DEFINING GOOD FAITH UNDER ENGLISH CONTRACT LAW

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Certain legal jurisdictions require that while entering into a contract the parties act in good faith. However, the development of the English contract law principles does not evidence any such requirement. The rationale for such absence of a moral view even if not unfounded in English law as we would see in this paper, the judges have in fact incorporated this principle on a case by case basis. Sir T. Bingham in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd.*[1] :

> Although English contract law has not committed itself to the principle of good faith it has succeeded in acting against cases of unfair dealing by developing piecemeal solutions in response to demonstrated problems of unfairness.

In other words it is understood that under English law, the courts have been able to deal with cases of unfair practice, and good faith principles have been adopted as and when the court felt its necessity. However, Lord Ackner in *Watford v Miles*[2] stated that

> The concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations... A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party.

If we accept this view of Lord Ackner, an inevitable conclusion with lead to express that the English law is rather antagonistic or unreceptive towards any good faith principle in law. It will be seen, as this author finds, in discussing certain cases that such an absence of a good faith principle has led to the development of subtle technical grounds and legal doctrines or principles.

The courts have attacked contracts on grounds of unconscionability. Epstein argues that the classical conception of contract at common law had as its first premise the belief that private agreements should be

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1 [1989] QB 433 CA.

2 [1992] 1 All ER 453.

enforced in accordance with their terms. The premise of course was subject to important qualifications. Promises procured by fraud, duress or undue influence was not generally enforced by the courts and the same was true with certain exceptions of promises made by infants and incompetents. Again, agreements that had as their object illegal ends were not usually enforced, as for example, in cases of bribes of public officials or contracts to kill third persons. Yet, even after these exceptions were taken into account, there was still one ground on which the initial premise could not be challenged. The terms of private agreements could not be set aside because the court found them to be harsh, unconscionable or unjust. The reasonableness of the terms of a private agreement was the business of the parties to that agreement. True, there were numerous cases in which the language of the contract stood in need of judicial interpretation, but once that task was done there was no place for a court to impose upon the parties its own views about their rights and duties. 'Public policy' was an 'unruly horse', to be mounted only in exceptional circumstances and with care.

This general regime of freedom of contract can be defended from two points of view. One defence is utilitarian. So long as the tort law protects the interests of strangers to the agreement, its enforcement will tend to maximise the welfare of the parties to it, and therefore the good of society as a whole. The alternative defence is on libertarian grounds. One of the first functions of the law is to guarantee individuals a sphere of influence in which they will be able to operate, without having to justify themselves to the state or to third parties: if one individual is entitled to do within the confines of the tort law what he pleases with what he owns, then two individuals who operate within those same constraints should have the same right with respect to their mutual affairs against the rest of the world.

Whatever its merits, however, it is fair to say that this traditional view of the law of contract has been in general retreat in recent years. That decline is reflected in part in the cool reception given to doctrines of laissez-faire, its economic counterpart, since the late nineteenth century, or at least since the New Deal. The total 'hands-off' policy with respect to economic matters is regarded as incorrect in most political discussions almost as a matter of course and the same view is taken, moreover, towards a subtle form of laissez-faire that views all government interference in economic matters as an evil until shown to be good. Instead, the opposite point of view is increasingly urged:

market solutions – those which presuppose a regime of freedom of contract – are sure to be inadequate, and the only question worth debating concerns the appropriate form of public intervention.

That attitude has, moreover, worked its way (as these things usually happen) into the fabric of the legal system, for today, more than ever, courts are willing to set aside the provisions of private agreements.

One of the major conceptual tools used by courts in their assault upon private agreements has been the doctrine of unconscionability. That doctrine has a place in contract law, but it is not the one usually assigned it by its advocates. The doctrine should not, in my view, allow courts to act as roving commissions to set aside those agreements whose substantive terms they find objectionable."[3] It is not out of place to aver that the doctrine of undue influence has also been extended is evident in the decision of *Lloyd's Bank Ltd. v. Bundy*[4] and classes of similar cases. In these classes of cases English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressure brought to bear on him by or for the benefit of the other. The principle of reasonableness brought forward in contracts restraint of trade as found in *Schroeder (A) Music Publishing Co. Ltd. v. Macaulay*[5] is another proof of incorporation of the good faith principle. In *Siboen and the Sibotre*[6] we find reference to the extension of the duress principle. In this case, an actual duress or threat of violence is extended to include coercion or compulsion and an importation of the economic duress principle is also brought forward. This case could be seen the first discussion about the concept of duress applied in an economic context. With 'the *Siboen and the Sibotre*, a court admitted for the first time that in the course of a business, some kind of pressure may cause one of the contracting parties to accept agreements that he would not have accepted otherwise. In the facts of the case, the charterers of two ships renegotiated the rates of hire after a threat by them that they would go bankrupt and cease to trade if

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3 "Unconscionability: A critical reappraisal"(1975) 18 *J Law & Econ* 293, 293-294.

4 [1975] QB 326.

5 [1974] 3 All ER 616.

6 [1976] 1 Lloyd's Rep. 293.

payments under the contract of hire were not lowered. Since they also represented that they had no substantial assets, this would have left the ship owners with no effective legal remedy. The owners would have had to lay up the vessels and would then have been unable to meet mortgages and charges. The problem is that the charterers knew it. Thus, the threats were false, mainly because there was no question about the charterers being bankrupted by high rates of hire. In his statement, Lord Kerr said:

> But even assuming, as I think, that our law is open to further development in relation to contracts concluded under some form of compulsion not amounting to duress to the person, the Court must in every case at least be satisfied that the consent of the other party was overborne by compulsion so as to deprive him of animus contrahendi. This would depend on the facts of each case [...] [The agent of the party alleging duress] was acting under great pressure, but only commercial pressure, and not under anything which could in law be regarded as a coercion of his will so as to vitiate his consent.

This case opened the way for lot of others. The presence of economic duress was rejected here, but it was clear from the judgment of lord Kerr that the notion was going to implant in English law. The basis for the notion was set, though it must be said that at the time, the way courts were going to deal with it was unclear. Nevertheless, one had to wait three years before the appearance of 'economic duress' in English law was confirmed, in a famous case called the 'Atlantic Baron'[7]. Here, the builders of a ship demanded a 10% increase on the contract price from the owners (because the value of the US dollar fell by 10%), or threatened not to complete the ship. The owners paid the increased rate demanded from them, protesting that there was no legal basis on which the demand could be made. The owners were almost obliged to pay, because at the time of the threat, they were negotiating a very lucrative contract for the charter of the ship being built. Mocatta J decided that this case was dealing with economic duress. The building company exerted an illegitimate pressure with their threat to break the contract. Where a threat to break a contract leads to a further contract, that contract, even though made for good consideration, is voidable by reason of economic duress. In this case, the right to have the contract set aside was lost by affirmation. Indeed,

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7 North Ocean Shipping Co. Ltd v Hyundai Construction Co. Ltd, *the 'Atlantic Baron'* [1979] QB 705.

the plaintiffs had delayed for reclaiming the extra 10% until eight months later, after the delivery of a second ship. However, in both cases, the existence of an economic duress doctrine was recognized. But we have to keep in mind that these two cases were the first ones. The doctrine, therefore, was not really well constructed and suffered a lack of coherence in its basis. The point on which judges were focusing was to find out in each case if the victim's mind was overborne. The basis on which the courts intervene to set aside a contract on the ground of duress is, at this time, where the victim's will has been coerced in such a way as to vitiate his consent. This idea, as we have previously seen, was first expressed in the *'Siboen and the Sibotre'* case, by lord Kerr, when he employed such words as: *'...coercion of his will such as to vitiate his consent.'*

According to Atiyah, economic duress is also an established principle in English law now.[8] The English legislators have not been silent and have gone to enact the Unfair Contract Terms Act 1977 to incorporate provisions for the protection of consumers of the weaker party in contract.[9] All such provisions lead to express a view more in line with other jurisdictions of having a good faith principle in place.

