell ^{6/} infers that "the principle of good faith may not be applied according to the standards ordinarily adopted within the different national legal systems" - so, perhaps we do not have to struggle through

Staudinger's commentary 7/ on the BGB ? Bonell continues, alas: "national standards must be taken into account only to the extent that they prove to be commonly accepted at a comparative level". Perhaps not only Staudinger but also

1/ Kessler and Fine 406.

2/ This is seen as a provision on which legal obligations can be based and is distinguished from BGB art. 157 whereby "Contracts shall be interpreted according to the requirements of faith and fidelity, giving consideration to common usage".

3/ Honnold, Documentary History of the Uniform law for International Sales (1989), p 370.

4/ These are listed by the Secretariat Commentary (with reference to the 1978 draft) and thus found in Honnold, Documentary History of the Uniform law for International Sales (1989), p 408. The list includes provisions in addition to those mentioned here.

5/ France: c civ art 1134; Italy: c civ articles 1337, 1338, 1366 and 1375; Netherlands: c civ. articles 6.1.1.2.1., 6.5.3.1.1., and 6.5.3.1.2.

6/ Bianca and Bonell, Commentary on the International Sales law (Milan 1987),

7/ In the 11th ed (1961) of Staudinger's commentary that one article occupied a whole volume of 1500 pages.

The immediate submission is that from these Conventions good faith has infiltrated common law and, over a period of time, will provide both the habit of thought and the impetus to bridge the gaps between existing instances that might be seen as good faith - although that is not how most of them are currently described or regarded; and that there will be many instances in which the law can be developed or completed incrementally by small moves rather than reaching out with the span of some great principle such as good faith, a move which is against the tradition of common law.^{1/}

To test this submission these instances are grouped (below 3): those that

concern good faith in making contracts, those concerned with the performance of contracts, and those concerned with the exercise of remedies. This is in part because some legal systems apply a doctrine of good faith as such only, for example, to performance.^{2/}

1/ See below 6.2C.

2/ For example, the UCC section 1-203 applies (only) to "performance or enforcement", although it is claimed the courts have supplemented this with a "duty to bargain in good faith". Generally: E. A. Farnsworth, Contracts (Boston, 1990), ch 3.

Current Instances of Good Faith

3.1 Good Faith in Making Contracts

3.1A Disclosure

In the case of insurance contracts, in England as in Hong Kong, one party may avoid the contract on the ground of non-disclosure, sometimes called concealment, of material information by the other party.^{1/} As regards the insured, the duty of disclosure is a prominent aspect but just one aspect of a more general duty of good faith in insurance contracts. Although the view of the majority in recent times has been that the duty is an incident of the contract of insurance imposed on the parties by the law,^{2/} there is also a respectable body of opinion that the duty arises as an implied term,^{3/} especially among commentators of an earlier generation.^{4/}

1/ Bower, The Law relating to Actionable Non-Disclosure (2nd ed. 1990).; Clarke, The Law of Insurance Contracts (1989 - supplement 1991), ch 23; B.M.F. Ho, Hong Kong Contract Law (1989) pp 103-105.; MacGillivray & Parkington, Insurance Law (8th ed., 1988), pp 255 ff.; Merkin & McGhee, Insurance Contract Law, A.5.

2/ Bower 2.01; Clarke 23-1A;

3/ For example Blackburn Low & Co v Vigors (1886) 17 QBD 553, 578 per Lindley LJ, 583 per Lopes LJ (CA), (1887) 12 App Cas 531, 539 per Lord Watson; Jester+Barnes v Licences &

General (1934) 49 Ll.L.Rep. 231, 234-5 per Mackinnon J; The Litsion Pride [1985] 1 Lloyd's Rep 437, 518-519 per Hirst J; The Good Luck [1988] 1 Lloyd's Rep 514, 547 Hobhouse J.

4/ For example, Devlin 45; Shawcross, The Law of Motor Insurance (2nd ed, London 1948) 645; Welford and Otter-Barry, The Law Relating to Fire Insurance (4th ed., London 1948) 5. Objectors to the implication of a term have balked at the idea that an implied term may operate before the contract has been concluded. Be that as it may, implication of a term comes easily as regards the continuing duty during the operation of the contract; below

Fiduciaries - other people have been obliged to disclose because they have the advantage of information. Good faith of this kind 1/ is required of the fiduciary: agents in dealing with their principal, 2/ directors contracting with their company and others. 3/

1/ Kessler and Fine 442.

2/ F.M.B. Reynolds (ed.), Bowstead on Agency (15th ed., London 1985), 156 ff. Hong Kong idem: B.M.F. Ho loc cit.

3/ P. D. Finn, Fiduciary Obligations (Sydney 1977). For the role of the fiduciary in relation to problems perceived in the financial services industry, see the Law Commissions's Consultation Paper, Fiduciary Duties and Regulatory Rules, L.C.C.P. No. 124 (1992).

In the USA, the duty of disclosure is regarded as one of the antecedents of the more general duty of contractual good faith. 1/ In England in 1915 in the first edition of the book The Law relating to Actionable Non-Disclosure Spencer Bower perceived a general principle which, in his view, underpinned a number of contracts which gave rise to a duty of disclosure, 2/ but when the second edition was published in 1990, the editors felt obliged to reject the global view and treat each case separately. 3/

1/ Holmes op cit.

2/ Such a duty, whenever A has relevant information B is unable

to get for himself, is an important instance of the general duty in German law: Kessler and Fine 405.

3/ For example, pp 85 ff.

