

A GUIDE TO A COMPARISON OF AUSTRALIAN AND UNITED STATES CONTRACT LAW

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I. INTRODUCTION

It would be a daunting task to attempt even an outline comparison of Australian and United States contract law. However, there are good reasons for at least making a start, now that the Australia Act 1986 (Cth) has brought Australia, by slow evolutionary process, to the same point of independence from England which the United States had reached with His Britannic Majesty after revolutionary process, by the Treaty of Peace of 1783. This independence means that Australia can, like other nations, decide what its contract law is and is to be, free of the authority of any other country.

With English authority of persuasive rather than binding force in this country, it seems very likely that the numerous similarities between contract law in the United States, England and Australia will lead to increased use of United States experience. In fact such a trend is already under way, and to my mind is to be encouraged. More authoritatively, this tendency has to some measure been encouraged by the High Court: see for example *Rochfort v. Trade Practices Commission*,¹ *Cook v. Cook*,² and some of the cases later discussed. However, to get the most out of the United States materials it seems to me to be necessary to have some understanding of such of the similarities and differences between the two

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1 (1982) 153 CLR 134, 147 *per* Mason J., 150 *per* Murphy J.

2 (1986) 162 CLR 376 where four members of the High Court joined in saying that, “[s]ubject, perhaps, to the special position of decisions of the House of Lords given in the period in which appeals lay from this country to the Privy Council, the precedents of other legal systems are not binding and are useful only to the degree of the persuasiveness of their reasoning”: *ibid.*, 390.

countries as affect contract law.

What I propose to do in this paper, by way only of taking a small step in the large task of comparing Australian and United States contract law, is to try to give some idea of the difficulties Australian lawyers will encounter in using United States materials. I intend to do so by reference to three areas currently of particular interest in the contract law of both countries: unconscionability, good faith, and estoppel, and to note the possibility of one unifying theme underlying both United States and Australian contract law.

II. CONTRACT LAW AND THE U.S. FEDERAL SYSTEM

Looked at externally, both countries are sovereign states and fully independent political entities among the community of nations. Looked at from the inside, the similarities between them are much more complicated, and some of the complications bear on the present topic. Each nation is a federation of states, whose constitution vests: enumerated legislative powers in a federal legislature, leaving the unenumerated powers to states; the executive power of the federation in a specified person; and the judicial power of the federation in a federal supreme court and such other federal courts as the legislature creates. Generally speaking, in both countries tort and contract law are state law matters and it is the state legislatures and the state courts which create, alter and decide what are the tort and contract rules in force in their states.

There is however a major difference between the position in Australia of the "Federal Supreme Court, to be called the High Court of Australia" created by Chapter III, section 71 of the Commonwealth Constitution 1901 and the position in the United States of the "one Supreme Court" created by Article III, section 1 of the United States Constitution. Although the Australian High Court has jurisdiction, unless the Legislature decides otherwise, to review any judgment of a federal court or any state supreme court without restriction, the jurisdiction of the United States Supreme Court to review judgments of state courts is limited to cases where a substantial federal question is involved. This comes about because Article III, section 2 of the United States Constitution extends (and thereby limits) the federal judicial power to cases arising under the Constitution, the laws of the United States and other defined cases of a national or federal kind.³ Article III section 2 then provides that with the

3 The full statement of the judicial power in USC Article III section 2 is as follows: "The judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; - to Controversies between two or more States; - between a State and Citizens of another State; - between Citizens of different States; - between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

exception of cases affecting ambassadors, other public ministers and consuls and those in which a state is a party, the Supreme Court has appellate jurisdiction in regard to the cases to which the judicial power extends. One result of these provisions is that in cases between citizens of different states, heard by a federal court, the court is bound to decide the case by the appropriate state law. The federal court is bound to take as the law of the relevant state the law declared by its legislature in a statute or by its highest court in a decision. There is no federal common law in such cases. The federal courts, including the Supreme Court, are bound to find and apply the state law: *Erie Railroad Co. v. Tompkins*.⁴ For an example of the Supreme Court's acknowledgment that it is bound by state law in a contract case, see *City of Opelika v. Opelika Sewer Co.*⁵ The *Erie Railroad* case is one of the best-known cases exemplifying the proposition that each state has its own common law.⁶

In practice the result of the foregoing situation is that the Supreme Court plays a far smaller part in laying down final rules of contract law in the United States than the High Court does in Australia. Another result is that there is a much greater chance in the United States of there being significant variations between states of what are regarded as common law contractual rules than there is in Australia. The potential of this centrifugal feature of the United States system is increased by the large number of states in the Union. Each state has its own law of contract and the final court of appeal in each state decides, subject to legislation of the state, what the state's contract law is. There is no court to which an appeal on matters purely of contract law can lie from the final courts of appeal of the states. In the United States there are 51 final courts of appeal in matters of contract law.⁷ In Australia, there is one.

