

# The Regulation of Fairness and Duty of Good Faith in English Contract Law: A Relational Contract Theory Assessment

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## Abstract

One of the first things a student of English contract law learns is that contracting parties are under no obligation to be 'fair'. However numerous exceptions are encountered which undermine this general principle. Mistake, duress and misrepresentation are instances when law mitigates unfairness. But then one finds more challenging exceptions: the 'snapping up principle', increased protection in consumer contracts, and a steady line of eminent judges suggesting that the law should and does do more than merely ascertain the subjective intentions of the parties.

Social expectations of fairness permeate far into legal and economic relations. Law, society and economy all share a part in regulating contractual fairness. At present, to the detriment of social and economic norms, traditional English contract law denies both its power to regulate fairness and any duty on parties to deal with good faith and honesty. This article shows how good faith is regulated implicitly in a piecemeal fashion, by exceptional doctrines of mistake, duress and unconscionability and misrepresentation and the Unfair Contract Terms Act (UCTA) 1977. It is advocated that English contract law recognise its role in regulating fairness. This encompasses an explicit and overriding obligation to contract in good faith based on objective standards. Applying the relational contract theory lens of Émile Durkheim and, more recently, David Campbell, this article argues that the current approach has led

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to uncertainty and unfairness. Their socio-legal theory illuminates how contract law is based on cooperation and voluntary consent. At a time of mounting pressure from international common law and EU law to adopt a general doctrine of 'fair and honest dealing', this paper challenges traditional English contract law to be honest with itself and realise its purpose of regulating fairness by objective means.

**Keywords:** English contract law, socio-legal studies, principle of fairness, fair and honest dealing, relationalism, Durkheim.

## I. INTRODUCTION

English contract law implicitly regulates fairness. The omission of an overarching and explicit doctrine of fair and honest dealing produces legal uncertainty. This problem is a consequence of a misunderstanding of the cooperative nature of the contractual agreement on the objective community values of fairness, and trust. This article submits that the current protection from excessive exploitation is inadequate and should be replaced by a more clear, consistent and just approach aligned with social norms. In advocating for an acknowledgement of the fundamental role of fairness, this article counters traditional assumptions of contract law. Classical contract theory is misguided in conceiving judgement-making as an assessment of the subjective intentions of the contracting parties. Inconsistent decisions and legal uncertainty follow from this presumption. Instead, courts should recognise contract law as having an objective standard of fairness. This insight stems from a relational contract theory assessment.

This article begins in section 2 with an exploration of the legal debates on whether contract law regulates fairness by a doctrine of good faith. The third section provides a theoretical framework of Durkheim and relational contract theory employed throughout the article. The current laws to defeat excessively exploitative contracts are explored in section 4 on the doctrine of mistake, section 5 on duress and unconscionability and section 5 on misrepresentation. These doctrines are referred to here as 'exceptional principles,' since they produce a nullifying or vitiating effect on the contract. 'Exceptional principles' is favoured over the term 'counter-principles'

used by the critical legal theorists Unger<sup>1</sup> and Wilhelmsson<sup>2</sup> to represent a dialectic conflict of laws. The phrase ‘exceptional principles’ in this paper appeals to the more nuanced relationalist theory approach to reveal how fairness is latent in the current piecemeal approach, despite the frequent denial of a specific doctrine of fair and honest dealing. In section 7, the Unfair Contract Terms Act (UCTA) 1977 sheds light on an alternative method of judging fairness explicitly. The statute provides positive protection against consumers’ naiveté and unequal bargaining position in contract law and protects business contracts on standard terms. The final section draws together the theoretical and practical debates on good faith and assesses the potential future of an overriding fairness principle.

## II. DEBATES ON THE PRINCIPLE OF FAIR AND HONEST DEALING

English law has, characteristically, committed itself to no such overriding principle [of fair open dealing] but has developed piecemeal solutions in response to demonstrated problems of unfairness.<sup>3</sup>

The oft-quoted passage of Lord Bingham voices the widespread assumption that runs through English contract law discourse, rejecting a doctrine of explicit fairness or good faith.<sup>4</sup> ‘A duty of good faith is... inherently inconsistent with the position of a negotiating party.’<sup>5</sup> In this traditionalist thought, each party attempts to attain the best bargain at the expense of the other party. Thus, negotiating by a standard of good faith may not be in the interest of the parties. Good faith is a manifestation of the fair and honest dealing principle, as explicit in the US legal definition of good faith as factual honesty.<sup>6</sup> However the US standard fails to cover

<sup>1</sup> R Unger ‘The Critical Legal Studies Movement’ [1983] 96 Harv L Rev 561, 646.

<sup>2</sup> T Wilhelmsson, *Critical Studies in Private Law: A Treatise on Need-Rational Principles in Modern Law* (Springer 1992) 3–32.

<sup>3</sup> *Interfoto* (n 3) 439 (Bingham LJ).

<sup>4</sup> H Beale, *Chitty on Contracts* Vol 1 (31<sup>st</sup> edn, 2012 Sweet & Maxwell) [1-039].

<sup>5</sup> *Walford v Miles* [1992] 1 All ER 453, [46] (Lord Ackner).

<sup>6</sup> The US Uniform Commercial Obligation Code (2012) Art 1 Part 1 §1-304 obliges parties to act in good faith when performing and enforcing contracts, and Art 1 Part 2 §1-203 defines good faith as factual honesty. This duty is also recognised

the negotiation stage. Judges in the UK<sup>7</sup> argue against adopting a requirement of fairness or ‘adequacy,’ by asserting that they only assess the ‘sufficiency’ of contract. Yet this traditionalist position expressed in *Walford v Miles*<sup>8</sup> contravenes the belief that parties have freedom to insert fair terms into the contract.<sup>9</sup> In *Walford v Miles*, the court denied any obligation to contract on good faith, despite that the parties expressly sought to deal on good faith. For Lord Ackner, such a duty of good faith would be ‘unworkable in practice.’<sup>10</sup> Reacting to the harsh judgement, Lord Longmore in *Petromec v Petroleo*<sup>11</sup> stated in *obiter* that if good faith is an expressed obligation, it should be enforceable.

Since Lord Bingham pronounced the piecemeal approach of principle of good faith in *Interfoto* in 1989, the incremental steps towards recognising an overriding principle have grown. Such a duty of good faith exists in international law<sup>12</sup> and European contract law,<sup>13</sup> which cannot be excluded. The influence of the success of the duty in European civil law and other common law jurisdictions cannot be understated, according to Bridge.<sup>14</sup> Recent judgements favouring a doctrine of good faith,<sup>15</sup> such as *Yam Seng*

in §205 of the Restatement (Second) of Contracts (1981).

<sup>7</sup> *Walford* (n 5) [46] (Lord Ackner); R Halson, *Contract Law* (2<sup>nd</sup> edn, Longman Law Series 2013) 164– 5.

<sup>8</sup> *Walford* (n 5), see also *Arcos v Ronaasen* [1933] AC 470.

<sup>9</sup> A Berg ‘Promises to Negotiate in Good Faith’ (2003) 119 LQR 357, 363.

<sup>10</sup> *Walford* (n 5).

<sup>11</sup> *Petromec v Petroleo Brasileiro SA Petrobras* [2005] EWCA Civ 891 [151]–[121]; E McKendrick, *Contract Law* (8<sup>th</sup> edn, Palgrave Macmillian 2009) 214.

<sup>12</sup> Vienna UN Convention on Contracts for the International Sale of Goods 2010, Art 7(1) states that the ‘observance of good faith in international trade’ is required.