However, such absence of a general principle of a good faith in English law as that of certain other systems of European jurisdictions has prompted the judges to exercise technical approach to bring good faith on board. The result has been an absence of a coherent development of the principle. This however, is in contrast with the fact that the obligation of - pacta sunt servanda - is present in English law.

Allan Farnsworth, in his paper "Good Faith performance and commercial reasonableness under uniform commercial code"[10] states that Good faith, as a term, consists of two fundamentally different things. The first issue relates to "good faith purchase". Here, good faith is used to describe a "state of mind: a party is advantaged only if he acted with innocent ignorance or lack of suspicion". This is very much alike the principle of a bonafide purchaser for value without notice.[11] Secondly, Allan[12] has used the term with respect to

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8 Atiyah P.S. (1982) 98 L.Q.R., pp. 197-202.

9 Treitel, G.H., *The Law of Contract*, 6th edition.

10 (1963) 30 *U. Chi. L. Rev.* pp. 666 and 667.

11 ibid.

performance of a contract in good faith. This, we may assert may be a general pre-condition to any contract.

No English author clearly speaks of a good faith issue or principle in the formation of a contract.[13] However, certain principles, as we shall see, do operate very much rather to ascertain the presence of such a practice.

The question of good faith is minimized with the very detailed and well set principles of offer, acceptance, consideration and intention to create a legal relationship as a matter for construction of a contract. In the formative stage of a contract, the good faith principle may not have a direct bearing to assert its presence or any importance. However, as one commences to deal with the area of rescission or variation of a contract by any subsequent agreement, the good faith principle comes into play. The non-binding variations due to lack of consideration are naturally unenforceable. This is because certain formal requirements have not been met or complied with. Problems in this respect can only be resolved by reference to the principle of good faith. Such variations are usually referred to as waivers since one party gives up his strict legal rights or as forbearance[14]. Forbearance as a matter of interpretation includes waivers, concessions and variations of performance which are not contractually binding or enforceable. *Hickman v. Haynes*[15] is a well-known example of a type of forbearance. It was held that where a seller voluntarily withheld delivery at the verbal request of the buyer, no new contract being substituted for the original one, the seller was entitled to maintain his action for non-acceptance of the goods in accordance with the original contract.

Lindley, J. said:

> the proposition that one party to a contract should thus discharge himself from his own obligations by inducing the other party to give him time for their performance, is to say the least, very startling, and if well founded will enable the defendants in this case to make use of the Statute of Frauds, not to prevent a fraud upon themselves, but to commit a fraud upon the plaintiff.

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12 ibid.

13 Treitel G.H. (1983), *Law of Contract*, 6th edition(1983).

14 Dugdale and Yates, 39 *Modern Law Review* p. 681.

15 (1875) L.R. 10 C.P. 598.

Thus, the concept of 'waiver' has been recognized as a means by which certain rights can be suspended, but then revived by appropriate notice. It is observed that the common law courts have created some difficult distinctions with regard to variation, waiver and forbearance in contrast with a more direct application of fairness and reasonableness by the courts of equity in dealing with cases of forbearances. In the leading case of *Hughes v. Metropolitan Railway Co.*[16] Lord Cairns (House of Lords) observed that:

> as the first principle upon which all Courts of Equity proceed", was "that the strict rights arising under the contract will not be enforced or will be kept in suspense or held in abeyance the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.

This rule can be interpreted to have been emanated from the principle of good faith. Later developments of the principles of promissory estoppel take its root from this rule of *Hughes*. This is a further ascertainment of the good faith principle. With subsequent applications and developments of the rule in *Hughes* in the areas of equitable or promissory estoppel, and its further extension to forbearance or waiver, it can be easily argues that the principle of good faith is indeed the actual basis of the common law principles in this area. A review of cases on forbearances, in the context of good faith, may show certain difficulties arising out of the doctrine of promissory estoppel. However, if the requirements of honesty, fairness and reasonableness are brought forth, rather than certain technical common law rules, some decisions which are difficult to adjust or reconcile within a technical and schematic approach become more understandable. However, the courts have always held that forbearances have operated to extinguish claims where it would have been impossible or excessively difficult for a party (i.e. the party not seeking to enforce on claim of forbearance) to return to the original position. This is very much akin to the principles of fairness and reasonableness and good faith. The revocability of the forbearance in circumstances where the beneficiary has behaved inequitably is of course perfectly consistent with the good faith nature of the rules in this area. In both *D. & C. Builders Ltd. V. Rees*[17] and *Arrale v. Costain*

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16 (1877) 2 App. Cas. 439, at p. 448.

17 [1966] 2 Q.B. 617.

Civil Engineering Ltd.[18] , which are clearly based on the principle of good faith, it was held that it would be clearly contrary to fairness and reasonableness to allow a party to benefit from a forbearance which he has obtained by unacceptable means.

D & C Builders Ltd. was hired to do work for Rees. Once the job was complete Rees had an outstanding debt of £432. Initially, Rees did not pay. Eventually they reached an agreement where Rees' wife agreed to pay £300 in satisfaction of the entire debt. D & C Builders was desperate and nearing bankruptcy, so they accepted the money. Rees' wife was aware of the company's difficult position and threatened to break the contract unless they provide a receipt stating that payment was "in completion of the account." The company later sued for the outstanding balance. Lord Denning writing for the Court, found in favour of D & C Builders Ltd. Denning considered *Pinnel's case*[19] which stated that settlement for less than full amount would not eliminate the full claim. However, he noted, the case had been criticized in *Couldery v Bartum.*[20] Instead, Denning relied upon equity

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18 [1976] 1 Lloyd's Rep. 98.

19 (1602) 5 Co Rep 117a (otherwise known as Penny v Core). The plaintiff sued the defendant for the sum of £8 10s. The defence was based on the fact that the defendant had, at the plaintiff's request, tendered £5-2s-2d before the debt was due, which the plaintiff had accepted in full satisfaction for the debt.