3.1B Inducement

Although there is no general obligation to speak, there is law against being misleading or too forcefully persuasive. A person induced to contract by misrepresentation,^{1/} fraud,^{2/} the exercise of undue influence,^{3/} or by economic duress ^{4/} by the other party may decline to perform the contract. Established rules like these ^{5/} support the argument (below) that, if we have no rule of good faith, at least we have a rule against certain kinds of bad faith. Or, as Bingham L J put it,^{6/} "English law has, characteristically, committed itself to no such overriding principle [as good faith] but has developed solutions in response to demonstrated problems of unfairness".

1/ Redgrave v Hurd (1881) 20 Ch D 1 (CA).

2/ Derry v Peek (1889) 14 App Cas 337.

3/ National Westminster Bank plc v Morgan [1985] AC 686. Cf Devlin (47) who saw this as an appeal to 'fair dealing' which he preferred to distinguish from good faith.

4/ Pau On v Lau Yiu [1980] A.C. 614 (PC from Hong Kong); The Evia Luck (No 2) [1992] 2 Lloyd's Rep 115 (HL).

5/ In Hong Kong these matters appear to be approached as in England: B.M.F. Ho pp. 82 ff, 128 ff, 135ff. In other countries these matters may be seen as an aspect of culpa in contra hendo and thus of good faith: Kessler and Fine 434, 437 ff.

6/ Interfoto Picture Library v Stiletto Visual Programmes Ltd [1989] QB 433, 439 (CA).

Cf. **Mistaken calculation**: Less clear is the reaction of English common law to the offer based on a mistaken calculation ^{1/} - this too would be regarded in some countries as question of good (or bad) faith.^{2/}

1/ Cecil v Webster (1861) 30 Beav. 62; and Hartog v Colin & Shields [1939] 3 All ER 566. This has been described as the rule that a person is not allowed to "snap up" (Steyn 136) an offer which he knows has been made by mistake, but cf Centrovincial Estates Plc v Merchant Investors Assurance Co Ltd. [1983] Com. L. R. 158 (CA), also reported by J.C. Smith and J.A.C. Thomas, A Casebook on Contract (8th ed, London 1987). 92 ff.

2/ Kessler and Fine 434.

Cf **Compromise** Although generally the law does not question the adequacy of consideration, an exception applies to contracts of compromise, for it is in the public interest 1/ to ensure that the position abandoned was a bona fide position, lest improper pressure (threat of litigation, refusal to pay and fund starvation) be brought to bear on the weaker party. Accordingly, the general law requires of the claimant that he has reasonable (objective) grounds for the claim, 2/ and that he has an honest (subjective) belief in its chances of success. 3/ The claim must have been asserted in good faith. 4/

1/ Poteliakoff v Teakle [1938] 2 KB 816, 824 (CA).

2/ He does not, however, have to prove his case on the balance of probabilities, otherwise there would be nothing to be gained by a compromise: Miles v New Zealand Alford Estate Co (1886) 32 Ch D 266, 284 (CA). There must be "'some prospect of success'" - Horton v Horton [1961] 1 QB 215, 221 .

3/ In other words there must be a "'real"' dispute: Piper v Royal Exchange Assurance (1932) 44 Ll L Rep 103, 117

4/ Wade v Simeon (1864) 2 CB 548, 564 per Tindal CJ.; Lucke 159; USA in this sense: Keller v State Farm Ins Co, 536 NE 2d 194, 198 (Ill, 1989). Generally: D. Foskett, The Law and Practice of Compromises (London, 3rd ed., 1991).

3.1C Tenders

When company A solicits tenders from selected parties and a clear, orderly and familiar procedure has been prescribed, it has been held that there was an implied obligation to consider any tender that observed the procedure

prescribed.1/ In other countries a decision of this kind has been reached on the basis of good faith.2/

1/ Blackpool & Fylde Aero Club Ltd v Blackpool Borough Council [1990] 3 All ER 25 (CA).

2/ In particular, as an aspect of culpa in contrahendo: Kessler and Fine 420.

3.1D Preparatory Work

Finally under existing English law, to prevent unjust enrichment, if A withdraws from contract negotiations with B prior to the conclusion of any contract, A may be obliged to compensate B for preparatory work, if that work was done at the request of A in the expectation that a contract would be concluded.1/ Semble, in so far as Hong Kong has hitherto followed developments of this kind in England,2/ the same appears to be true of the law there.

1/ William Lacey v Davis [1957] 1 WLR 932: builders' estimates requested. G. Treitel, The Law of Contract (8th ed, London 1991) 934.

2/ B.M.F. Ho, pp 350 ff.

3.1E The Sales Convention: Specific Provisions

Quite apart from the general rule of interpretation in accordance with good faith (above 2.3), there are specific provisions of the Convention that are regarded as applications of a rule of good faith.

Irrevocable offers: under English common law an offer can be withdrawn, whether the offeree has been led to believe that the offer was irrevocable or not, unless its irrevocability has been bought, ie it is part of an option purchased by the offeree. In contrast, Article 16(2) of the Sales Convention provides that "an offer cannot be revoked ...(b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer". For example, it seems that if an offer is made with a fixed time for acceptance, there is a (rebuttable) presumption that it was reasonable for the offeree to rely on its being irrevocable in that

time.1/ Again, if supplier A tenders (offers) components to manufacturer B, knowing that the tender will be in part the basis of a bid by B for a contract with X, which would have to be submitted by a specified date, A cannot withdraw his offer until that date.2/

1/ Honnold, p 209. In certain countries this problem would be dealt with as an aspect of culpa in contrahendo: Kessler and Fine 420 ff.

2/ Honnold, p 210. Idem in USA: Rest., Second of Contracts, s. 87. Cf James Baird Co v Gimbel Bros, 64 F.2d 344 (2 Cir, 1933). See further Rosenberg (1992) 20 Austral. Bus. L. Rev 442.