<sup>13</sup> European statutes which refer to ‘good faith’ include the Unfair Terms in Consumer Contracts Regulations (UTCCR) 1999, SI 1999/2083, implementing the Unfair Terms in Consumer Contracts Directive (UTCCD) [1993] OJ L095; Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053; and the Principles of European Contract Law, Art 1.06(1).

<sup>14</sup> M Bridge, ‘Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?’ (1984) 9 Canadian Business Law Journal 385.

<sup>15</sup> English courts have applied a doctrine of good faith in the following cases: *Timeload Ltd v British Telecommunications plc* [1995] EMLR 459; *Philips Electronique Grand Publique SA v British Sky Broadcasting Ltd* [1995] EMLR 472; *Balfour Beatty Civil Engineering Ltd v Docklands Light Railway Ltd* [1996] 78 Build LR 42, 58; *Re Debtors (Nos 499 and 49950 of 1998)* [1999] 1 All ER (Comm) 149, 157–158).

*Pte Ltd v International Trade Corporation Ltd*,<sup>16</sup> indicate a positive step away from traditionalist denial of the doctrine.

Judges and academics continue the fervid debate into what a contractual legal requirement of 'good faith' would require. Lord Bingham in *Director General of Fair Trading v First National Bank plc*<sup>17</sup> proposed an objective and procedural criterion to test if consumers were unfairly taken advantage of when there is a 'significant imbalance' between the parties.<sup>18</sup> This would include the factors of 'necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2' of the Unfair Terms in Consumer Contracts Regulations 1999.<sup>19</sup> In comparison, Johan Steyn has called for an 'effective and fair framework for contractual dealings'<sup>20</sup> to 'ascertain whether the law does indeed compel demonstrable unfairness. . . [when] the *prima facie* solution to a problem runs counter to the reasonable expectations of honest men.'<sup>21</sup> The proposed Johan Steyn<sup>22</sup> framework may reach further than the Lord Bingham criterion in providing a necessary ethical standard akin to a general duty of good faith.

Debates on achieving social and contractual fairness in contract law can be divided in two general positions. One endorses classical economics with individualism and the other pro-state regulation with paternalism.<sup>23</sup> These positions carry political undertones and substantiate their position by selecting the cases or principles to support their desired end-states.<sup>24</sup> This paper reassesses the

<sup>16</sup> *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QBD).

<sup>17</sup> *Director General of Fair Trading (DGFT) v First National Bank plc* [2001] UKHL 52, [17] (Lord Bingham).

<sup>18</sup> *ibid.*

<sup>19</sup> *ibid.*; Unfair Terms in Consumer Contracts Regulations (UTCCR) (n 13).

<sup>20</sup> J Steyn 'Contract Law: Fulfilling The Reasonable Expectations Of Honest Men' (1997) 113 LQR 433, 434; *Director General of Fair Trading* (n17) [30] – [37] (Lord Steyn).

<sup>21</sup> *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 1 Lloyd's Rep 194, 196 (Lord Steyn).

<sup>22</sup> J Steyn, 'Contract Law: Fulfilling The Reasonable Expectations Of Honest Men' (n 20) 439.

<sup>23</sup> D Campbell, 'Relational Constitution of Discrete Contract' in David Campbell and Peter Vincent Jones, (eds) *Contract and Economic Organisation* (Dartmouth 1996) 61.

<sup>24</sup> D Campbell, 'Book Review of Exploitative Contracts by Rick Bigwood (OUP

foundations of these debates and argues in favour of a relational reconstruction of contract legal theory. Leftists like Wilhelmsson and Unger argue that by explicit, state-sanctioned regulation of fairness the exploited party or consumer is more protected.<sup>25</sup> A problem for aligning contract law with political ideology is the impending uncertainty that pandering to the ‘whims of the politically dominant hierarchy’ would bring.<sup>26</sup> Traditionalists, however, advocate for fairness standards to only exist in the alleged ‘subjective minds’ of the parties privy to that contract.<sup>27</sup> Relational contract theory provides a critique of both sides of the debate. As the following section details, relationalism captivates the essence of how contracts are regulated by social, political and market forces imbedded in human relations, regardless of whether they are recognised as ‘regulation’ in legal discourse.

### III. DURKHEIM AND RELATIONAL CONTRACT THEORY

To provide a theoretical framework to investigate how the courts regulate fairness, this paper adopts relational contract theory, stemming from Émile Durkheim.<sup>28</sup> Durkheim attacked the Classical view of contract:<sup>29</sup> a subjective ‘meeting of the minds’ of two atomistic individuals competing for economic self-interest. The dominant neo-classicalist and libertarian view represents this freedom of contract as a negative freedom from regulation. Privy of contract is considered to omit any external fairness principle. The ideal type is

the individual who has an untrammelled power of disposition over his property, who recognises no superior but the state, and is not bound by anything but the contracts he has entered

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2003) (2005) 61 CLM 243, 245.

<sup>25</sup> Wilhelmsson, *Critical Studies in Private Law...* (n 2); R Unger *The Critical Legal Studies Movement* (Harvard University Press 1986)

<sup>26</sup> S Wheeler and J Shaw, *Contract Law: Cases, Materials and Commentary* (OUP 1994) 116.

<sup>27</sup> R J Pothier, *Treatise on Obligations* (A Strahan 1806).

<sup>28</sup> É Durkheim (trans. W D Halls), *The Division of Labour in Society* (Macmillan 1984).

<sup>29</sup> R J Pothier, *A Treatise on the Contract of Sale* (Legal Classics Library [1839]1762) 17–24.

into.<sup>30</sup>

Durkheim and Marx, echoed by Cohen<sup>31</sup> and Duncan<sup>32</sup> are resolute in their rebuttal: although men are legally free to contract, they are not economically or socially free. Dalton, a post-structuralist theorist, deconstructs the underlying assumption of traditional individualism that the contract is ‘private property’ of the parties.<sup>33</sup> In effect, the traditional theory suppresses public, societal aspects of the contract. The aim is to restrain ‘outside’ interference in private agreements and any imposition of a judicial standard of fair dealing, which is assumed to contradict the fairness ideals of the contracting parties.

The relational view stems from the socio-economic philosophy of Durkheim: ‘the contract is the symbol of exchange’, and conversely society is the basis of contract.<sup>34</sup> His analysis links the relationship between the parties to the economy and state. Contract law functions to increase modern, ‘organic’ solidarity by encouraging the cooperation and interdependence of social actors.<sup>35</sup> Like Durkheim, Max Weber identifies how the economic division of labour itself mandates a social co-operative exchange of goods.<sup>36</sup>

Law reflects substantive, social injustice – ‘there can be no rich and poor by birth without there being unjust contracts.’<sup>37</sup> Law embodies a social, economic, and ideological tool, which has the potential to exacerbate class conflict. Durkheim,<sup>38</sup> Weber<sup>39</sup> and

<sup>30</sup> E Ehrlich, *Fundamental Principles of the Sociology of Law*, trans. Moll (Arno Press, 1975 [1936]) 235; This is concept can be said to originate from Adam Smith’s ideal of the invisible hand, laissez-faire economics, see A Smith, *The Wealth of Nations* (Penguin Books, 1974[1776]); see also B Barry, *Political Argument* (rev. edn. Harvester Wheatsheaf 1990).

<sup>31</sup> M Cohen, ‘The Basis of Contract’ (1933) 46 Harv L Rev 553, 562.

<sup>32</sup> K Duncan, ‘Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power’ (1981-1982) 41 Md L Rev 563, 568.

<sup>33</sup> C Dalton, ‘An Essay in the Deconstruction of Contract Doctrine’ (1985) 94 Yale LJ 1011.