The rule in *Pinnel's case* is that "payment *of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the Judges that by no possibility, a lesser sum can be a satisfaction to the plaintiff for a greater sum: but the gift of a horse, hawk, or robe, etc. in satisfaction is good ... [as] more beneficial to the plaintiff than the money"* The rule is obiter; in *Pinnel's case* itself the debt was paid before the date of satisfaction, which was considered good consideration. The decision was applied by the House of Lords in *Foakes v. Beer* [1884] 9 A.C. 605 to another part payment of debt. In Stilk v. Myrick (1809) S.C. 6 Esp. 129, where it was agreed that crewman would be given additional wages to help guide the ship home, the rule was held to apply to non-monetary obligations: the Court of Common Pleas held that the crewmen did no more than they were originally contracted to do, and could not recover the additional payment that had been agreed. Pinnel's case and the line of authority that flowed from it was distinguished in the decision of Williams v Roffey Bros [1991] 1 QB 1, where the English Court of Appeal held that performing an existing obligation could be good consideration where it conferred some "practical benefit" above what was originally envisaged. In that case, it was held the a subcontractor who had asked for additional remuneration to do previously agreed work was enforceable, as avoid the subcontractor going into bankruptcy (which otherwise would have happened) constituted a practical benefit). The reasoning in Williams v Roffey Bros has been doubted in subsequent cases, although it has not been overruled.

20 L.R. Ch. D. 394, 399 (1880)

which precluded creditor from enforcing a legal right where there has been an accord. The accord cannot be made under pressure, as it was in the circumstances, at the insistence of Rees' wife. The tactics used by Rees' wife meant equity could not be relied upon.

In *Arrale v Costain Civil Engineering Ltd* the plaintiff had lost his left arm in an industrial accident in Dubai and had accepted a paltry sum in local currency, the full sum to which he was entitled under a local ordinance, "in full satisfaction and discharge of all claims in respect of personal injury whether now or hereafter to become manifest arising directly or indirectly from an accident which occurred on 3 July 1998." The issue was whether the release applied to claims for common law damages. Lord Denning, in agreement with Stephenson LJ (Geoffrey Lane LJ dissenting), held that it did not. But he also held that if, contrary to his view, the release did cover common law claims there was no consideration for the plaintiff's promise. As he put it (at p. 102):

> . . . I would say that, if there was a true accord and satisfaction, that is to say, if Mr Dohale, with full knowledge of his rights, freely and voluntarily agreed to accept the one sum in discharge of all his claims, then he would not be permitted to pursue a claim at common law. But in this case there is no evidence of a true accord at all. No one explained to Mr Dohale that he might have a claim at common law. No one gave a thought to it. So there can have been no agreement to release. There being no true accord, he is not barred from pursuing his claim at common law.

In English law fraudulent misrepresentation with tenets of clear breach of good faith has always given rise to the possibility of adequate remedies.[21] However, less obvious breaches of good faith, at both the formation and performance stages, did not have the same treatment and have mostly gone without remedy. The unconscionability of the bargaining power was at a later stage invoked to remedy unfairness and unreasonableness in the English legal jurisprudence. A distinction, however, is needed to be made between a new general rule on unconscionable bargains, based on the principle of good faith, and long-established rules of common law and equity. In common law and equity a contract may be vitiated if anything therin have been obtained by fraud, duress, undue influence

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21 Spencer, Bower and Turner, *The Law of Actionable Misrepresentation*, 3rd edition, (1974), ch.XI.

and mistake. These rules, although intends to enhance the purpose of law to do justice and ensure fairness as opposed to strictly laid down legal principles, these are not necessarily good faith rules. They can be termed as normal or general principles of law, and even when developed to include new situations of inequality of bargaining power such as 'economic' duress they remain part of the normal body of rules.

As stated earlier, certain other jurisdictions have felt the necessity for the parties to act in good faith even at a pre-contract stage. This means conducting negotiation in good faith. However, as also stated earlier, this is not the case with English law. The case law and the statutes do lessen under English law the necessity to act in good faith at a pre-contract stage. Moreover, it is difficult to categorize any breach at a pre-contract stage. For example, an unreasonable last-minute withdrawal from negotiations or unjustified breaking of the deal is the kind of actions or conduct which might constitute breach of duty to negotiate in good faith.

The basic principle of freedom of contract,[22] and the absence of any legally relevant intermediate stage between contract and no-contract, makes it difficult to identify a possible cause of action for breaches of

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22 The law relating to freedom of contract refers to those choices available to the individual as to who they contract with and what they contract for and on what terms. It comes from the classical model of contract where an individualistic approach is of the highest importance. In the classical theory there is minimal state intervention.c *Atiyah* was central to the classical model. His fall came about when pragmatism, consumer welfarism and reliance took the place of the laissez faire approach and the bargaining model. The notion of freedom of contract has come under scrutiny as legislation has been passed in the UK that has implications on such 'freedom of choices'. There are many examples of statutory interference with the freedom of contract, for example in the fields of employment law, racial and gender discrimination. A wide variety of legislation was passed that helped shape the law of contract. *The Unfair Contract Terms Act 1977 and the Sale of Goods Act 1979* to name but a few. The law of contract, like the legal system itself, involves a balance between competing sets of values. Freedom of contract emphasizes the need for stability, certainty, and predictability, but, important as these values are, they are not absolute, and there comes a point where those most vulnerable need protection. The law began to recognise that not all parties have equal bargaining power as was previously thought. One particular group that were particularly affected were consumers. For this reason, new regulations such as the afore-mentioned examples were implemented. I think this has been of benefit to the English law. Not only does it ensure social justice, it redresses equality of bargaining power. This is particularly of benefit to those disadvantaged from the start.

good faith in the negotiation stage.[23] As it is normal that such breaches may often involve representations about future conduct of the parties themselves, it is difficult in general for a plaintiff to get any remedy since the defense of equitable estoppel will come into play which works as a shield and not as a cause of action.[24] In *Combe v Combe*, an ex-wife tried to take advantage of the principle that had been reintroduced in the *High Trees case*[25] to enforce her husband's promise to give her maintenance. The Court held that promissory estoppel could not be applied. It was only available as a defence and not as a cause of action. In this case Mr and Mrs Combe were a married couple. Mr Combe promised Mrs Combe that he would pay her an annual maintenance. Their marriage eventually fell apart and they were divorced. Mr Combe refused to pay any of the maintenance he had promised. Seven years later Ms Combe brought an action against Mr Combe to have the promise enforced. There was no consideration in exchange for the promise and so no contract was formed. Instead, she argued promissory estoppel as she had acted on the promise to her own detriment. At a trial the Court agreed with Ms Combe and enforced the promise under promissory estoppel. Lord Denning reversed the lower court decision and found in favour of Mr Combe.

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23 Cf. *Brewer Street Investments Ltd. v. Barclay's Woollen Co. Ltd.* [1953] 3 W.L.R. 869 at p.873 and 874.

24 *Combe v. Combe* [1951] 2 K.B. 215.

25 *Central London Property Trust Ltd v. High Trees House Ltd* [1947] K.B. 130; [1956] 1 All E.R. 256 (Note); 62 T.L.R. 557; [1947] L.J.R. 77; 175 L.T. 333 – sometimes simply referred to as the High Trees – is a High Court case decided by Mr Justice Denning (later Lord Denning) that helped establish the doctrine of Promissory estoppel in contract law in England and Wales. In 1937 *High Trees House Ltd.* leased a block of flats for a rate £2500/year from *Central London Property Trust Ltd.*. Due to the war and the resultant heavy bombing of London occupancy rates were drastically lower than normal. In January of 1940, to ameliorate the situation *High Trees House Ltd.* made an agreement with *Central London Property Trust Ltd.* in writing to reduce rent by half. However, neither party stipulated the period for which this reduced rental was to apply. Over the next five years, *High Trees* paid the reduced rate while the flats began to fill and by 1945 the flats were full. *Central London* sued for payment of the full rental costs from June 1945 onwards (i.e. last 2 quarters of 1945). Based on previous judgments in *Hughes v. Metropolitan Railway Co.* and *Birmingham and District Land Co. v. London & North Western Railway*, Mr Justice Denning held that the full rent was payable from the time that the flats became fully occupied in mid-1945, but stated 'obiter' that if *Central London* had tried to claim for the full rent from 1940 onwards, they would not have been able to. This 'obiter' remark was not actually a binding precedent, yet it essentially created the doctrine of promissory estoppel. This decision should be contrasted with *Foakes v. Beer*.