I think it is a moderately safe guess that when an Australian lawyer sets out to see whether he can get help on some point of contract law from the

4 (1938) 304 US 64 (hereafter *Erie Railroad*).

5 (1924) 265 US 215.

6 In Australia there has never been any great need to examine the corresponding position. Until 1988 the Judiciary Act 1903 (Cth) section 80 provided that in courts exercising federal jurisdiction, where Commonwealth laws were not applicable or their provisions insufficient to carry them into effect or to provide adequate remedies or punishment, "the common law of England as modified by the Constitution and by the statute law in force in the State in which the Court in which the jurisdiction is exercised is held ... shall govern all Courts exercising federal jurisdiction ...". The obscurity of the section and the kind of problem dealt with in *Erie Railroad* have not caused difficulty in Australia, because of the central position of the High Court *qua* state common law. The difficulties tucked away in section 80 may have been increased when in 1988 the section was amended by substituting "the common law of Australia" for "the common law of England", see section 41 of Act No.120 of 1988.

7 I am assuming that the United States Supreme Court fulfills the function of an ordinary final court of appeal in regard to, e.g. the District of Columbia: see H.M. Hart and H. Wechsler, *The Federal Courts and the Federal System* (2d. ed., 1973), 47, and *Supplement* (1981) 6, 108. However I will adopt the practice of most of the American texts and hereafter refer to fifty jurisdictions.

United States experience, he begins by turning to the most readily available from among the *Restatement of Contracts*,⁸ the Uniform Commercial Code and such case books as Dawson, Harvey and Henderson, *Cases and Comment on Contract*,⁹ Kessler, Gilmore and Kronman, *Contracts, Cases and Materials*,¹⁰ or Knapp and Crystal, *Problems in Contract Law, Cases and Materials*.¹¹ The other textbooks likely to be consulted, closer in form to the texts with which Australian lawyers are familiar, although encyclopedic, will be Williston, *A Treatise on the Law of Contracts*,¹² *Corbin on Contracts*,¹³ and Farnsworth, *Contracts*.¹⁴ These all form excellent quarries for the Australian searcher to work in. They must however, like United States law generally in this area, be treated with care. For example, the Australian searcher might feel on reasonably firm ground in regard to the area covered by the Uniform Commercial Code (UCC). A quick look at the case books will indicate that it has been enacted by each of the state legislatures. The introduction to Kessler Gilmore says of it:

[t]he Code has been adopted in all states but Louisiana (which has not adopted Article II), and substantially affects the general law of contract. To be sure, the Code does not displace all principles of law and equity, but in contrast to the Uniform Sales Act, [which the UCC superseded] it does state rules governing significant aspects of the law of contracts, such as offer and acceptance, consideration, and unconscionability, which are not always in harmony with traditional contract rules.¹⁵

However, when the situation is looked at in a little more detail, the appearance of uniformity becomes more blurred. From the *Handbook of the Law under the Uniform Commercial Code*,¹⁶ one finds that although all the states except Louisiana had enacted the Code by 1968, in 1972 the American Law Institute and the National Conference of Commissioners on Uniform State Laws approved a revised Article IX as part of the new 1972 Official Text of the entire Code. As at 1979, 25 states had not yet enacted the 1972 Official Text. Louisiana had enacted Articles I, III, IV, V, VII and VIII of the 1972 Official Text, with amendments. Many of the states made individual amendments to the Code. New York amended Article V so that it was inapplicable to many letter of credit transactions