<sup>34</sup> Durkheim, *The Division of Labour in Society* (n 28) 80.

<sup>35</sup> *ibid* 316.

<sup>36</sup> *ibid* 78–82; M Weber, (G Roth and C Wittich, eds.) *Economy and Society* (Bedminster Press 1968).

<sup>37</sup> Durkheim, *The Division of Labour in Society* (n 28) 319.

<sup>38</sup> R Reiner, ‘Crime, Law and Deviance: The Durkheim Legacy’, in Steve Fenton, *Durkheim and Modern Sociology* (Cambridge University Press 1984) 178.

<sup>39</sup> Weber (n 36).

subsequent critical legal theorists<sup>40</sup> reflect on this ideological power of law to reinforce social hierarchies. These theorists assert that in order to achieve fairness in contracts, measured by equal bargaining positions between the parties, the socio-economic context must change.<sup>41</sup> Campbell, Macneil,<sup>42</sup> Kennedy,<sup>43</sup> Austen-Baker<sup>44</sup> as well as neo-liberals such as Friedman<sup>45</sup> recognise that contractual exchanges are composed of both competitive and cooperative elements. Yet neo-liberals contend that such cooperation is disconnected from any objective regulation of fairness.<sup>46</sup> But like cooperation, fairness and its implicit and explicit regulation through judicial doctrines is intrinsic to contract.<sup>47</sup> Relational theory of contract captures this complexity and thus should replace the classical theory in explaining all contracts.<sup>48</sup>

Durkheim agrees with traditionalists in endorsing the principle of freedom of contract. Yet voluntary cooperation is twinned with the danger of creating undesired duties, in which case wider social and state regulation can assist while not constraining the contracting parties. At its root, 'liberty itself is the product of regulation.'<sup>49</sup> Regulations may infringe our negative freedom, but such rules are necessary to build social solidarity.<sup>50</sup> Durkheim appeals to a positive freedom for contracts to exist by a social and legal

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<sup>40</sup> Wheeler and Shaw, *Contract* (n 26) 113; On the ideologies behind contract (formalism, realism, market-individualism and consumer-welfarism), see J N Adams and R Brownsword *Understanding Contract Law* (4<sup>th</sup> edn, Sweet & Maxwell 2004) 184–204.

<sup>41</sup> A Hunt, *The Sociological Movement in Law* (Macmillan 1978) 88.

<sup>42</sup> I Macneil, *The New Social Contract: An Inquiry Into Modern Contractual Relations* (Yale University Press 1980); I R Macneil, 'Values in Contract: Internal and External' (1983) 78 *North-Western University Law Review* 340.

<sup>43</sup> D Kennedy, 'Distributive and Paternalist Motives in Contract Law' 41 *Maryland Law Review* (1982) 563.

<sup>44</sup> R Austen-Baker, 'Comprehensive Contract Theory: A Four-Norm Model of Contract Relations' (2009) 25 *Journal of Contract Law* 16.

<sup>45</sup> M Friedman, *Capitalism and Freedom* (University of Chicago Press [1962]1982).

<sup>46</sup> *ibid* 13.

<sup>47</sup> D Campbell, 'The Relational Constitution of Contractual Agreement' (2004) 38 *Kobe University Law Review* 99, 106, citing also F Bastiat, 'The Law' in Frédéric Bastiat, *Selected Essays on Political Economy* (Irvington-on-Hudson 1995 [1850]) 65–66.

<sup>48</sup> Campbell, 'Relational Constitution of Discrete Contract' (n 23) 61.

<sup>49</sup> Durkheim, *The Division of Labour in Society* (n 28) 320.

<sup>50</sup> *ibid* 161.

standard of fairness. Only a paradigm shift in legal theory and practice can displace the traditional emphasis on negative freedom and anti-regulation.<sup>51</sup> Remarkably, contract law

foresees what we could not do individually; what we could not regulate is regulated, and this regulation is mandatory upon us, although it is not our handiwork, but that of society and tradition.<sup>52</sup>

Relationalists bridge the freedom of contract principle with the requirement of objective, rather than subjective regulation of fairness in contract. The power of consent to bind parties must rest on some objective foundation.<sup>53</sup> Human communication solidifies an agreement. An agreement must be objective; it constitutes an observable sign, understood in the social structure of shared signs, language and meaning to constitute agreement.<sup>54</sup> Honesty and mutual consent to contract are ascertained by interpreting the compatibility of signs with objective standards. These social standards function to regulate which contracts are fair to enforce.<sup>55</sup>

Despite the traditional justification of contracts as *consensus ad idem*, a subjective meeting of the minds, contract law regulates fairness through a normative and objective doctrine. Basing contract law on subjective minds would be impossible, contrary to Lord Steyn's belief.<sup>56</sup> Pothier's classic *Law of Obligations*<sup>57</sup> describes this paradoxical process of legitimation: the objective test confers rights as if they were the 'true' subjective intentions derived from our will. Yet only objective standards for contractual agreements carry the power to allay social and legal conflicts and enable social solidarity based on the contracting parties' cooperation. The following sections dispel the traditional myth of subjectivity in the exceptional

<sup>51</sup> Campbell, 'The Relational Constitution of Contractual Agreement' (n 47) 119.  
<sup>52</sup> *ibid.*

<sup>53</sup> Durkheim, *The Division of Labour in Society* (n 28) 317–318.

<sup>54</sup> Campbell, 'The Relational Constitution of Contractual Agreement' (n 47) 103, citing *Benedict v Pfunder* (1931) 237 NW 2 ; *Anon v Anon* (1477) YB 17 Edw 4, fo 1, pl 2 (Brian CJ).

<sup>55</sup> *Smith v Hughes* (1891) LR 6 QB 597, 607.

<sup>56</sup> *Trentham (G Percy) Ltd v Architral Luxfer Ltd* [1993] 1 Lloyds Rep 25 (Lord Steyn); Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (n 20).

<sup>57</sup> Pothier, *Treatise on Obligations* (n 27).

doctrines which provide a piecemeal doctrine of good faith. Each exceptional doctrine sets a threshold for when consent is breached and the contract should be nullified or modified.<sup>58</sup>

#### IV. THE DOCTRINE OF MISTAKE

The subsequent three sections will investigate the piecemeal approach to explicit regulation of fairness in exceptional doctrines, which operate when consent to contract is objectively vitiated. The doctrine of mistake is testimony to the objectivity principle, contrary to the dominant Classical assumption that it caters to subjective intentions. Mistake nullifies the agreement and discharges contractual duties by appealing to an objective standard of fairness. Mistake mitigates the harshness of the strict common law rule that a contract is agreed when a definite offer mirrors an acceptance to the terms and mitigates the principle of consideration. Consideration marks a change in legal position – either in fact conferring a benefit or detriment, such as paying money,<sup>59</sup> or in law doing something that was requested as the ‘price’ for a party’s promise<sup>60</sup> and is in excess of a pre-existing legal duty.<sup>61</sup> In general, contracts remain enforceable if a party makes a mere subjective mistake or considers the result unfair.<sup>62</sup> This general principle against subjective mistake is premised on the notion that nullifying the contract would produce objective unfairness to the other party.

Contrary to popular belief, mistake is not a subjective doctrine.<sup>63</sup> This is demonstrated first in ‘common mistake’ where the same, objectively-seen mistake is made by both parties. Furthermore in mutual mistake, the different mistakes made by both parties must be objectively visible. In *Scriven Bros v Hindley & Co*,<sup>64</sup> the mistake of the offeror to mislead and induce the offeree into a contract

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<sup>58</sup> Durkheim, *The Division of Labour in Society* (n 28) 317–318.