He elaborated on the doctrine from High Trees. Stating the legal principle, Denning wrote:

> where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him. He must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only by his word.

He stated the estoppel could only be used as a "shield" and not a "sword". In High Trees, there was an underlying cause of action outside the promise. Here, promissory estoppel created the cause of action where there was none. In this case, the court could not find any consideration for the promise to pay maintenance. While it may be true that the wife did forbear from suing the husband on the arrears for seven years, this forbearance was not at the request of the husband. Thus, if a remedy in any other branch of law, or more specifically in tort is not found, for instance, by an action for deceit or for negligent representation under the principle in *Hedley Byrne v. Heller*,[26] there may be no effective remedy at all in English law,[27] *Hedley Byrne v. Heller* is the decision of the House of Lords that first recognized the possibility of liability for pure economic loss, not dependent on any contractual relationship, for negligent statements. The basis of this liability was variously held to be an "assumption of responsibility" to the claimant, a "special relationship" between the parties, or a relationship "equivalent to contract". The bankers for Hedley Byrne (an advertising partnership) telephoned the bank of Heller & Partners Ltd. inquiring about the financial state and credit record of one of Heller's client companies, Easipower Ltd. Hedley Byrne was about to undertake some significant advertising contracts for them, and wanted to be sure of their financial security. Heller vouched for their client's record but qualified it by waiving responsibility, stating that the information was: "for your private use and without responsibility on the part of the bank and its officials." Hedley Byrne relied on this information and entered into a contract

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[26] [1963] 2 All E.R. 575.

[27] *Acrow Automation v. Rex Chainbelt* [1971] 3 All E.R. 1175 (CA).

with Easipower which went bankrupt soon afterwards. Unable to obtain their debt from the bankrupt, Hedley Bryne sued Heller for negligence, claiming that the information was given negligently and was misleading. In the end Umayr was liable. The court found that the relationship between the parties was "sufficiently proximate" as to create a duty of care. It was reasonable for them to have known that the information that they had given would likely have been relied upon for entering into a contract of some sort. This would give rise, the court said, to a "special relationship", in which the defendant would have to take sufficient care in giving advice to avoid negligence liability. However, on the facts, the disclaimer was found to be sufficient enough to discharge any duty created by Heller's actions. There were no orders for damages. *Acrow Automation v. Rex Chainbelt,* is important because it hints at an economic tort which may not be covered by the TULRCA 1992,[28] s. 219 immunity. Here there was no commercial contract at all, merely preliminary negotiations, and the defendant interfered only with the entering into of a contract. If this is tortious (and the authority is not particularly conclusive), then the tort falls outside s. 219. Acrow Automation (AA) had a contract with SI Handling Systems Inc. of Pennsylvania (SI) under which AA had an exclusive license for 5 years to manufacture the 'lo-tow' system. They could only do this by using a chain made by Rex Chainbelt (RC), which was closely associated with SI, but with whom AA had no contract. SI had a dispute with AA, and persuaded RC not to supply chains. This was a clear breach of contract by SI and AA obtained an interlocutory injunction. The issue was whether RC could continue to obey SI's instructions - the CA held not. Lord Denning said :- if one person, without lawful excuse, deliberately interfered with the trade or business of another, and did so by unlawful means, that was unlawful. Here it was unlawful for RC to obey SI's unlawful instructions, in breach of the injunction. This reasoning, if correct, extends general tortious liability beyond the protection of the TULRCA immunities. Under English law, an agreement simply to negotiate does not bind the parties, even to the limited extent of using their best endeavors to reach an agreement.[29] This is a classic instance where there may be a serious breach of good faith and other common law jurisdictions have invoked the principle to provide a remedy. In

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28 Trade Union And Labour Relations (Consolidation) Act 1992.

29 The Scaptrade, [1981] 2 Lloyds' Rep. 425, at 432.

Hoffman v. Red Owl Stores Inc.[30] Hoffman owned a bakery, but wanted to open a Red Owl store. Red Owl assured him that he could open one for $18,000. He started working on opening a store, which included selling the bakery, buying and later selling a small grocery store, paying the option on a lot in Chilton, renting a house in Chilton, and moving to Neenah. Then Red Owl starting raising the amount of capital they wanted from Hoffman to be able to open the store. Hoffman backed out of negotiations and sued Red Owl. The trial court found that Hoffman had acted to his detriment in reasonable reliance on Red Owl's promises, and awarded him reliance damages. The defendant appealed. On appeal, the judge upheld everything except for the damages for the sale of the small grocery store. The defendants appealed again. The issue in this case was should Wisconsin adopt § 90, and if so, it is applicable to the facts of this case? The Court held that insofar as it's necessary to prevent injustice, a promisor will be held to their promise if they reasonably expected that promise to induce reliance on the part of the promisee and they actually did so. The court finds that there was reliance and that the promise must be enforced in order to prevent injustice. The court also goes over the damages and finds them all reasonable except for the damages related to selling the small grocery store.

The House of Lords in *Walford v Miles*[31] maintained the approach which has existed in

England since the 1975 decision in *Courtney & Fairbairn Ltd v Tolaini Bros (Hotels) Ltd,*[32] where it was held by the Court of Appeal that *"the law ... cannot recognise a contract to negotiate.' Walford v Miles* was concerned with negotiations between parties for the sale of a photographic processing business in London. Walford wished to purchase Miles' business and during negotiations the two came to an arrangement. Walford agreed to provide a comfort letter from a bank in respect of the purchase price in return for which Miles agreed to terminate negotiations with any third party and not to consider any further proposals from other third parties. Despite the arrangement, Miles sold the business to a third party. Walford then brought an action against Miles for breach of their agreement. The House of Lords noted that ordinarily this would constitute what is called a

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30 133 N.W. 2d. 267 (1965).

31 (1992) 1 All E.R . 453(HL) .

32 [1975] 1 All ER 716.

'lock-out' agreement, which is enforceable provided that the duration of the 'lock-out' is certain. A 'lock- out' agreement, it was observed, is a negative agreement, whereby one person promises another that he will not negotiate, for a fixed period, with any third party. The House of Lords found that the agreement in this case was not enforceable. The 'lock-out' agreement was missing two essential elements which it required to be enforceable. The first was that it did not specify for how long the lock-out was to last; the second was that in the absence of any term in the agreement as to its duration, it did not contain a provision which would allow Miles to determine negotiations. Walford argued that in order to give the agreement business efficacy there must be an implied term that Miles would continue to negotiate in good faith. Further, because it was not specified in the agreement for how long the negotiations would continue, Walford contended that the obligation on Miles to negotiate must endure for as long as was *reasonably necessary for parties negotiating in good faith* to reach a binding agreement (that is, until there is a 'proper reason' to withdraw). The House of Lords held that the 'lock-out' agreement could not be enforced if enforcement required the existence of either a direct or indirect implied agreement to negotiate in good faith. Lord Ackner (with whom the other Lords agreed) observed generally, "the reason why an agreement to negotiate, like an agreement to agree, is unenforceable is simply because it lacks the necessary certainty."