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- 8 There are Restatements in a number of areas of law. In regard to contracts what is now usually referred to as the *Restatement, First, Contracts* was published in 1932. The *Restatement, Second, Contracts* was published in 1979.
- 9 J.P. Dawson, W.B. Harvey and S.D. Henderson, *Cases and Comment on Contract* (5th ed., 1987).
- 10 F.Kessler, G.Gilmore and A.T. Kronman, *Contracts, Cases and Materials* (3rd ed., 1986) (hereafter *Kessler Gilmore*).
- 11 C.L.Knapp and N.M. Crystal, *Problems in Contract Law, Cases and Materials* (2nd ed., 1987).
- 12 S.Williston, *A Treatise on the Law of Contracts* (3rd ed., 1969), plus *Supplement* (1989).
- 13 *Corbin on Contracts* (1963) plus *Supplement* (1989).
- 14 E.A.Farnsworth, *Contracts* (1982).
- 15 Note 10 *supra*, 15.
- 16 J.White and R.Summers, *Handbook of the Law under the Uniform Commercial Code* (2nd ed., 1980), 5 (hereafter *White and Summers*).

although New York did more letter of credit business than any other state.¹⁷ Summers gloomily concluded that

with fifty judiciaries at work, uniformity is simply not attainable on anything like the scale that the Code drafters originally envisioned. On many issues under Article Nine there are now major conflicts of authority. Yet Article Nine is as tightly drawn as any Code article.¹⁸

Summers also referred to the process of making amendments departing from the official text as “continuing apace”. His co-author White was more cheerful; he thought there was no doubt that a lawyer attempting to resolve a commercial law problem in 1978 would find the law more uniform, certain, precise and sensible than he would have found it in 1938.¹⁹ The warning however is clear. Before being confident of what help a decision from within the United States might be on a matter of commercial contract apparently falling within the UCC, the lawyer would need to be very careful to see precisely what text the court was dealing with, and what different lines of authority may have arisen in different states concerning that text if it was in a different form from state to state, or even if identical in form.

For present purposes the most important part of the Code regarding contracts is Article II which deals with transactions involving the sale of goods. Other Articles deal with other aspects of commercial law but by no means cover it all. Not covered are the sale of realty, the formation, performance or enforcement of insurance contracts, or suretyship transactions. The Code does not define legal tender and leaves most issues of contract formation to general contract law.²⁰

The Australian lawyer using the *Restatement, Second, Contracts* should remember that it contains the same uncertainties as the UCC, for the same reasons, and in addition has no statutory force anywhere. Because judges in many jurisdictions in the United States pay it great respect, it is, in Australian terms, something like a cross between a statute and *Halsbury's Laws of England*. I will mention some particular problems with its use when dealing with some of the chosen areas of comparison to follow.

There are two things I should stress at this point. One is that the difficulties I am pointing out do not lead to the conclusion that use should not be made of the American materials. They mean simply that the principal keys to the materials have to be used bearing in mind that they are collating the product of fifty jurisdictions and to get true value from them can involve quite a deal of work. The other is that the materials I have mentioned function in opposition to the centrifugality caused by the numerous jurisdictions. The UCC and the Restatements have been intended to foster uniformity and provide central collecting points for the

17 *Id.*, 8.

18 *Id.*, 21; Article Nine deals with secured transactions and sales of accounts and chattel paper.

19 *Ibid.*

20 *Id.*, 6; this list is not exhaustive.

products of all jurisdictions. In Williston,²¹ Corbin²² and Farnsworth,²³ as well as in the case books, case and statute law from all around the country is heaped up. As a result, virtually the only way the law schools can teach contract law is by generalising from the materials in the texts. This is undertaken with a view to providing students with a technique sufficient to cope, in later practice, with what could prove to be a quite distinctive approach to law in the particular state by whose law a problem will have to be solved. Every contract case will be decided by the law of one state, so the student must be provided with knowledge of ideas and a method of dealing with them which will enable him to come to grips with what will be, in hard practice, the contract law of one jurisdiction. It is likely that the law on the relevant question will be very similar to many other states, but always there is the possibility that it is different in a way significant to the decision of the case. This last possibility will not be such a worry to the Australian lawyer, in search principally of ideas useful in his home jurisdiction, but nevertheless must be kept in mind in case it is harmful to the analogy he wants to draw.

A. UNCONSCIONABILITY

In recent years, there has been a marked quickening of interest in the application in Australia of the equitable doctrines of unconscionability to contract law. This interest has been the subject of considerable comment in the professional literature, which I shall forbear from repeating here.²⁴ For present purposes, recent statements of the principle in the High Court may be summarised along the following lines:

Unconscionable conduct, because of which equity will set-aside a contract, is conduct by which one party has unconscientiously used the superior position he occupied as against another party to obtain advantageous terms in a contract with that other party, the latter being in some position of special disadvantage as against the first party.