<sup>59</sup> *Currie v Misa* (1875) LR 10 Ex 153.

<sup>60</sup> *Combe v Combe* [1951] 2 KB 215.

<sup>61</sup> *Glasbrook Brothers v Glamorgan County Council* [1925] AC 270; *Stilk v Myrick* [1809] 2 Camp 317.

<sup>62</sup> *Storer v Manchester City Council* [1974] 3 All ER 824, 828; *Tamplin v James* (1880) 15 Ch D 215, 217.

<sup>63</sup> See *Centrovincial Estates plc v Merchant Investors Assurance Company Ltd* [1983] Com LR 158 (Slade LJ).

<sup>64</sup> [1913] 3 KB 564.

that he otherwise would not have entered invoked an apparent unfairness, which rendered the contract unenforceable.<sup>65</sup> Finally, in the unilateral, one-party mistake case of *Hartog v Colin & Shields*,<sup>66</sup> found the contract void since an objective third party would have been able to recognise the error that the product (hares) were usually quoted at price per piece, not per pound as expressed in the contract. This factor distinguished the case from *Tamplin v James*,<sup>67</sup> where specific performance was ordered because the purchaser could reasonably have known that the property did not include the gardens, had he inspected the map. The seller had not set out to deceive the buyer, who had merely made a mistake without checking if his assumptions were correct. *Hartog* established the ‘snapping up principle’ – parties should not take advantage of one’s mistake – and illustrates how judges strive towards objectivity in assessing contractual fairness, through a relationalist lens.<sup>68</sup>

Uncertainty lingers in bringing a claim of mistake, since the dominant, traditional method of judgement attempts to (wrongly) justify decisions by attempting to read the subjective minds of the parties to locate the causation of a mistake. This uncertainty results in mistake being utilised only as a last resort in practice.

## V. THE DOCTRINES OF DURESS AND UNCONSCIONABILITY

This section will explore the objective regulation of fairness and support for consensual cooperation through the two exceptional doctrines of duress and unconscionability. Both mitigate the common law requirement of consideration. Analogous to mistake, the doctrine of duress demonstrates how courts regulate fairness through an objective threshold. Duress renders agreements void if ‘the contract entered into was not a voluntary act.’<sup>69</sup> Lord Scarman

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<sup>65</sup> *ibid.*

<sup>66</sup> [1939] 3 All ER 566.

<sup>67</sup> (1880) 15 Ch D 215.

<sup>68</sup> Campbell, ‘The Relational Constitution of Contractual Agreement’ (n 47) 110–111.

<sup>69</sup> *Pao On v Lau Yiu Long* [1980] AC 614, 636 (Lord Scarman), citing *Maskell v Horner* [1915] 3 KB 106.

in *Pao On v Lau Yiu Long*<sup>70</sup> established the test for finding such an illegitimate breach: (1) coercion; (2) absence or presence of protest; (3) adequacy of alternative; (4) independent advice provided. Any *illegitimate act* may now constitute duress,<sup>71</sup> including undue commercial pressure.<sup>72</sup> For Durkheim, duress marked the point at which acquiescence to contract under direct or indirect pressure became no longer 'willed' and thus unlawful.<sup>73</sup> Rather than the absence of consent, fairness is the primary motive in finding a claim of duress successful.<sup>74</sup> As such it curtails opportunism and unfair competition,<sup>75</sup> demonstrated in *The Atlantic Baron*,<sup>76</sup> which applied *Stilk v Myrick's*<sup>77</sup> principle that a pre-existing duty was insufficient consideration to amount to contractual modification. Thus Halson<sup>78</sup> and Phang<sup>79</sup> argue for replacing the traditional and rigid pre-existing duties doctrine in contractual modification with the more honest and fair approach of economic duress.<sup>80</sup>

The equitable doctrine of unconscionability<sup>81</sup> sets yet another threshold of when a contract becomes voidable. When the inequality of bargaining power so severely affects the contract that it vitiates 'consent,' the threshold is reached. Such an unconscionable use of the power, especially against the 'poor, ignorant or weak-minded,'<sup>82</sup> is tantamount to fraud.<sup>83</sup> Unconscionability is often

<sup>70</sup> *ibid*; *CTN Cash and Carry Ltd v Gallaher Ltd* [1993] EWCA Civ 19.

<sup>71</sup> *The Universal Sentinel* [1983] 1 AC 366, 400–401 (Lord Scarman).

<sup>72</sup> *D & C Builders v Rees* [1966] 2 QB 617; *The Atlantic Baron* [1979] QB 705.

<sup>73</sup> Durkheim, *The Division of Labour in Society* (n 28) 317; É Durkheim (trans. C Brookfield), *Professional ethics and civil morals* (2<sup>nd</sup> edn, Routledge 1992).

<sup>74</sup> D Campbell, 'The Relational Constitution of Contractual Agreement' (n 47) 115.

<sup>75</sup> *ibid* 110–111.

<sup>76</sup> *The Atlantic Baron* [1979] QB 705.

<sup>77</sup> *Stilk v Myrick* [1809] 2 Camp 317 (Campbell Report).

<sup>78</sup> R Halson, 'Case Comment: Sailors, subcontractors and consideration' (1990) 106 LRQ 183.

<sup>79</sup> A B L Phang, 'Case Comment: Consideration at the Crossroads' (1991) 107 LRQ 21–24.

<sup>80</sup> *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 (CA (Civ Div)).

<sup>81</sup> *Lloyds Bank Ltd v Bundy* [1975] QB 326.

<sup>82</sup> E Peel, *Treitel The Law of Contract* (12<sup>th</sup> edn, Street & Maxwell 2007) 10-041; see *Cresswell v Potter* (1978) 1 WLR 255 about a wife's ignorant choices when transferring shared property during a divorce. However not knowing the English language does not constitute a relievable ground: *Barclays Bank Plc v Schwartz*, *The Times*, August 2, 1995.

<sup>83</sup> *Credit Lyonnais Bank Netherland NV v Burch* (1997) 1 All ER 144, 151; Peel, *Treitel*,

used in conjunction with an undue influence or fraud claim,<sup>84</sup> especially since the House of Lords recently decided in *Cobbe v Yeoman's Row Management Ltd*,<sup>85</sup> that alone unconscionability would not suffice as a claim. Promissory estoppel represents another injection of equity into contract law to mitigate the harshness of consideration. This exceptional principle prevents a party from withdrawing a promise reasonably relied upon by the opposing party. Since the 'wilful' promise does not amount to contractual modification, its requirements<sup>86</sup> and effects<sup>87</sup> are strict.

Requiring an objective 'will' to validate contracts, rather than threatening physical force, is, according to Durkheim, indicative of modern society codifying a moral fairness in contract to strengthen cooperation within the capitalist system.<sup>88</sup> Macneil posits that the 'effectuation of consent' is achieved by the visible and conscious accommodation of each party's interest in maximising profit and welfare.<sup>89</sup> A further relationalist perspective from Campbell illustrates how duress provides a 'freedom of one private actor from

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*The Law of Contract* (n 82) 10-039-1040.

<sup>84</sup> *Aylesford v Morris* (1873) LR 8 Ch App 484, 491 (Selborne LC). The undue influence and exploitation case concerned an employee guaranteeing an extortionate overdraft of their employer, who also knew of the other party's insanity.

<sup>85</sup> [2008] UKHL 55; [2008] 1 WLR 1752, [92] (Lord Walker of Gestingthorpe).