Delay in transmission of acceptance Acceptance of offer, even one sent by post, is not effective under the Sales Convention until it "reaches the offeror": article 18(2). In this connection article 21(2) provides: "If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect". Thus, the offeree bears the risk of defects in the medium, but if he is likely to be unaware of the delay, the offeror cannot leave him in the dark and in the lurch.

There is no corresponding rule in English common law, because of the different ('postal') acceptance rule,1/ but the spirit of article 26(2) is also one of the considerations that underlie the English rule of receipt for instantaneous acceptance: if something has gone wrong in communication, the offeree is or should be aware of that and can act accordingly.2/

1/ Adams v Lindsell (1818) 1 B & Ald 681. A rule of this kind is found in eg BGB 149; for other examples, see Cigoj, (1976) 23 Neth. Int. L. Rev. 257, 302.

2/ Entores Ltd v Miles Far East Corp [1955] 2 QB 327 (CA).

3.1F A General Rule for Negotiations ?

Not in England: "A duty to negotiate in good faith is as unworkable in

practice as it is inherently inconsistent with the position of a negotiating party." 1/ It is thought to be unworkable for two reasons:

First, it is too vague and even at a high level of generality there is no universally accepted definition. To this objection we return (below 6.1).

Secondly, it is inconsistent with negotiations because of the assumption that parties should be free to be as self-interested and awkward as they wish. Even proponents of a good faith doctrine accept that they must live with that, i.e., a "contract tradition with its strong emphasis upon the legitimacy of self-interest as the governing motive".2/

If, however, a contract already exists, some of these objections lose force. A duty of good faith becomes less vague and more workable because the contract provides a framework of reference, as well as perspective, and thus reduces the open legal space. And, of course, inconsistency with freedom to negotiate does not arise except as regards the possibility of variation or discharge by agreement.

1/ Walford (above) 461. Cf (1) Channel Home Centers Division v Grossman, 795 F. 2d 291 (1986), which was criticised by Lord Ackner (460) for confusing a duty of good faith with a duty to exercise best endeavours. (2) Cases in which equitable estoppel has been applied to relations between persons who do not in fact have a contractual relationship, when one encourages the belief of the other that there is a contract between them: The Henrik Syf [1982] 1 Lloyd's Rep 456; The Uhenbels [1986] 2 Lloyd's Rep 294; A/G of Hong Kong v Humphrey Estate Ltd [1987] AC 114 (PC from Hong Kong). (3) Attempts to enforce letters of intent: Treitel 154.

2/ Lucke 162.

3.2. Good Faith in Performance of Contracts

3.2A Insurance Contracts.

Not surprisingly, performance in good faith is required under insurance contracts, especially of the insured: good faith does not stop when the cover starts.1/ Throughout the contractual relationship the duty of good

faith continues in a form and at a level appropriate to the operation in hand.

In particular, the duty of disclosure, arises whenever the insured A has an express or implied duty to supply information to enable insurer B to make a decision.^{2/} Hence it applies if cover is extended ^{3/} or renewed.^{4/} It also applies when the insured claims insurance money: he must make "full disclosure of the circumstances of the case".^{5/} Further, if a claim by the insured against his insurer is settled, any compromise must be bona fide and honest.^{6/}

As regards the insurer, it is clear that the liability insurer who defends the insured has a duty of good faith,^{7/} as does any insurer exercising rights in subrogation.^{8/} It is less clear but arguable that, if good faith requires a degree of disclosure by claimant to insurer, the generally mutual character of the duty suggests that the insurer should owe a similar duty to the claimant, for example, a duty to disclose adjusters' reports.^{9/} However, the duty of good faith owed by the insurer to the insured is owed to the insured only and not, for example, to a bank which, having lent money to the insured, takes an assignment of the benefit of the contract of insurance; ^{10/} any rights that the bank might have against the insurer derive from the insured.

1/ Boulton v Houlder Bros & Co [1904] 1 KB 784, 791-792 per Mathew LJ (CA); Leon v Casey (1932) 43 Ll.L.Rep 69, 70 per Scrutton LJ (CA). See also Distillers-Bio-Chemicals (Australia) Pty Ltd v Ajax Ins Co Ltd (1973) 130 CLR 1, 31 per Stephen J (HCA); Deaves v CML Fire & General Ins Co Ltd (1979) 23 ALR 539, 580 per Murphy J (HCA); and, more recently: Trans-Pacific Ins Co (Australia) Ltd v Grand Union Ins Co Ltd (1989) 18 NSWLR 675, 702-703, by reference to Boulton (above).

2/ The Litsion Pride [1985] 1 Lloyd's Rep 435, 511 per Hirst J.

3/ Lishman v Northern Maritime (1875) LR 10 CP 179.

4/ Lambert v Cooperative Ins Sy [1975] 2 Lloyd's Rep. 485.

5/ Shepherd v Chewter (1808) 1 Camp 274, 275 per Lord Ellenborough.

6/ Shepherd (above). See also 3.1B (above).

7/ Groom v Crocker [1939] 1 KB 194, 203 per Sir Wilfred Greene MR (CA).

8/ See Mullins (1991) 4 Ins LJ 83.

9/ Pincott (1988) 1 Ins LJ 27, 34.

10/ The Good Luck [1988] 1 Lloyd's Rep 514, 546-547 per Hobhouse J. This view was approved on appeal: [1989] 2 Lloyd's Rep 238, 264 per May LJ. That decision was affirmed on other grounds: [1991] 2 WLR 1279 (HL).