Further, Lord Ackner noted:

> A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from these negotiations, at any time and for any reason. There can thus be no obligation to continue to negotiate until there is a 'proper reason' to withdraw. Accordingly, a bare agreement to negotiate has no legal content.

Earlier in a lucid dissenting judgment[33], Bingham L.J. emphasised that the courts would strive not to invalidate a provision for uncertainty and would, wherever possible, uphold commercial practices. He considered the 'lock-out' arrangement to be a separate undertaking which was not part of the continuum of negotiations which were

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33 In the Court of Appeal , [1991] 2 E.G.L.R. 185 .

subject to contract, rather it related to the machinery for conducting the negotiations. As such its terms were to be construed as negative in content, the defendant agreeing not to deal with any party other than the plaintiffs. His Lordship considered that:

> If any obligation by either party to negotiate is disregarded as legally ineffective, there remains a clear undertaking by Mr. Miles on behalf of himself and his wife, conditional on timely production of a comfort letter, not to deal with any party other than the plaintiffs and not to entertain any alternative proposal. If this undertaking was supported by consideration moving from the plaintiffs as promisees and was sufficiently certain to be given legal effect, I see no reason why it should not form part of a legally enforceable contract.

Although no time limit was prescribed for this 'lock-out', Bingham L.J. saw no obstacle in its remaining in force for a reasonable time which would end if the parties reached 'a genuine impasse'. On the facts, he was unable to accept that the defendant's reasons for ending the negotiations (which were never communicated to the plaintiffs) could be an impasse bringing the plaintiff's period of exclusivity to an end. This reasoning would, of course, indirectly subject the parties to a duty to negotiate in good faith but Bingham L.J. did not view this as an obstacle *"since it is without doubt what the parties intended should happen."* He unequivocally accepted the weight of authority which precluded any finding of a valid contract to negotiate in good faith but, although acknowledging the difficulties inherent in enforcing such a contract, he was "not ... persuaded that the concept was impossible." His Lordship continued:

> such a contract were recognized, breach could not of course be demonstrated merely by showing a failure to agree, and if negotiations were shown to have broken down it might be necessary for the court to decide whether the parties had reached a genuine impasse or whether one or the other party had for whatever ulterior reason aborted the negotiation. This could be hard to decide, but no harder than other matters which regularly fall for judicial decision.

The House of Lords tried to make a clear distinction between 'lock-out' and 'lock-in' agreements. It was held that a negative 'lock-out' arrangement could be enforceable if it provided expressly for the duration of the 'lock-out' and was supported by consideration but that the parties could never be 'locked-in' to positive negotiations by such a contract as it would amount to an uncertain and unenforceable contract to negotiate. Moreover, there could be no implied term to

negotiate positively subsisting for a reasonable period of time in a 'lock-out' contract. Lord Ackner thus decided that an agreement to negotiate positively was not recognized by English law. He thought that the inherent difficulties were that the parties could be under no absolute obligation to finalize a contract and neither would know when he could legitimately end the bargaining. Moreover, he emphasized that a court could not police such an agreement as it would be impossible to decide whether there were, on the facts, proper reasons for terminating the negotiations. The possibility of good faith being the pivotal determinant factor in negotiations was vilified by Lord Ackner in the strongest terms:

> How can a court be expected to decide whether, subjectively, a proper reason existed for the termination of negotiations? The answer suggested depends upon whether the negotiations have been determined 'in good faith.' However, the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiation is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations.

The essence of Lord Ackner's reasoning appears to be, first, that the duty to negotiate in good faith is inherently 'inconsistent with' and 'repugnant to' the adversarial position of the parties when involved in negotiations, and secondly ,that performance of the obligation cannot be policed. As to the first of these points, it is clear from what Lord Ackner stated earlier that this inconsistency or repugnancy does not exist if one party or both parties have undertaken to use their best endeavors to agree. What he calls 'the necessary certainty' then exists. It also clear that the Privy Council in the *Queensland Electricity Generating Board v New Hope Collieries Pty. Ltd*[34] must have thought that there was no inconsistency or repugnancy involved where the parties impliedly undertook to make reasonable endeavors to agree. Yet a best endeavors negotiation or a reasonable endeavor negotiation is still a negotiation. What the parties do, however, by undertaking to use their best endeavors to impose reasonable restraint on their 'adversarial position.' Moreover Lord Ackner heavily relied on the *Courtney & Fairbairn Ltd v Tolaini Bros (Hotels) Ltd,* [35] where the reason given by Lord Denning M.R. for a contract to negotiate in good faith

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[34] (1989) 1 Lloyd's Rep. 205.

[35] [1975] 1 All ER 716.

having no binding force is that the court could not estimate damages because no one could possibly tell whether the negotiation will be successful or not. This should be contrasted with the case of *Allied Maples Group Limited v Simmons & Simmons*[36] where, Hobhouse L.J. stated that where parties are engaged in negotiations on the detailed terms of a commercial deal upon which they are both agree in principle and from which both are expecting to gain, it is in no way unrealistic to conclude that meaningful negotiations are possible. Further, in *Walford v Miles* Lord Ackner asserted as a law of nature that duty to negotiate in good faith is 'unworkable in practice' or is inherently inconsistent with the position of a negotiating party and it is impossible for the court to police . If that was correct, one would expect it to hold good for other cases also. But in *AT&T Corp. v Saudi Cable Co.*[37] Lord Woolf M.R. accepted that New York law recognizes a contract to negotiate in good faith as a binding contractual obligation. Putting to one side the 'subject to contract' complication in *Walford v Miles*, it is difficult to see who benefits from the decision to apply the rule that an agreement to negotiate is not in law an effective contract, in cases where there is consideration for the promise. If businesspeople are prepared to reach such agreements, why should the law not enforce them? Moreover, it seems that the relevant US cases were not cited in *Walford v Miles*, the only case that was cited was *Channel Home Centers, Division of Grace Retail Corp. v Grossman* [38] which Lord Ackner was able to distinguish because it concerned an obligation to use best endeavors, as opposed to an obligation to negotiate in good faith. The House of Lords was not referred to *Teachers Insurance and Annuity Association of America v Tribune Company*[39] which indisputably concerned an obligation to negotiate in good faith. The facts were also similar to those in *Walford v Miles*, the main terms of the deal had been agreed between the parties on a subject to contract basis. *Teachers Insurance* concerned a commitment letter for a loan which Teachers, as would be lender, sent to Tribune Company as would be borrower. It was held by the Court that Tribune Company was obligated in good faith to conclude a final agreement within the terms specified in the commitment letter. Lord

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36 [1995] 1 WLR 160.

37 [2000] 2 All ER (Comm.) 625.