<sup>86</sup> The three requirements of promissory estoppel are: (1) The promise is a clear and unambiguous representation or promise by one party; (2) Reliance: if it would be inequitable for the promisor to revoke the promise reasonably relied upon; (3) If it would be inequitable to enforce the promisor's legal rights. The promissory estoppel doctrine rules laid down in *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 were established through relying on *Hughes v Metropolitan Railway Co* (1876-77) LR 2 App Cas 439 UKHL 1 to minimise the harshness of the *Foakes v Beer* [1884] UKHL 1 rule that the part payment of debt (a lesser sum) cannot amount to good consideration to satisfy a greater amount owed; see also A Truhtanov 'Foakes v Beer: Reform of the Common Law at the Expense of Equity' (2008) LRQ 364, 366.

<sup>87</sup> The effects of promissory estoppel are that (1) the doctrine can only be used as a defence (as a shield and not a sword, see *Combe v Combe* [1951] 2 KB 215 (Lord Denning) and that (2) the rights to hold a promisor to their statement are extensive as to the past, but suspensory as to the future, see *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 1 WLR 761; *Collier v P & M Wright (Holdings) Ltd* [2007] EWCA Civ 1329, [2008] 1 WLR 643 at [42].

<sup>88</sup> Durkheim, *The Division of Labour in Society* (n 28) 319.

<sup>89</sup> Macneil, *The New Social Contract: An Inquiry Into Modern Contractual Relations* (n 42) 64-69; D Campbell and D Harris, 'Flexibility in Long-term Contractual Relationships: The Role of Co-operation' (1993) 20 J Law & Soc 166.

legally backed imposition by the other' to protect weaker parties.<sup>90</sup> However the difficulty in assessing consent and the equality of bargaining power in contractual relationships is that 'most (if not all) contracts concluded in a capitalist economy can be described in such a way as to have some exploitation.'<sup>91</sup> Therein lies the failing of Bigwood's argument for a 'purely procedural' fairness view of exploitation<sup>92</sup> – exploitation is rooted in socio-economic unevenness and unfairness, and the State and judicial choice to enforce unfair contracts.<sup>93</sup> For Dalton, duress and unconscionability demonstrate 'public law' moving to restrain the ability of a party to exploit another.<sup>94</sup> Viewing duress and unconscionability as 'exemptions' to the general harsh rule may divert 'attention from the fact that the entire doctrine of consideration reflects societal attitudes about which bargains are worthy of enforcement.'<sup>95</sup> However, the social expectation of fair dealing in contract extends beyond the two clear circumstances of exploitation when agreements are secured by duress or an unconscionable use of bargaining power.

## VI. MISREPRESENTATION AND THE DUTY OF DISCLOSURE

A general principle in the contractual agreement constitutes the omission of a duty to disclose information. Premised on the assumption that knowledge is a source of power and carries a financial value, a legal requirement to disclose all material facts could unjustly enrich the other party.<sup>96</sup> In traditional theory, 'arm's-length dealing' allows parties' to agree on the best bargain to suit their self-interests. Thus the traditional 'exception,' expressed in the doctrine of misrepresentation, is any judicial requirement to disclose facts in particular circumstances, which acts as a mechanism for the regulation of good faith and honesty in contractual agreement and

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<sup>90</sup> Duncan, 'Distributive and Paternalist Motives in Contract and Tort Law... ' (n 32) 569.

<sup>91</sup> Campbell, 'Book Review of Exploitative Contracts by Rick Bigwood' (n 24) 243.

<sup>92</sup> R Bigwood, *Exploitative Contracts* (OUP 2003).

<sup>93</sup> Campbell, 'Book Review of Exploitative Contracts by Rick Bigwood' (n 24) 245.

<sup>94</sup> Dalton, 'An Essay in the Deconstruction of Contract Doctrine' (n 33) 1011.

<sup>95</sup> *ibid.*

<sup>96</sup> McKendrick, *Contract Law* (n 11) 210.

negotiation. *Felthouse v Bendley*,<sup>97</sup> followed by *Linnett v Halliwells LLP*<sup>98</sup> and *Re Selectmove Ltd*<sup>99</sup> demonstrate how the courts require an objective manifestation of consent.<sup>100</sup> A further illustration of how the agreement is not a subjective *consensus ad idem*, but rather an objective standard abiding by pre-existing social rules is in the case of *Rust v Abbey*.<sup>101</sup>

*Rust* held that by exception,<sup>102</sup> contractual acceptance and terms may be inferred from conduct or trade practice and prior course of dealing.<sup>103</sup> In effect, this principle encourages judges to interpret terms according to a doctrine of good faith and honesty. Furthermore it becomes in the parties' interest to prevent the possibility of liability by failing to disclose material facts. Austen-Barker successfully proposes that this exception indicates how a contractual agreement is not a 'meeting of the minds,' but rather mandates clear and visible communication of an *apparent* acceptance.<sup>104</sup> A more explicit insertion of an objective and overriding goal of fairness would not only enhance legal fairness, but also increase the reliance on contracts and encourage further contracting.

Misrepresentation, mistake and the requirement to disclose material facts in contracts of *uberimea fidei* (utmost good faith) constitute exceptions to the harsh common law omission of a duty of disclosure. *Uberimea fidei*<sup>105</sup> and statutory<sup>106</sup> insurance contracts require disclosure of material knowledge in order for the prudent

<sup>97</sup> (1862) 11 CB (NS) 869.

<sup>98</sup> [1995] 1 WLR 474 (Peter Gibson LJ).

<sup>99</sup> [1995] 2 All ER 531.

<sup>100</sup> W Howarth, 'The Meaning of Objectivity in Contract,' (1984) LQR 100 265 describes these three different interpretations of the objective test; nb support for the promisee objectivity is also found in the case on offer and acceptance *Smith v Hughes* (n 55).

<sup>101</sup> *Rust v Abbey Life Assurance Co Ltd* (1979) 2 Lloyd's Rep 334.

<sup>102</sup> The general principle on the incorporation of terms is that the claimant must give notice of the term in order for its incorporation: *McCutcheon v MacBrayne* (1964) 1 WLR 125 and *British Crane Hire Corporation Ltd v Ipswich Plant Hire Ltd* [1975] QB 303.

<sup>103</sup> A misrepresentation can also be made by conduct, *Spice Girls Ltd v Aprilia World Service BV* [2002] EWCA Civ 15.

<sup>104</sup> R Austen-Baker 'Offeree Silence and Contractual Agreement' (2006) 35 CLWR 247.

<sup>105</sup> *Lambert v Co-operative Insurance Society Ltd* [1975] 2 Lloyd's Rep 485.

<sup>106</sup> Marine Insurance Act 1906, s18(1).

insurer to make a reasonable assessment.<sup>107</sup> Furthermore an exceptional duty exists to not actively make misrepresentations in unequivocal statements of fact which induce the representee to enter into the contract.<sup>108</sup> Once a party does disclose information, the information must be disclosed truthfully.<sup>109</sup> This mitigates the harshness of the common law rule against requiring disclosure.<sup>110</sup> Encouraging disclosure, and implicitly fair and honest dealing, it was held in *Dimmock v Hallett*<sup>111</sup> that omissions can amount to misrepresentation. This exceptional duty of disclosure and to negotiate in good faith also holds valid in negligent misrepresentation.<sup>112</sup>

The regulation of fairness to prevent ‘bad bargains’ is visible when courts imply fact in misrepresented statements of opinion or intention,<sup>113</sup> as in cases concerning expertise<sup>114</sup> and inequality of bargaining power. Misrepresentation is the only exceptional doctrine Lord Ackner<sup>115</sup> accepts as an essential good faith instrument. By basing this assertion on the traditional grounds that preventing misguided inducements to contract is in the subjective intentions of both parties, he maintains his stance against an overarching doctrine of good faith. Campbell turns this argument on its head.<sup>116</sup> In a case of fraudulent misrepresentation like *Derry v Peek*,<sup>117</sup> there is hardly a mutual *consensus ad idem* in favour of injecting a standard of fairness, since the fraud is in the misrepresentor’s interest and to the detriment of the misrepresentee. Thus the exceptional doctrine of misrepresentation uses an objective standard of fairness to regulate contracts. Although widely well-regarded, misrepresentation endures similar problems to mistake. The remedies vary depending on classifications of innocent, fraudulent or negligent

<sup>107</sup> McKendrick, *Contract Law* (n 11) 210

<sup>108</sup> *Dimmock v Hallett* (1866) LR 2 Ch App 21.