3.2B Fiduciaries

Company director A is a fiduciary, and as such owes special duties to B, the company. He can profit from his position only in certain circumstances.^{1/}

1/ In French law a person such as an agent is not allowed to profit personally in executing his mandate: S 1933. I, 330.

3.2C Promissory Estoppel

When one party has, by his words or conduct, made to the other an unequivocal promise affecting the legal relations between them, and the other has (reasonably) relied on that representation, the representor will not be allowed to revert to the strict legal position between them, when it would be inequitable, having regard to the representation and reliance.^{1/} Generally, it is 'equitable' only after A has given B reasonable notice of his wish to revert to the strict legal position.

Under the 1980 Sales Convention, Article 29(2), a contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct. For example, manufacturer B agrees to make 10,000 units to buyer A's specifications, all this having been recorded in a written contract,

which also requires modification in writing. A and B agree a change of specification by phone, and B starts production on that basis. A is precluded from objecting to the change - to the extent of B's reliance: A can insist on the original specifications for subsequent production.^{2/} Clearly, the same result might be achieved at common law by estoppel.

1/ Treitel 101 ff. In A/S Tankexpress v Cie. Fianciere Belge des Petroles SA 1949 AC 76, 98, Lord Wright referred to this kind of rule as one of "fair dealing and justice". See also Curtis v Chemical Cleaning & Dyeing Co Ltd [1951] 1 KB 805 (CA), below. Estoppel of this kind is seen as a manifestation of good faith: Kessler and Fine 408. Also associated with law of this kind, is estoppel by convention, which is sometimes described as a rule of construction: below.

2/ Honnold 280.

3.2D Unreasonable Exclusion Clauses

These, but not other contract terms,^{1/} are controlled by the courts under statutory powers.^{2/} In addition, however, the court in England has intervened to block the application of an unreasonable term, regardless of whether it is an exclusion clause,^{3/} by describing it as 'unusual' and invoking an old rule to declare that an unusual term does not apply unless A, seeking to rely on the term, drew B's attention to the term at the time of contracting.^{4/}

1/ Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1988] 1 All ER 348 (CA).

2/ Unfair Contract Terms Act 1977 (England); Control of Exemption Clauses Ordinance 1989 (Hong Kong).

3/ On the difficult question of identifying clauses as exemptions or exclusions, see Macdonald (1992) 12 L.S. 277.

4/ Crooks v Allen (1879) 5 QBD 38, 40; Thornton v Shoe Lane Parking Ltd [1971] 2 QB 163 (CA); Interfoto (above), in which Bingham L J observed (455) that 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 the contract is concerned".

3.2E No Sabotage: Implied Terms about Business Efficacy

In Shirlaw 1/ B was appointed managing director of company A on terms inter alia that he could only remain as MD if he also continued to be a director of the company. After the company had been taken over, the articles of the company were changed and the result of that was that the MD's appointment was terminated. Although the company could not be prevented from changing its articles, it was held that the company was in breach of the contract of employment.

This decision was based on an implied term of the contract. Terms will be implied by the courts, however, only when the term is necessary to give the contract 'business efficacy'.^{2/} If B contracts with A for supplies there is no implied term that A will not undercut B by supplying B's competitor C at a lower price.^{3/} Still, we have in Shirlaw an instance of a wider rule, to which we return.^{4/}

1/ Southern Foundries Ltd v Shirlaw [1940] AC 701

2/ Liverpool C.C v Irwin [1977] AC 239 - applicable in Hong Kong: B.M.F. Ho p 69.

3/ Shell v Lostock [1977] 1 All ER 481 (CA). Cf: (1) Prenn v Simmonds [1971] 1 WLR 1381 (HL) in which a key employee was promised a bonus if profits exceeded a stated figure, but the computation of profit was controlled by the employer. It was held that 'profit' in the promise was to be construed in such a way as to give effect to the 'business object' (1385) of the agreement and thus, in casu, to 'enable' payment of a bonus.

(2) In Astra Trust Ltd v Williams [1969] 1 Lloyd's Rep. 81 Megaw J held that 'subject to satisfactory survey' in an agreement to buy a ship was like 'subject to survey' in an agreement to buy land, and that there was no binding contract; but that, if there were, it was an implied term that (87) the buyers "would use all reasonable diligence to have a survey held" and that "it must be a bona fide dissatisfaction before they can reject".

4/ Below 7.2. Cf Steyn 133: "In civil law countries the existence of a generalized duty of good faith in the performance of contracts reduces the need for the implication of terms."

3.2F The Sales Convention

Quite apart from the general rule of interpretation in accordance with good faith (above 2.3), there are specific provisions of the Convention that are regarded as applications of a rule of good faith.

Cure and Retender Article 37 provides: "If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any nonconforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense." At the very least this clarifies common law, according to which there is probably a limited right of retender of non-conforming goods but, in any event, the scope of this right is uncertain.^{1/}

1/ Benjamin, Sale of Goods (4th ed., London 1992), no. 12-044.

Fitness for Purpose. Under the Sale of Goods Act 1979,^{1/} the seller must supply goods for the purpose for which they are intended. That purpose may be implied from the nature of the goods: for example, it is implied that food is fit for eating. Alternatively, that purpose may be express: the buyer may tell the seller that he wants the fuel to run a particular machine and, if the seller agrees to supply it in those circumstances, it must be fit for running that particular machine.^{2/} That is all - at common law. The Sales Convention goes further. If, although the buyer has a special purpose, he does not tell the seller, but the seller finds out anyway, farewell caveat emptor: the seller must warn the buyer that, in his view,^{3/} the goods will not be suitable for the special purpose that the buyer has in mind but has not expressed.^{4/}

1/ Section 14(3). Hong Kong idem: the Sale of Goods Ordinance 1977, section 16.