38 795 F . 2d . 291 (1986).

39 670 F Supp. 491(1987) .

Ackner's pronouncement that 'the concept of a duty to carry on negotiation in good faith is inherently repugnant to the adversarial position of the parties' should now be understood as expressing a rule of construction. An undertaking to negotiate in good faith is to be construed as an agreement to renounce purely adversarial negotiation in the following factual undertaking: A responsibility to begin negotiation in a clearly defined manner and have the necessary involvement in the process of contract negotiation. An open mind to consider each other suggestion for resolution of any dispute that might rise in negotiation process or likely to crop up in a later stage of the contract. Particularly in terms of valuation, pricing and title rights the parties should not take undue advantage of each other and keep each other in dark about known fact which have a direct bearing on the negotiation process.[40]

Cheshire and Fifoot[41] hold that the "common commercial device of a 'letter of intent' which indicates that one party is very likely to contract with another is also a possible source of non-actionable breaches of good faith under existing English law". These issues can also be governed under a general rule requiring negotiations in god faith.

Good faith, in the sense of 'honesty' can be both relevant and irrelevant in considering the legality of a contract. Considerations of public policy at times do require that the innocent party who has acted in good faith should nevertheless be penalized.[42] In this referred case of *Nash* it was held that a contract for the use of unlicensed vehicles is prohibited despite that intentions of the parties. The courts the courts would be always influenced by the facts and considerations of fairness, justice, reasonableness, however it would be rare occasions when courts would permit a party who entered into an illegal contract in good faith or honestly" to recover damages. The cases mostly are cases to recover money paid or property transferred under an illegal contract. Thus, the rules relating to good faith that we find in place today are mostly positive laws in branches of law which have

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40 http://209.85.165.104/search?q=cache:HUN_3snJX18J:employment.indlaw.com/publicdata/articles/article214.pdf+Roger+Brownsword+%2B+good+faith&hl=en&ct=clnk&cd=9&gl=uk.

41 Cheshire and Fifoot, op. cit., p. 39; S.N. Ball, "Work carried out in pursuance of letters of intent", 99 L.Q.R. 572.

42 *Nash v. Stevenson Transport Ltd.* [1936] 2 K.B. 128.

enunciated in them the principles of good faith rather than making direct principles of good faith as a general rule. Under English law of contract, good faith requirement is incorporated to for assessing performance or breach of the parties in the branches of contract law. Therefore, separate rules for good faith are not called for.

However, as mentioned earlier, there are situations where the existing rules cannot deal with particular manifestations of unfair or unreasonable conduct, and the general principle of good faith may be invoked. In *Panchaud Frères SA v. Etablissements General Grain Co.*,[43] Winn, L.J. suggested that "there may be an inchoate doctrine stemming from the manifest convenience of consistency in pragmatic affairs which would prevent a party from 'blowing hot and cold' in commercial conduct". In that case, the defendant accepted without objection shipping documents which clearly showed that the goods had been shipped out of time in breach of an express term of the contract. When the goods arrived, the defendant rejected them on another ground which was later held to be insufficient and only three years later sought to justify rejection on the ground that the goods had been shipped out of time. To have allowed rejection after such a long time for a ground which might properly have been raised immediately would be inconsistent with 'a requirement of fair conduct. Winn LJ suggest that there must be actual knowledge and that constructive notice would not be sufficient to establish waiver in the context of commercial law. The plaintiff here relied and acted upon the concession that was extended by the defendant by way of an earlier letter. And what the plaintiff did was entirely within the purview of what Lord Denning LJ said in the case of *Charles Rickards Ltd v. Oppenheim*[44] where his Lordship said that for a waiver to operate effectively, the party to whom the concession was granted must act in total reliance of that concession. The general rule that a party can reject goods, or terminate a contract of employment, for breach, which is a material one and although he was not aware of that particular breach at the time, and relied instead on some other alleged breach which in fact is insufficient, is understood to be well settled.[45] It was, however, overridden in Pachaud Frères because the principle

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43 [1970] 1 Lloyd's Rep. 53.

44 [1950] 1 KB 616 at 623; [1950] 1 All ER 420, at 423, CA.

45 *Arcos Ltd. v. E.A. Ronaasen & Sons* [1933] A.C. 470.

of good faith required it.[46] A great deal of discussion in made in the case of *Director-General of Fair Trading* v. *First National Bank plc.*[47] "The Unfair Terms in Consumer Contracts Regulations 1994 ("the 1994 Regulations") were adopted to implement Directive 93/13/EEC. These Regulations (which have since been replaced with the Unfair Terms in Consumer Contracts Regulations 1999 ("the 1999 Regulations") provide, *inter alia,* for the challenge of terms perceived as unfair by a public body with an interest in consumer protection. This has been done successfully over the past five years by a special unit within the Office of Fair Trading (OFT). The 1999 Regulations enable other bodies with an interest in consumer protection to challenge unfair terms. One element of this power is that the Director-General of Fair Trading (DGFT) may apply to the courts for an injunction to prevent the continued use of an unfair term where the business using the particular term fails to agree to remove this after receiving the OFT's objections. The decision in *Director-General of Fair Trading* v. *First National Bank plc* is of interest for a number of reasons: first, the case is the result of the first application by the DGFT for an injunction to prevent the continued use of a term which is regarded unfair in consumer contracts. Secondly, the decision offers important guidance on the interpretation of two concepts, that of the "core term" and the meaning of "good faith", for the purposes of the Regulations. The case arose over the disputed fairness of a condition in a standard form for regulated consumer credit agreements used by First National Bank plc ("the bank"). Under the agreement, a consumer who had taken out a loan with the bank had to repay this by monthly installments. Clause 8 of the agreement permitted the bank to demand payment of any installments which were more than 7 days late, and to demand repayment of the full loan amount should the consumer fail to meet the bank's initial demand for the unpaid installment. The final sentence of this condition stated that "Interest on the amount which becomes payable shall be charged . . . until payment after as well as before any judgment (such obligation to be independent of and not to merge with the judgment)." This sentence was objected to by the DGFT. The effect of this condition was that when the bank obtained judgment against a consumer, the consumer would have to pay interest on the total amount still outstanding as

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46 *Waren Import Gessellschaft Krohn & Co. v. Alfred C. Jeopfer* (The "Vladimir Ilich") [1975] 1 Lloyd's Rep. 322 at 329.