<sup>109</sup> *Keates v Cadogan* (1851) 10 CB 591; 20 LJCP 76.

<sup>110</sup> *ibid.*

<sup>111</sup> (1866) LR 2 Ch App 21.

<sup>112</sup> *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

<sup>113</sup> *Edgington v Fitzmaurice* (1885) 29 Ch D 459.

<sup>114</sup> *Esso Petroleum Co Ltd v Mardon* [1976] 2 Lloyd’s Rep 305, cf *Bisset v Wilkinson* [1927] AC 177 where the defendant had no expert knowledge and there was relatively equitable bargaining power.

<sup>115</sup> *Walford* (n 5) [46] (Lord Ackner) (each party ‘is entitled to pursue his (or her) own interests so long as he avoids making misrepresentations’).

<sup>116</sup> Campbell, ‘Relational Constitution of Discrete Contract’ (n 24) 62.

<sup>117</sup> See *Derry v Peek* (1889) 14 App Cas 337, 374 (Lord Herschell).

misrepresentation.<sup>118</sup> Confusing and overlapping classifications that are wrought with legal incoherence produces uncertainty and more frequent trials. In effect, the difficult remedies procedure increases the costs of litigation, dissuades legal practitioners from bringing misrepresentation claims and itself produces procedural unfairness.

## VII. UNFAIR CONTRACT TERMS ACT 1977 (UCTA)

Beyond common law principles, the UCTA 1977 expands the principle of fairness to protect, *inter alia*, consumers from the effect of excessive liability exclusion clauses and consumers' unequal bargaining positions. Before the Act, courts merely judged the incorporation of limitation or exclusion clauses *contra proferendum* against the party (usually the business) relying on the clause.<sup>119</sup> This was illustrated in *Arcos v Ronaasen*<sup>120</sup> where the buyers acted in bad faith by alleging to reject goods based on failure to conform to the description and unsatisfactory condition, but in fact they sought to take advantage of the fallen market price and repurchased the exact same goods from the original seller. Such an unjust move was also upheld in *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*.<sup>121</sup>

By contrast, UCTA 1977 was able to assist in *Interfoto v Stiletto*,<sup>122</sup> where Lord Bingham held that particularly onerous terms required greater notice to the customer. This decision marked a salient incremental step towards a duty of good faith and to disclose, albeit only in particular circumstances. *Interfoto* indicated that although the English legal system may not carry an explicit and overriding doctrine of good faith like in other legal cultures, the requirements of good faith and fair dealing exist in some contractual contexts.<sup>123</sup>

<sup>118</sup> Remedies include the equitable remedy of rescission or damages can be awarded under the tort of deceit, *Derry* (n 117) or the Misrepresentation Act 1967 s 2(1) and 2(2).

<sup>119</sup> *Contra proferentem* is applied in *Wallis, Son & Wells v Pratt & Haynes* [1920] 2 KB 1003 and *Olley v Marlborough Court Ltd* [1949] 1 KB 189.

<sup>120</sup> [1933] AC 470.

<sup>121</sup> [1962] EWCA Civ.

<sup>122</sup> *Interfoto* (n 3) 439.

<sup>123</sup> *Yam Seng* (n 16) [151]

The process of *Interfoto* to imply a duty of notice is indicative of the modern common law emphasis to incorporate the particular matrix of facts into judging.<sup>124</sup> Hence, based on these judgements, Mr Justice Leggatt successfully rebuts the fear that a general duty of good faith would usher in uncertainty, when in practice it would be no more uncertain than contractual interpretation.<sup>125</sup>

UCTA aimed to combat the inconsistency of the common law protection. In effect it curtailed the ability of parties to limit and exclude general liability for breach of contract by implying specific terms listed in the Sale of Goods Act 1979 and later in the Supply of Goods and Services Act 1982. UCTA provides a basic minimum standard of fairness for products and services in business-to-business (B2B) and business-to-consumer (B2C) contracts. This permits optimal exchanges to occur and limits which terms are negotiable. This effect is apparent in section 3 of UCTA: when the claimant deals as a consumer or the B2B contract is written on standard terms, the defendant can only exclude or restrict liability for breach if the term is 'reasonable'. Section 11 UCTA states the test of reasonableness: the contractual term must have been fair and reasonable to be included, having regard to the circumstances which were, or should reasonably have been, known to or in the contemplation of the parties when the contract was created.

The reasonableness test further applies to particular implied terms in the transfer of goods in B2C contracts,<sup>126</sup> or in the exclusion of liability in specific B2B contract terms.<sup>127</sup> Finally the reasonableness test is used to judge terms which exclude liability or restrict negligence claims.<sup>128</sup> In fact this imposition of a sense of fairness through an objective test of reasonableness is typical of tort law, whereby the judge defines what exactly constitutes 'reasonable'.<sup>129</sup>

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<sup>124</sup> *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912–3 (Lord Hoffmann); *BCCI v Ali* [2002] 1 AC 251, 269.

<sup>125</sup> *Yam Seng* (n 16) [152]

<sup>126</sup> UCTA 1977, s 6(1) enforcing s 12 of the Sale of Goods Act (SGA) 1979 (amended)

<sup>127</sup> UCTA 1977, s 6(3) where C does not deal as a consumer, D can exclude liability for breaching their obligations under ss 13, 14, 15 SGA 1979 (amended)

<sup>128</sup> UCTA 1977, s 2 ; A Mullis and K Oliphant, *Torts* (4<sup>th</sup> edn, Palgrave Macmillan Law Masters 2011) 153–155; nb terms which attempt to restrict liability for personal injury or death cannot be excluded.

<sup>129</sup> McKendrick, *Contract Law* (n 11).

The inequality of bargaining power is the highest regarded factor by protectionists to indicate the successful injection of a fairness standard. UCTA in effect mitigates the inequality of bargaining power and places the parties under more equal positions than they otherwise would have been. This constitutes the legal reform Durkheim called for.<sup>130</sup> One may speculate that this marks the limit to which contract law can improve existing inequalities derived from the unequal distribution of wealth. Duncan<sup>131</sup> asserts that this measure fails to go far enough, since the inequality of bargaining party is nevertheless inherent to the contracts. Ahead of his time, Durkheim appreciated this contradiction – increased contracting both enables organic solidarity and renders inequalities in bargaining power more apparent and stark.<sup>132</sup> This discussion indicates how making contract law fairer through a doctrine of good faith is unlikely to correspond to improving social and economic justice. Achieving substantive justice requires tools beyond law. Nevertheless the doctrine of good faith and UCTA may offer means to enhance social cooperation.