2/ Manchester Liners Ltd v Rea Ltd [1922] 2 AC 74

3/ The assumption is that the matter is within the seller's area of knowledge and expertise.

4/ P. Schlechtriem, Uniform Sales Law (Vienna, 1986), p 68 n. 253, by reference to the Secretariat Commentary, which can be found in Honnold, Documentary History of the Uniform law for International Sales (1989), pp. 404 ff.

4. The Interpretation and Construction of Contracts

4.1 Reasonable Expectations

Expectations Apparent It has been argued 1/ that the rule found in the USA, whereby the court seeks to give effect to the reasonable expectations of the insured, might be applied in England to insurance contracts. However, although this argument has attracted some interest, it has not been encouraged by the courts, at least, not in commercial cases.^{2/} Although, contracts have been interpreted with an eye to the common purpose of the transaction,^{3/} this, it seems, is more limited than regard for what one party alone, B, hopes to achieve by the contract, however obvious that hope may be to, A, the other party. A broad view of good faith would legitimise the wider search, as that would imply that A was obliged to show 'fidelity' to the objectives of B.^{4/} So far, English law does not do this.

1/ Clarke [1989] JBL 389.

2/ Smit Tak Offshore Services v Youell [1992] 1 Lloyd's Rep. 154, 159 (CA - liability). Cf The Annual Report of the Insurance Ombudsman 1990, para 2.4; Adams and Brownsword (1991) 54 MLR 281.

3/ Drinkwater v Royal Exchange Assurance Corp (1767) Wilm 282, 287; Prenn v Simmonds [1971] 1 WLR 1381, 1384 - 1385 (HL). Cf the German Civil Code, art. 133: "In interpreting a declaration of intent ... close adherence to the literal meaning of the expression is to be avoided".

4/ Lucke 164.

Expectation Induced: The Meaning of Terms In one situation, however,

party B is already protected if his expectation is induced or confirmed by A. If B asks A what a term of the proposed contract, usually one introduced by A, means, and B is thus influenced to contract because he believes that on that point the contract fulfils his expectations, and if it is reasonable for B to rely on A's interpretation, that term will be taken to mean what A said it meant, whatever the objective or 'true' meaning of the term .1/ This has been seen as an instance of good faith.2/

1/ Kaufmann v British Surety Ins Co Ltd (1929) 33 Ll. L. Rep. 315; Curtis v Chemical Cleaning & Dyeing Co [1951] 1 KB 805 (CA); Hiscox v Outhwaite (No.3) [1991] 2 Lloyd's Rep. 524, 535.

2/ Powell [1956] CLP 16, 27-28.

4.2. Estoppel by Convention

Estoppel by convention applies when "(1) parties have established by their construction of their agreement or their apprehension of its legal effect a conventional basis, (2) on that basis they have regulated their subsequent dealings [and] (3) it would be unjust or unconscionable if one of the parties resiled from that convention". 1/ For example, if A and B contract that their joint venture company shall be financed by one method but a practice develops whereby it is financed by a different method, the practice may prevail over the letter of the contract.2/ This too might be seen as an instance of good faith.3/

1/ The Vistafjord [1988] 2 Lloyd's Rep. 343, 352 (CA).

2/ AIP Property Co Ltd v Texas Commerce International Bank Ltd [1982] QB 84 (CA). For further examples, see Linnane [1991] Bus. L. Rev. 185.

3/ For the usefulness of rules like this for the operation of a limited application of good faith, see Bridge 423.

4.3 Unilateral Decision

In Niarchos (London) Ltd. v Shell Tankers 1/ the owners had a right to substitute the chartered ship, but subject to the charterers' approval of the dimensions and draft of the substituted ship. McNair J. held 2/ that the

charterers could withhold approval but that they could only do so if they were acting in good faith.

1/ [1961] 2 Lloyd's Rep. 496.

2/ 507-509.

5. The Enforcement of Contracts

In the context of performance, good faith tends to expand the obligations of the parties but when it comes to enforcement the effect is generally to curtail obligations.^{1/}

As regards enforcement English common law still starts from the position expressed in 1897 that "any right given by contract may be exercised against the giver by the person to whom it is granted, no matter how wicked, cruel or mean the motive may be which determines the enforcement of the right".^{2/} A rule that remedies must be pursued 'reasonably' was subsequently rejected.^{3/} As things now are, the position has been qualified by the refusal of equity to allow a remedy when enforcement is unfair,^{4/} and courts have offered relief against forfeiture and against penalties,^{5/} as well as rectification of documents.^{6/} A general duty of good faith would go much further and would result in "something similar to the civil law doctrine of abuse of rights."^{7/}

1/ Lucke 164.

2/ Allen v Flood [1898] AC 1, 46.

3/ White & Carter Ltd v McGregor [1962] AC 413. Cf The Hansa Nord [1976] QB 44 (CA).

4/ Patel v Ali [1984] Ch 283.

5/ Shiloh Spinners Ltd v Harding [1973] AC 691, 723-724 per Lord Wilberforce. But the doctrine was held inapplicable to commercial transactions in The Scaptrade, Scandinavian Trading Tanker Co A/B v Flota Petrolera Ecuatoriana [1983] QB 529; [1983] 2 AC 694 - applicable in Hong Kong: B.M.F. Ho p 274; and the doctrine was held inapplicable to a commercial licence in

Sport International Bussum B.V. v Inter-Footwear Ltd [1984] 2 All ER 321 (HL). Note also the rule against penalty clauses: Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd [1915] AC 79. Lord Devlin wrote with reference to these doctrines of "the broad principle that equity will intervene to prevent a man from using his contractual powers in a harsh or oppressive way" - op cit 48. However, it is now clear that the field of intervention is limited.