47 [2000] 2 W.L.R. 1353, (C.A.) (Gibson, Waller and Buxton L.JJ.

well as any interest accrued which was unpaid at the date of judgment. This goes against the objective of the Consumer Credit Act 1974, which provides that once judgment is given in consumer credit claims, no further interest may be charged by the lender. It is, however, possible to ask the court to order that interest will continue to be chargeable after judgment. The DGFT believed this term to be unfair, because it deprived the consumer of the protection under the Consumer Credit Act 1974 that no further interest may be charged after judgment when the court has extended the time allowed for repayment. Whether or not this provision is economically sound, the thinking behind this was to limit the financial difficulties of consumers who were already in serious debt. At first instance, Evan-Lombe J. refused to grant the injunction sought by the DGFT. He held that the term was not unfair for the purposes of the 1994 Regulations, and that the DGFT's application should be refused. The DGFT appealed. The Court of Appeal disagreed with the judge at first instance and allowed the appeal. Peter Gibson L.J., who delivered the only judgment in this case, held that the term in question was not a core term and could be assessed for its fairness, and, furthermore, that the term in question was, in fact, unfair. Both at first instance and in the Court of Appeal, two issues had to be considered: the first was whether the term in question was to be regarded as a core term, in which case it would not be open to challenge under the 1994 Regulations. Secondly, if it was not a core term, then the question was whether it was unfair within the meaning of the Regulations. These issues will now be examined more closely. The core terms were: Regulation 3 (2) of the 1994 Regulations states that: In so far as it is in plain and intelligible language, no assessment shall be made of the fairness of any term which (a) defines the main subject matter of the contract, or (b) concerns the adequacy of the price or remuneration, as against the goods or services sold or supplied. Thus, a term which merely describes the reason for the contract (*e.g.*, "A Regulated Consumer Credit Agreement between Bank X and Consumer Y"), as well as the "price" for this (*e.g.* "19.5% a.p.r.") would not be assessed for its fairness. The Bank had claimed that Clause 8 was a core term. Its argument was as follows. If the bank obtained a judgment against a consumer following a default in repaying the loan, this clause provided the new rate of interest which the consumer would have to pay. Therefore, this was a term which defined the price to be paid for the service (*i.e.* the loan) supplied. At first instance, Evans-Lombe J.

rejected this. He suggested that a consumer seeking to obtain a loan from a bank would not regard the default provisions in the loan agreement as important terms of the contract in the sense that these provisions would influence the consumer in deciding whether or not go ahead with the loan agreement. The important term for the consumer would be the clause which set the rate of interest he would have to pay if he repaid the loan in instalments by the due date each month. This term would indicate to him the overall cost of the loan facility. Therefore, Clause 8 was not a core term, and could be assessed for its fairness. The Bank raised this issue again when the DGFT's appeal was heard by the Court of Appeal. It argued that any term in a consumer credit agreement which set the amount of interest and the period over which this was payable (both before and after a judgment) constituted a core term because it contained the price payable for the loan facility. It also referred to the Scottish case of *Bank of Scotland* v. *Davis*[48] as authority that any contractual term which deals with the payment of interest was a core term of that contract. The DGFT counter-argued that Clause 8 was not a core term for two reasons: first, the clause only took effect when there had been a breach of contract, *i.e.*, a failure by the consumer to repay the loan in accordance with the terms of the loan agreement. Core terms, however, only define the rights and obligations of the parties in the due performance of the contract. Secondly, the clause did not specify the rate of interest payable, but rather set out the circumstances in which interest is to be paid. The Court of Appeal agreed with the DGFT. It held that the issue was not whether the term would be regarded as core term under the ordinary rules of contract, but whether the term fell within the definition of Regulation 3(2). As the clause neither defined the main subject matter of the contract, nor the adequacy of the remuneration, it did not fall within that definition and could therefore be assessed as to its fairness.

Having thus decided that clause 8 could be assessed as to its fairness, the Court then had to decide whether the clause was fair or not. Under Regulation 4(1), a term is unfair if, "contrary to the requirements of good faith, [it] causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer". It was, first of all, necessary to consider the meaning of "good faith". In interpreting the "good faith" principle under the

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48 [1982] S.L.T. 20.

Regulations, both the judge at first instance and the Court of Appeal, referred to academic commentary, and notably an essay by Professor Hugh Beale. At first instance, Evans-Lombe J. decided to apply common sense before considering the legislative framework. He suggested that a consumer would expect to have to pay the normal rate of interest on the loan amount, whether or not a judgment had been obtained against him by the bank. Furthermore, the judge suggested that a consumer would be surprised to discover that his financial situation would improve after a judgment if the bank were not allowed to charge interest: Equally, it seems to me, that if he was informed that . . . if he defaulted in making the payments required by the agreement, and judgment was obtained against him, he would . . not have to pay interest at all . . . he would have been surprised that his financial obligations would become less onerous as the result of a judgment. In other words, the term complained of by the DGFT would not change the consumer's position. Evans-Lombe J. then referred to Bingham L.J. in *Interfoto Library Ltd.* v. *Stiletto Ltd.*[49], who observed that good faith at least required a business to deal openly and fairly with its customers. He then went on to draw on "several academic commentators on this area of law" and suggested that a breach of the requirement of good faith could take two forms, "substantive" and "procedural" unfairness. The former involved the imposition of "an onerous term out of proportion to a reasonable assessment of the obligations of the parties under the contract by the supplier on the consumer". The latter referred to instances where a consumer becomes subject to an onerous term, although not necessarily substantively unfair, affects the balance of obligations under the contract to the consumer's detriment. This is what has also been referred to as "unfair surprise". Based on this interpretation, the judge concluded that there was no infringement of the requirement of good faith. He held that the only substantive advantage of which consumers may have been deprived by Clause 8 was the fact that no interest would normally be imposed after a judgment. The procedural disadvantage could only have been that consumers would have been unaware of the clause, but the judge found that on the evidence before him, no such disadvantage had been made out. Therefore, the clause did not infringe the requirement of good faith. The Court of Appeal took a similar approach to applying the "good faith" requirement.

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49 [1989] Q.B. 433, [1988] 1 All E.R. 348.

Peter Gibson L.J. first similarly referred to Bingham L.J. in *Interfoto*, and then to Professor Beale's essay, which discusses the procedural and substantive elements of the "good faith" concept. He then observed that the element of "significant imbalance" in Regulation 4(1) appeared to overlap substantially with that of the absence of good faith. The Court of Appeal disagreed with the judge's application of the "good faith" requirement. It held that the assessment of unfairness was to be done purely by reference to the legislative scheme. With reference to Evans-Lombe J.'s "common sense" approach, Peter Gibson L.J. observed: [W]e are far from convinced that a borrower would think it fair that when he is taken to court and an order for payment by installments has been tailored to meet what he could afford and he complied with that order, he should then be told that he has to pay further sums by way of interest. The term was, therefore, unfair and the appeal was allowed. The DGFT sought an injunction that would have operated to prevent the use of the term in dispute not just in the agreement in question, but generally, with the effect that agreements offered by other lenders which contained this term would automatically be regarded as unfair and could no longer be used. The Court of Appeal was only willing to grant a limited injunction, but it encouraged the parties to come to an arrangement by which the term in question would be amended. Following the handing-down of the judgment, an undertaking was agreed and no injunction was ultimately granted.