UCTA may indicate a landmark triumph of distributive wel­farism over laissez-faire capitalism, as both Duncan<sup>133</sup> and Atiyah<sup>134</sup> suggest. It undoubtedly destabilises *caveat emptor*, the principle of ‘let the buyer beware’ and exempts the courts from judging the adequacy of the bargain.<sup>135</sup> In calling contract to be the core of an atomistic capitalist society, Duncan and other critical contract theorists appear to have misguided prejudices against contract law itself.<sup>136</sup> Whereas relationalists consider UCTA to represent how society regulates contractual fairness regardless of whether individual parties mutually agree to an unfair clause, as Durkheim posited.<sup>137</sup>

<sup>130</sup> Durkheim, *The Division of Labour in Society* (n 28) 319.

<sup>131</sup> Duncan, ‘Distributive and Paternalist Motives in Contract and Tort Law...’ (n 32).

<sup>132</sup> Durkheim, *The Division of Labour in Society* (n 28) 160.

<sup>133</sup> Duncan, ‘Distributive and Paternalist Motives in Contract and Tort Law...’ (n 32).

<sup>134</sup> P S Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press 1979).

<sup>135</sup> P S Atiyah, *The Sale of Goods* (8<sup>th</sup> edn, Pitman 1990) 205, 212–13.

<sup>136</sup> M Cohen, ‘The Basis of Contract’ (1933) 44 *Harv L Rev* 553, 562.

<sup>137</sup> Durkheim, *The Division of Labour in Society* (n 28) 162.

## VIII. THE FUTURE OF FAIRNESS IN ENGLISH CONTRACT LAW

Current English contract law applies a doctrine of good faith in a piecemeal manner characteristic of the common law.<sup>138</sup> Its *ad hoc* nature produces inconsistent justice and thus manifest unfairness. However there have been incremental steps towards realising the potential of abiding by a clear and objective doctrine of fairness. Imminent reform remains necessary to allow contract law to assert a common standard of fairness.

Pressures from EU law have supported an injection of a principle of fairness into English law.<sup>139</sup> First, the Principles of European Contract Law Article 1.201 states that parties may not exclude or limit their duty to act in accordance with good faith and fair dealing principles. Although non-binding, Morgan and Beale consider that this principle provided the needed protection to consumers in the Consumer Rights Directive,<sup>140</sup> and to commercial parties who opt in for such protection in their agreement.<sup>141</sup> A further new benchmark for regulating fairness in consumer contracts was created in the Unfair Terms in Consumer Contracts Directive,<sup>142</sup> which was implemented by the UK legislation Unfair Terms in Consumer Contracts Regulations 1999.<sup>143</sup> Lord Bingham praised this development in the debt case *Director General of Fair Trading v First National Bank*.<sup>144</sup> Fairness should be examined when it 'causes a significant imbalance in the parties' rights and obligations arising

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<sup>138</sup> *Interfoto* (n 3) 439 (Bingham LJ).

<sup>139</sup> *Yam Seng* (n 16) [124].

<sup>140</sup> Council Directive 2011/83/EU of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC [2011] OJ L304; nb this Directive consists of a merge between Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (UTCCD) [1993] OJ L095 and Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises OJ L372.

<sup>141</sup> J Morgan, 'Book Review of Hugh Beale, *Mistake and Non-Disclosure of Facts: Models for English Contract Law* (OUP 2012)' [2013] 129 LQR 459, 461.

<sup>142</sup> Unfair Terms in Consumer Contracts Directive (n 140).

<sup>143</sup> Unfair Terms in Consumer Contracts Regulations (n 13).

<sup>144</sup> *Director General of Fair Trading (DGFT) v First National Bank* (n17) 1307–8 (Lord Bingham)

under the contract, to the detriment of the consumer and violates the requirement of good faith'.<sup>145</sup> Willett deems this EU 'significant imbalance' factor to indicate judgement-making on the basis of substantive fairness.<sup>146</sup> Yet the English judicial uptake of these developments remains slow. Both *First National Bank* and *Abbey National*<sup>147</sup> indicate the House of Lords failing to take advantage of the wide-ranging consumer protection available from the European general clauses of good faith and fair dealing.<sup>148</sup>

These judgements nevertheless do not deter the development of the common law doctrine of good faith. In *Director General of Fair Trading*<sup>149</sup> as previously done in *Interfoto*,<sup>150</sup> Lord Bingham expressed how the EU and UK share a goal of achieving fairness in contract law, whether it was an explicit or *ad hoc* requirement. Moreover Beale hypothesises that in 75 per cent of contract cases, there is harmony between English and European laws.<sup>151</sup> This may explain why the majority of English legal practitioners argue in favour of maintaining the choice between national and EU law in cross-border contracts.<sup>152</sup> This commonality of regulating fairness between the two systems casts doubt on whether following a strict EU approach would fundamentally change or improve English contract law.

Contrary to Willett,<sup>153</sup> Mr Justice Leggatt in *Yam Seng Pte Ltd v International Trade Corporation Ltd*<sup>154</sup> asserts that the doctrine is not quintessentially European or biased towards an ethic of consumer

<sup>145</sup> *ibid*; UTCCR (n 13), Article 3(1).

<sup>146</sup> C Willett, 'General clauses and the competing ethics of European consumer law in the UK' (2012) 71 CLJ 412, 419.

<sup>147</sup> *OFT v Abbey National and others* [2009] UKSC 6.

<sup>148</sup> Willett (146).

<sup>149</sup> *Director General of Fair Trading v First National Bank Plc* [2001] UKHL 52; [2002] 1 A.C. 481 at [17].

<sup>150</sup> *Interfoto* (n 3) 439, 445.

<sup>151</sup> H Beale, *Mistake and Non-Disclosure of Facts: Models for English Contract Law* (OUP 2012) 12–13.

<sup>152</sup> Expert Group on European Contract Law, 'A European Contract Law for Consumers and businesses: publication of the results of the feasibility study carried out by the Expert Group on European Contract law for stakeholders' and legal practitioners' feedback' (*Europa*, May 2011) <[http://ec.europa.eu/justice/policies/consumer/docs/explanatory\\_note\\_results\\_feasibility\\_study\\_05\\_2011\\_en.pdf](http://ec.europa.eu/justice/policies/consumer/docs/explanatory_note_results_feasibility_study_05_2011_en.pdf)> accessed 1 June 2013.

<sup>153</sup> Willett (146) 421.

<sup>154</sup> *Yam Seng* (n 16) [125].

protection. The long-standing US recognition of a doctrine of good faith and subsequent adoption in numerous common law countries indicates that the doctrine is no marker between civil and common law. In addition, the Scottish case *Smith v Bank of Scotland*<sup>155</sup> is strong House of Lords authority for recognising a broad principle of good faith. Recently Canada has recognised an implied duty of good faith in commercial contracts in some situations.<sup>156</sup> An Australian judge summed up the imperative reason for Australia and other jurisdictions to have a contractual duty of good faith: the duty of good faith 'is in these days the expected standard, and anything less is contrary to prevailing *community expectations*.'<sup>157</sup>

Not only is English contract law outdated compared to other common law jurisdictions, but as the Australian judge expressed above, it is contrary to community expectations and norms of behaviour. Honesty and fair dealing are rooted social norms. These should be recognised as a positive duty rather than maintaining the traditional assumption that freedom of contract constitutes a negative freedom and punishment for a breach of contract.<sup>158</sup> This shared value is rarely inserted into the written contract, since even to do so may suggest dishonesty.<sup>159</sup> The social expectation of honesty has already been recognised in the House of Lords case of *HIH Casualty v Chase Manhattan Bank*.<sup>160</sup> In that case a statement was interpreted by Lord Bingham<sup>161</sup> and Lord Hoffmann<sup>162</sup> to exclude deceit, based on a shared expectation of honesty and good faith. This doctrine is furthermore consistent with the established principle that the reasonable expectations of the parties must be protected, as voiced by Lord Steyn in *First Energy (UK) Ltd v Hungar-*

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<sup>155</sup> *Smith v Bank of Scotland* [1997] UKHL 26; [1997] 2 FLR 862 (HL) 111, 121 (Lord Clyde).