6/ Cf Steyn 133: "No such doctrine is needed in civil law jurisdictions because it would be contrary to good faith for a party to put forward as accurate a document which does not reflect the true agreement of the parties."

7/ Lucke 174.

Under the Sales Convention A may give B more time to perform,^{1/} for example, more time to obtain and deliver the machine ordered. If he does so, he cannot later refuse performance from B, if the machine is tendered within the extended time. This is seen as an implementation of the duty of good faith.^{2/} English law has reached the same result using the doctrine of waiver: having waived his right to reject for lateness, buyer A must accept and pay for the machine.^{3/}

1/ More time for seller under article 47(1) and more time for the buyer under article 63.

2/ Honnold p 147; Bianca and Bonell, Commentary on the International Sales Law (Milan 1987), 84.

3/ Devlin 46; Rickards (Charles) Ltd v Oppenheim [1950] 1 KB 616 (CA) - subject to delivery within an unrevoked extension or within a reasonable time.

6. Where Next ?

We started from the orthodox position that there is no general duty of good faith in English law. Will there be one in 1993 or 2000 ? And, anyway, what would that mean ?

6.1 Definitions

The UCC defines good faith shortly but hardly simply as "honesty in fact in the conduct or transaction concerned".^{1/} The premise of good faith is that "each party to a Code contract will make efforts, honest in fact, to meet the terms and, more importantly, the spirit" where the agreement is silent.^{2/}

Among the writers, O'Connor,^{3/} speaks of "the basic obligation of good faith - pacta sunt servanda and other generally accepted perceptions of good faith, such as its association with honesty, fair dealing and reasonableness".

A second writer, Powell, sees not only German law but also Roman law the doctrine of good faith as "an appeal to common usage".^{4/}

A third writer, Lucke,^{5/} argues for good faith as "loyalty", in the sense of "pacta sunt servanda". "Good faith looks to the spirit or true intent of transactions, whilst literalism or formalism adheres strictly to the letter".^{6/} "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? Like good faith, the duty to fulfil expectations engendered by one's contractual promise is first and foremost a moral requirement and one of such force that the law cannot fail to endorse it." ^{7/} Eloquent perhaps but unlikely to move the English courts, for the following reasons.

1/ Section 1-201(19). A similar view has been taken in France of art. 1134 c. civ. - Powell [1956] CLP 16, 30.

2/ W. F. Ebke and J. R. Griffin, Good faith and fair dealing in commercial lending transactions: from covenant to duty and beyond [1990] J S African L 366, 368.

3/ O'Connor 23. See also Steyn (131) for whom the "first imperative of good faith and fair dealing is that contracts ought to be upheld".

4/ Powell [1956] CLP 16. "When I read of a lawyer trying to tread

daintily in the china shop of ethics, I wish that someone would lead him back into the streets where walk all manner of men" - *ibid* p 38.

5/ Lucke 162

6/ Lucke 164.

7/ Lucke 162. See also Steyn (131) that a "theme" of good faith is that "the reasonable expectations of honest men must be protected".

6.2. Objections to a General Rule

6.2A The Right of Breach

First, it is current orthodoxy that contracts contain a primary promise to perform, and that it is understood from the start that the promisor may choose not to perform, for there is a secondary promise to pay damages instead.^{1/} If this 'right' is to be retained in anything like its present form, it cannot live side by side with a duty of good faith, except in a very narrow sense of the latter.

^{1/} The Heron II, C. Czarnikow Ltd v Koufos [1966] 2 WLR 1397, 1417; affirmed [1969] 1 AC 350; Photo Production v Securicor Transport [1980] AC 724. Lucke recognises that the loyalty theory was attacked by Holmes (10 Harv L Rev 457, 462 (1897)) precisely because the theory reduced the right of the 'promisor' not to perform. But he also contends that the theory was rejected in the past in Ahmed Angullia [1938] AC 624 (PC); and in Australia in Coulls v Bagot's Exor. and Trustee Co Ltd (1967) 40 ALJR 471, 487.

6.2B Vagueness

The second objection is that the very notion of good faith is too vague. It "means different things to different people in different moods at different times and in different places". "Eliminating rules to the highest point of abstraction may well produce contemplative gains, but if this process occurs in a practical world, these gains are more than offset by the losses introduced by uncertainty and vagueness." ^{1/} "Does not the triumph of

an ethical standard without overt legal recognition show the absence of such recognition ?.... In the form in which [good faith and fair dealing] is cast in s. 205 of the Restatement Second, good faith is an invitation to judges to abandon the duty of legally reasoned decisions and to produce an unanalytic incantation of personal values."^{2/} In Germany, the good faith provision: BGB 242. has generated an enormous case law and an equally enormous literature. Moreover, it can be a dangerous weapon in the hands of the wrong judge, as Germany past has shown, for it allows him to apply his own notions of social policy,^{3/} and even among the 'right' judges the notion of good faith may change under the influence of relative values.^{4/}

1/ Bridge 407 and 409. Cf Lucke 165 ff. who argues that the German experience does not bear out this fear.

2/ Bridge 412-413.

3/ Lucke 167; Powell 1956 CLP 16, 35.

4/ Devlin (1976) 39 MLR 1, 14; Lucke 169.