The judgment of the Court of Appeal is particularly welcome for its clarification of the scope of the 'good faith' principle. It is now clear that 'good faith' in the context of the 1994 Regulations is to be equated with open and fair dealing, and has a procedural and substantive element. But is this an acceptable interpretation of the 'good faith' principle? The literature on 'good faith' in English law has grown rapidly in the last five years or so, undoubtedly motivated, at least in part, by the adoption of the EC Directive on unfair contract terms. Thus, Brownsword[50] has similarly suggested that one possible interpretation of 'good faith' could be by reference to the standards of fair dealings of the society of which the contracting parties are members – in his words, a 'good faith requirement'. However, Brownsword favours an objective standard of good faith, which would be based on the standards of fair dealing and co-operation as

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50 Brownsword, Roger, "Two Concepts of Good Faith", (1994) 7 *JCL* 197.

prescribed by the most defensible moral theory. He prefers an objective criterion – a 'good faith regime'. Yet, he concedes that English law at present seems to be developing a 'good faith requirement', and this decision of the Court of Appeal confirms this. This interpretation of the concept and its most likely prevalence over a normative interpretation was also suggested by John Wightman. His concept of 'contextual good faith' is based on what the parties to the contract would reasonably expect particularly reasonable standards of fair dealing. Whereas Wightman also finds merit in an objective 'good faith' concept, he too concedes that English contract law would develop the concept more in line with an interpretation as open and fair dealing. Thus, the Court of Appeal's judgment confirms academic opinion on how the 'good faith' concept would develop in English contract law."[51]

The law of remedies in English law, however, puts huge restriction on abuse of rights and hence does compensate to some extent the absence of a general principle of good faith. It is to be remembered that remedies is the core of a contractual suit n most cases and hence is an influential mechanism. This is more so for the fact that remedies are controlled by the courts and because the parties' freedom of contract in this field is limited. We need to distinguish here between the discretionary (equitable) remedies and non-discretionary (legal) remedies and self-help.

Discretion, as the word suggest, refers to the withholding power of the court to allow a relief. A difficult question arises when the rights given are absolute and the remedy is essentially discretionary. Some of the legal paradoxes are to be found where a legal right is defined as absolute, while the remedy for its protection is discretionary.[52] In the exercise of this discretion, the court may deprive the part of the ability to do that which in theory it is entitled to do, namely, to insist upon his 'absolute' right in disregard of the circumstances and interests of others. The plaintiff's unfairness may lead to the denial of specific performance not only if it occurred at the formation of the contract, but also when it happened during its performance. The court's power

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51 http://209.85.165.104/search?q=cache:PccDkaCTAiUJ:www.ntu.ac.uk/nls/centreforlegalresearch/nlj_recent_editions/8371.pdf+John+Wightman+%2B+good+faith&hl=en&ct=clnk&cd=5&gl=uk

52 Sherwin EL, "An Essay On Private Remedies", (1993) 6 *Can J. of Law and Jurisprudence* 89.

to withhold discretionary remedies is, therefore, an important tool of controlling unfair conduct. It is a particularly a great weapon where the alternative non-discretionary remedy, usually, damages, is unavailable or of little value, as where the plaintiff suffered no loss or where the loss cannot be proved.[53] Here, Lord Parker observed that "indeed, the dominant principle has always been that equity will only grant specific performance if, under all the circumstances, it is just and equitable so to do." The problem becomes more complex where the non-discretionary remedies, which the plaintiff has at his disposal, can potentially be effective. Sherwin, in "Law and Equity in Contract Enforcement" observes that "Specific performance (discretionary remedy) and damages (non-discretionary remedy) are meant to serve precisely the same purpose".[54] Both intend to put the innocent party in the position he would have been in, had the contract not been breached[55]. The difference is a general knowledge of any law student that the specific enforcement grants the plaintiff the promised performance in specie, while damages intend to provide him with the exact equivalent in monetary terms. Although these two remedies may in theory serve the same purpose, they can differ considerably in effect. The extent of the difference depends upon the rules on the appraisal of the damages. The principles of awarding damages attempt to reduce the practical gap between specific performance and damages. Thus, although the remedy of damages is non-discretionary and English law does not recognize a general principle of good faith, the rules on damages often take good faith into account. This is sometimes reflected in the mode of calculating damages, and in other instances through the principle of mitigation.

Then, there is the issue of self-help. Atiayh[56] observes that the exercise of self-help enables the aggrieved party to obtain a remedy without resorting to an action in court. He goes on to state that self-help can be challenged in court as well, but it has the advantage of moving the duty to initiating litigation to the other party. There are two types of self-help. Physical help takes such forms as, for example, reception of stolen goods. Legal self-help refers to an extra-judicial legal act which affects the rights of the parties. A typical example is the termination of

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53 *Shell UK Ltd. v. Lostock Garage Ltd.* [1976] 1 WLR 1187, at 1202.

54 (1991) *50 Maryland LR* 253, 260

55 Farnsworth, *Contracts*, 2nd edition, (1990) pp. 826-9.

56 Atiyah, PS, *An Introduction to the Law of Contract*, 4th edition (1989).

a contract on the ground of breach. The question of physical self-help arises rarely in the context of contractual rights. Legal self-help is, however, quite common in contractual contexts. Legal self-help consists of forfeiture, termination and the right to 'earn' the contractual payment. Typically, forfeiture is a self-help remedy. Where the forfeited interest greatly exceeds the loss suffered by the aggrieved party, the forfeiture is severe. Moreover, the option to terminate the contract or to keep it in force is an option to exercise legal self-help at the instance of the sufferer. The innocent party is given a power which he is free to use without resorting to court. The basic position of English law is that the party in breach cannot dissolve the contract. This privilege is reserved to the injured party. But as the power to terminate a contract can be abused, so can the power to keep it in force. A typical case in which the issue arises is where the contract is kept in force so that the injured party can gain the promised performance.

Concluding, good faith is a vital feature of legal systems. Despite the fact that it isn't adopted by the English legal system, it is implied and applied in many situations in combination with the other remedies, sometimes. It is a fundamental principle directly related to honesty, fairness and reasonableness aiming to improve legal rules. It seems that the signs of traditional English hostility towards good faith might be abating. The courts have adopted a more sympathetic stance on a number of occasions recently and the express references to good faith in the Unfair Terms in Consumer Contracts Regulation 1999 and the Commercial Agents (Council Directive) Regulations 1999 will require English judges to use the language of good faith. While English law presently does not recognize a duty of good faith, it can be very firm in its treatment of those who act in bad faith. Secondly, many if not most of the rules of English contract law do in fact conform to the notion of good faith. It has been acknowledged that the foundation of a general rule of good faith can be discerned in the common law dust but the courts have not been prepared to use these particular rules *'as the piles for building the principle of good faith.'*[57] Moreover, if English law is to embrace international conventions or to play role in the development of the Principles of European Contract, it must come to grips with the language of good faith. And in what is now a global

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57 *Timeload Ltd v British Telecommunication Ltd.* [1995] EMLR 472; *Balfour Beatty* Civil Engineering Ltd. v *Docklands Light Railways Ltd* (1996) 78 Build R L 42, p. 58 ; and *Re* Debtors (Nos 4449 and 4450 of 1998) .

economy, it may not be possible for English contract law to resist the commercial and economic pressure in favor of an increasingly unified law of contract and unified law of contract will almost certainly contain a significant role for good faith and fair dealing. Lord Steyn best reflects the present argument when he turns to criticise the narrow approach in *Walford v Miles*, claiming that a good faith principle is perfectly practical and workable. However, he emphasized :

> I have no heroic suggestion for the introduction of a general duty of good faith in our contract law. It is not necessary to. As long as our courts always respect the reasonable expectations of the parties our contract law can satisfactorily be left to develop in accordance with its own pragmatic tradition. ....After all, there is not a world of difference between the objective requirement of good faith and the reasonable expectations of the parties.[58]

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58 Lord Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 *LQR* 433 p. 439.

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