<sup>156</sup> *Transamerica Life Inc v ING Canada Inc* (2003) 68 OR (3d) 457, 468.

<sup>157</sup> *Renard Constructions (ME) Pty v Minister for Public Works* (1992) 44 NSWLR 349 [95] (Priestly JA) [emphasis added].

<sup>158</sup> D Campbell, 'What do we mean by the Non-Use of Contract?' in Jean Braucher, John Kidwell and William C Whitford, *Revisiting the Contracts Scholarship of Stewart Macaulay: On the Empirical and the Lyrical* (Hart 2013) 168.

<sup>159</sup> *Yam Seng* (n 16) [135].

<sup>160</sup> [2003] 2 Lloyd's Rep 61 (HL).

<sup>161</sup> *ibid* [15].

<sup>162</sup> *ibid* [68].

*ian International Bank Ltd.*<sup>163</sup> *Yam Seng*, relying on the above cases, has even allowed reliance on acting in good faith.<sup>164</sup>

These cases are testimony to how securing a duty of good faith would improve business relationships. Honesty and fairness are current social requirements which give businesses efficacy to commercial transactions.<sup>165</sup> Rendering them explicitly legal requirements would only further enhance cooperation. This commercial advantage is compounded by the fact that many civil and common law jurisdictions have a doctrine of good faith and thus may expect or require it in contracting with parties in the UK. Furthermore, since the *expectation* of a contract is more pertinent than the actual performance of contract itself, an objective standard of fairness when entering into an agreement would augment its legal security.<sup>166</sup> The exact content of a duty of good faith both sensitive to the specific relationships and context and the presumed conduct of reasonable and honest people. To reiterate,

The court is concerned not with the subjective intentions of the parties but with their presumed intention, which is ascertained by attributing to them the purposes and values which reasonable people in their situation would have had.<sup>167</sup>

This quote counters the dominant theory used to negate the adoption of a good faith doctrine, namely that English contract law embodies an ethos of individualism and freedom to pursue self-interest until the party breaches a term.<sup>168</sup> From a relationalist perspective, an obligation of good faith would enhance the parties' positive freedom to contract, since it is already implicit in their

<sup>163</sup> *First Energy* (n 21) 196.

<sup>164</sup> *Yam Seng* (n 16) [230] ('ITC was in breach of contract in delivering the second order placed by Yam Seng very late, in failing to make products available when promised and in acting in bad faith in misleading Yam Seng about the steps taken to ensure that the domestic retail price in Singapore was not lower than the duty free price.')

<sup>165</sup> *ibid* [137].

<sup>166</sup> Campbell, 'What do we mean by the Non-Use of Contract?' (n 158) 167; S Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28 *American Sociological Rev* 1.

<sup>167</sup> *Yam Seng* (n 16) [141] – [144].

<sup>168</sup> See E McKendrick, *Contract Law* (9<sup>th</sup> edn, Palgrave Macmillan 2011) 221–2.

agreement. Campbell,<sup>169</sup> Mr Justice Leggat,<sup>170</sup> and other relation-  
alists have long held that the basis of contract is cooperation for  
the parties' mutual benefit. This freedom to cooperate allows a  
perspective that capitalism itself may be a process of cooperation,  
as opposed to ruthless individualism. Building objective rules, like  
a principle of fair dealing, is fundamental to advancing this con-  
cept of capitalism based on cooperation. Classical conservative<sup>171</sup>  
and critical legal theorists<sup>172</sup> too often pit freedom of contract, a  
capitalist value, against the Socialist value of state-imposed sub-  
stantive fairness. To replace these misguided positions, reform  
must emanate from relational contract law – a socio-legal lens  
on contract and exchange which 'shows them to be fundamen-  
tally co-operative structures.'<sup>173</sup> Furthermore the Classical and  
Marxist-inspired theories create a false assumption that choosing to  
adopt an internationally widespread duty of good faith would be a  
choice 'between continental paternalism and Anglo-Saxon individ-  
ualism.'<sup>174</sup> Although the future of an objective standard of fairness  
in English contract law may not be certain, a judicial movement is  
gaining momentum to increase the steps towards its realisation.

## IX. CONCLUSION

This paper has sought to achieve three aims. First, to explore the  
particular advantage of relational contract theory in bridging tra-  
ditional and critical legal theories to assert that contract is based  
on cooperation, mutual benefit, and fairness. Second, following  
relationalists like Durkheim and Campbell, this paper holds the  
doctrine of fair and honest dealing to already exist in contract law,  
albeit in an implicit and piecemeal manner. Third, the exceptional  
doctrines which make up the piecemeal regulation of fairness are  
objective, contrary to the popular traditional *consensus ad idem* prin-  
ciple that judging contracts is based on the reading the subjective

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<sup>169</sup> Campbell, 'What do we mean by the Non-Use of Contract?' (n 158) 184.

<sup>170</sup> *Yam Seng* (n 16) [148].

<sup>171</sup> See McKendrick, *Contract Law* (n 168) 221–2; Pothier, *Treatise on Obligations* (n 27).

<sup>172</sup> Unger 'The Critical Legal Studies Movement' (n 25) 619.

<sup>173</sup> Campbell, 'What do we mean by the Non-Use of Contract?' (n 158) 186.

<sup>174</sup> *Yam Seng* (n 16) [131].

minds of the parties. The objective rules of contract law provide the security and structure for contracting, far beyond the scope of what mere individuals could achieve. If made an explicit duty, expectation of fairness could be protected by the security of law.<sup>175</sup> This would increase business efficacy for English parties, and notably parties from common law and European civil law jurisdictions which already expect a duty to deal on good faith.

Problems ensue from the current *ad hoc* method of regulating fairness. As sections 4 to 6 revealed, inconsistent justice arises from the fact that exceptional doctrines are often used as a last resort, due to the uncertainty of allocating appropriate costs and the high price of lengthy litigation itself. Furthermore, mistake, duress, unconscionability, and misrepresentation illustrate how only in particular circumstances following a breach of contract will contracting parties dealing on bad faith or dishonesty be brought to justice. Exceptional principles function as a negative punishment for vitiating of consent, a notion based on the freedom of contract principle.

By contrast, sections 8 and 9 showed how the UCTA judicial implication of terms based on reasonableness and context, as well as the latent doctrine of good faith both provide a obligation to deal honestly. This indicates a positive freedom to expect fairness and uphold other shared community norms when contracting. In fostering cooperation and organic solidarity, the positive obligation offers a distinct advantage from the current negative freedom approach which fosters fear of exploitation. A further incremental reform could come in extending the UCTA reasonableness test's clear balance of factors, including inequality of bargaining power, to all contracts.

Future judgements should follow the relationalist judgement of Mr Justice Laggatt in *Yam Seng* and explicitly interpret a duty of good faith into the contract.<sup>176</sup> The theoretical lens of relationalism should continue to be utilised as a structured tool for academics and practitioners to assess legal movements. A relationalist analysis further warns that contract law alone is inadequate, and must be joined with social, economic and political forces, to uproot sub-

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<sup>175</sup> *ibid* [148].

<sup>176</sup> *ibid*.

stantive economic injustice. Adopting an objective approach and an overarching doctrine to explicitly regulate fairness would profoundly enhance the theory and legal certainty of English contract law.