6.2C In Commerce, Better the Letter than the Spirit

The third objection is that a rule of such breadth is contrary to the traditions of English contract law. The "common law of contract was designed mainly to serve commerce. If a man minded only about keeping faith, the spirit of the contract would be more important than the letter. But in the service of commerce the letter is in many ways more significant. This is because in most commercial contracts many more than the original parties are concerned".^{1/} It "is dangerous and disruptive to believe that the comparative legal method can be used to justify highly selective legal transplants without regard to the whole of the country's legal tradition".^{2/} When English lawyers are involved in the drawing up of contracts, "they tend to follow the same high standards of articulation which we find in legislation" in England, "a trend which the courts have encouraged".^{3/} Those same courts are correspondingly reluctant to construct general principles from particular pieces.^{4/} Here are some notable illustrations.

1/ Devlin 44. At the same time he recognised (45) that the harshness of the common law in this regard was in some respects redressed by equity which "treated good faith as an obligation to

be imposed by the law of its own motion", although it is (46) the exception rather than the rule in the law of contract". "The perceived needs of commerce have been decisive" - Steyn 132.

2/ Bridge 414, who develops the argument that good faith is a necessary corrective to the tendency to ossification and paralysis in codified systems.

3/ Lucke 172.

4/ Lucke 168. "English law favours empirical and concrete solutions; the civil law proceeds deductively from broad first principles" - Steyn 131.

Tort: the Duty of Care. In 1988 one could say that if (a) the loss to a plaintiff of the kind before the court was reasonably foreseeable by the defendant, and (b) it was neither unfair nor unreasonable that the defendant should owe the plaintiff a duty of care (ie no reasons of public policy), a duty was owed. This was the Anns of Lord Wilberforce, from which the House of Lords has since recoiled. Today, courts still say something like this 2/ (except that the onus of proof on (b) is now on the plaintiff), but the ground is instantly taken away from this platform of principle, because courts go on to say that the answer on (b) lies in traditional categories, particular precedent.

1/ Anns v Merton London Borough [1978] AC 758; Caparo Industries plc v Dickman [1990] 2 AC 605; Murphy v Brentwood D.C. [1991] 1 AC 398.

2/ See eg Lord Bridge in Murphy (above).

Unconscionability In Bundy 1/ Lord Denning stated a general rule of unconscionability but this was rejected by the House of Lords in Morgan. 2/

1/ Lloyd's Bank Ltd v Bundy [1975] KB 326, 339 (CA).

2/ National Westminster Bank plc v Morgan [1985] AC 686. Cf O'Connor 33.

Disclosure As observed above (3.1A), the general duty of disclosure

conceived by Lord Mansfield and developed by Spencer Bower has not been recognised by the courts.

7. Some Answers to the Objections:

7.1 The Unwarranted Fear of the Unknown: The Distinction between Rules and Standards

The fear of uncertainty is not justified by the track record of the doctrine of good faith in Germany.^{1/} The fear is based on a misunderstanding of good faith: it is not a rule but a standard, which is not applied without more but which requires 'concretisation' through the judicial creation of particular rules.^{2/} This appears, for example, from the reference to good faith in the EC Draft Directive (above 2 2). Put like this, the notion should not be alien to the traditions of the current House of Lords (above 6.2C, which has told us that the 'rules' of Lord Wilberforce^{3/} for establishing a duty of care are not rules but "underlying general principles" and that courts should attach "greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes".^{4/}

1/ Lucke 166

2/ Ibid

3/ Anns v Merton London Borough [1978] AC 728. 751-752.

4/ Caparo Industries plc v Dickman [1990] 1 All ER 568, 574 (HL).

Here, at least, is an answer to some but not all of the objections. The concern of English courts with the particular, with commerce and with the effect on third parties has been conceptualised and hence entrenched to a degree that will pose a serious line of resistance to the advance of good faith. In particular, the concern of the courts has resulted in the traditionally objective approach of the common law,^{1/} concerned with promises and the effect of promises on other persons, rather than the attitude or motive of the promisor. Even in equity the emphasis is to a significant degree on the effect of A's conduct on B. Thus. there is no

promissory estoppel unless the representation has been acted on by B, no remedy for misrepresentation unless B was induced to contract, no case of economic duress unless the will of B was 'overborn',^{2/} no undue influence unless B was indeed influenced by A and, if A can prove otherwise, no remedy lies against him.

1/ Steyn 132. See also G. Samuel in (1992) 12 L.S. 271-2, quoting from J. Gordley, The Philosophical Origins of Modern Contract Doctrine (Oxford 1991), p 144.

2/ Cf recent cases which place more emphasis on the 'illegitimate' character of A's conduct: Universal Tankships Inc v ITWF [1983] AC 366, 384; see Birks [1990] LMCLQ 342, 343; Halson (1991) 107 LQR 649, 665; Macdonald [1989] JBL 460, 461.

Still, in spite of this, a case can be made that good faith has already made significant advances into English law, and has been accepted by English law - in two quite different ways.

7.2 Traditional Habits: Duck Shooting.

First, in the USA, "good faith in the general requirement of good faith in ordinary moral dealings, and in the general case law of contract up to the late 1960s, was most felicitously conceptualized as an 'excluder'. That is, it was not appropriately formulable in terms of some general positive meaning - through the specification of a set of necessary and sufficient conditions, for example; rather, it functioned as an **excluder to rule out a wide range of heterogenous forms of bad faith**".^{1/} So too, in England and in Hong Kong, as was once the position in the United States: "Although the cases do not use the term culpa in contrahendo, its underlying philosophy of responsibility for 'blameworthy' conduct has found expression in numerous ways".^{2/} Summers drew on the work of J.L. Austin,^{3/} which included this telling example: "'A real duck' differs from the simple 'duck' only in that it is used to exclude various ways of not being a real duck - but a dummy, a toy, a picture, a decoy, &c....[T]he attempt to find a characteristic common to all things that are or could be called 'real' is doomed to failure; the function of 'real' it not to contribute positively to the characterization of anything, but to exclude possible ways of being not real." It might be argued that this is the stage reached in England and in Hong Kong today; ^{4/} that there is a (limited) doctrine of

good faith, which can be described only by saying what it is not - misrepresentation, economic duress, abuse of a stronger bargaining position and so on.

1/ Summers, 67 Cornell L Rev 810, 819 (1982) (emphasis added). Cf Nicholas, French Law of Contract, 147, that although art. 1134 c. civ. requires that contracts be executed in good faith, relatively little use has been made of that provision, at least by comparison with the equivalent German provision; and that good faith has been introduced indirectly "under the cover of the concepts of erreur and dol (particularly dol par reticence)".

2/ Kessler and Fine 448.

3/ J.L. Austin, Sense and Sensibilia (1962) 70-71,

4/ Powell [1956] CLP 16, 24.

7.3 The English Restatement: Implied Terms

Secondly, if it is against the tradition of English law (above 6.2C) to acknowledge something broad and borrowed, why not redress them more modestly with something old - if not also blue - with the cold of neglect ?
1/ In this way, the dynamic use of traditional principle might permit "a generation of lawyers to adjust to the realities of the present without sacrificing their cultural legal heritage" 2/ As it was a put a century or two earlier, a rose by any other name Compare these two statements of the law:

1/ For example, Lord Denning, who having been told that he could not strike out exemptions clause on the ground that they were 'unreasonable', achieved a large measure of the same result by dusting off an old rule (Crooks v Allen (1879) 5 QBD 38) and by saying that there was insufficient notice of them when they were 'unusual': Thornton v Shoe Lane Parking Ltd [1971] 2 QB 163 (CA).

2/ Bridge 423.

(i) "neither party to an agreement may do anything to impede performance

of the agreement or to injure the right of the other party to receive the supposed benefit".1/

(ii) There is a "positive rule of the law of contract that conduct of either [party] which can be said to amount to ... bringing about the impossibility of performance is itself a breach".2/

The first is a statement in 1982 of the rule of good faith in performance as found in the law of New York and of Connecticut. The second is a statement by Lord Atkin of the English law of contract in 1939, a rule which still stands after 50 years.

1/ US Surgical Corp v Hospital Products International Pty Ltd [1982] 2 NSWLR 766, 800: testimony of the rule of good faith as applied in New York and Connecticut. The landmark statement in New York, found in Kirke La Shelle Co v Paul Armstrong Co, 263 NY 79, 87 (1933), is this: "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." This statement has been recognised as a prominent precursor of the doctrine of good faith in the USA: Lucke 157. See also Beck v Farmers Ins Exchange, 701 P 2d 795 (Utah, 1985). 5 Williston, section 670, p 159. 157. In Australia see Secured Income Real Estate (Australia) Ltd v St Martin's Investments Pty Ltd (1979) 144 CLR 596 (HCA). Cf the relatively narrow theory of good faith advanced by Burton 94 Harv L Rev 369 (1980) which gives some place to the sphere of implied terms and interpretation, but which has been effectively criticised by Bridge (401 ff), albeit not, it is submitted, in a way that obstructs the argument presented here about the value of the implied term.

2/ Southern Foundries Ltd v Shirlaw [1940] AC 701, 717 per Lord Atkin. with reference to Cockburn CJ: "If a party enters into an arrangement which can only take effect by the continuance of an existing state of circumstances there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative" - Stirling v Maitland 5 B & S 840, 852. Lord

Atkin insisting, however, that it was less an implied term than a rule of law.

Another way of stating the English rule 1/ is as a duty of cooperation, that when "in a written contract it appears that both parties have agreed that something shall be done, which cannot be effectually done unless both parties concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect".2/ The case was made in 1968, however, that the implied term requires not action but inaction: that the English rule does not go so far as to compel a party to perform positive acts which he would not otherwise be obliged to do. The duty of cooperation appears to go further and require action and, perhaps for this reason, an obligation of co-operation will only be implied in cases of necessity; 3/ or, as it was put more recently, where it is necessary to make the agreement work.4/

1/ They appear to be equated by the citations employed in support in, for example 9 Halsbury's Laws of England (4th edn) para 359.

2/ Mackay v Dick (1881) 6 App Cas 251, 263 per Lord Blackburn. See also Mona Oil Equipment & Supply Co Ltd v Rhodesia Railways Ltd [1949] 2 All ER 1014, 1018 per Devlin J.

3/ Burrows, 31 MLR 392, 393, 404 (1968). This is in line with the strict view of implied terms taken in Liverpool CC v Irwin [1977] AC 239.

4/ Treitel 186.

In conclusion, if we put together the doctrine of bad faith, and the implied term of cooperation rather than sabotage, together with estoppel, we have more than the start of a bridge across the Channel.1/ Whether that bridge should be open to all kinds of contract is another matter: it may be that some contracts, such as commodity contracts, are too heavily loaded with the tradition of cut and thrust to be suitable.2/ But a bridge there is and a bridge there will be.

1/ France is the country nearest to England in more ways than one. The French civil code has a general principle of good faith in

article 1134, the "French courts however, have made very little express use of article 1134. There is a considerable number of decisions which are seen by doctrine as applications of the requirement of good faith in the performance of contract. Many of these ... would in English law be dealt with by implied terms and are treated by the French courts in a similar way" .: Nicholas, The French Law of Contract (Oxford, 2nd ed 1992), 153. Others, in France, notably decisions concerning negotiation of contract, find their counterpart in the duck shooting, the doctrine of bad faith.

2/ Steyn 140.

@ Dr Malcolm Clarke
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