This formulation has two essential elements: the unconscientious use of his superior position by the party in that position, and the position of disability or disadvantage of the other party. The above formulation is regarded as orthodox but the courts have recently shown a willingness to find an increasing range of cases falling within its scope. The result is, in fact, to give much greater scope to the unconscionability idea.

What I have called the 'orthodox formulation' was acted on in substance by the majority of the High Court in *Commercial Bank of Australia v.*

21 Note 12 *supra*.

22 Note 13 *supra*.

23 Note 14 *supra*.

24 References to some of the recent literature are collected in A.Black, "*Baumgartner v Baumgartner*, The Constructive Trust and the Expanding Scope of Unconscionability" (1988) 11 (1) *UNSWLJ* 117.

Amadio.²⁵ It is substantially the same as one of the propositions used by Lord Hardwicke in *Earl of Chesterfield v. Janssen*.²⁶ In that case Lord Hardwicke surveyed the Court of Chancery's jurisdiction to relieve against every species of fraud. In doing so he gave examples of different classes of such fraud, ranging from plain cases to the more complicated. One of the plain cases was where looking at the bargain itself it could be seen to be such that no sensible man would subject himself to it and no honest man would take the benefit of it. These were said to be such unequitable and unconscientious bargains that even the common law would notice. The last head of fraud mentioned by his Lordship was what I have called the 'orthodox' view, examples of which he gave as catching bargains with heirs, reversioners or expectants, such bargains being characterised by "weakness on one side, usury on the other, or extortion or advantage taken of that weakness".²⁷ Each of these classes of fraud could, at least in the sense of its attracting relief from the Chancellor in the exercise of conscience, be classed as a species of unconscionability. Lord Hardwicke's last head of fraud asserted the most generalised form of unconscionability, the earlier ones being either more obvious, and easier to prove, or limited to very particular cases. In later years the last head tended to be confined to the particular bargains with heirs, reversioners or expectants which Lord Hardwicke gave as examples, although it seems reasonably clear that he was not intending to indicate that those examples comprised the whole class in regard to which relief might be given under that head of fraud. In Australia, *Blomley v. Ryan*²⁸ can now be seen as heralding the revival in case law of a broader approach to Lord Hardwicke's last head. Although it took some time, the other shoe finally dropped in *Amadio*.²⁹

An important factor, in my opinion, in the growing willingness to use old unconscionability rules more freely, has been the steadily increasing use in Australia this century of expansive definitions of unconscionability in both state and Commonwealth statutes. These have authorised courts to interfere with contractual relations in a way almost scandalous to adherents of nineteenth century Anglo-Australian doctrine and have caused both lawyers and people regularly encountering contract law to become much more comfortable with the court's potential presence as a contract alterer and fixer.³⁰ In this area of the law the legislatures appear to have been for a period more responsive to overall community sentiment than the courts.

25 (1983) 151 CLR 447.

26 (1751) 2 Ves Sen 125, 155-6; 28 ER 82, 100.

27 28 ER 82, 101.

28 (1956) 99 CLR 362.

29 *Commercial Bank of Australia v. Amadio*, note 25 *supra*.

30 This idea is explained at some length in L.J. Priestley, "Unconscionability as a Restriction on the Exercise of Contractual Rights" in J. Carter (ed.), *Rights and Remedies for Breach of Contract* (1987), 57-8.

The effect of the recent Australian decisions has been to bring the Australian law into a very similar position to that in the United States. Although I think this general statement is accurate, it is not very useful. To see what it means, it is necessary to go into detail. Because I think this topic provides a particularly instructive example of both the usefulness to Australian lawyers of the United States materials, and also of the care necessary in using them, I will set out in full the principal UCC section which deals with the matter, as well as the official comment upon the provision itself.

2-302. Unconscionable Contract or Clause

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Official Comment

Prior Uniform Statutory Provision: None

Purposes:

1. This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability. The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. Subsection (2) makes it clear that it is proper for the court to hear evidence upon these questions. The principle is one of the prevention of oppression and unfair surprise (*Cf. Campbell Soup Co. v. Wentz*, 172 F 2d 80; 3d Cir (1948)) and not of disturbance of allocation of risks because of superior bargaining power. The underlying basis of this section is illustrated by the results in cases such as the following:

Kansas City Wholesale Grocery Co. v. Wever Packing Corporation, 93 Utah 414; 73 P 2d 1272 (1937), where a clause limiting time for complaints was held inapplicable to latent defects in shipment of catsup which could be discovered only by microscopic analysis; *Hardy v. General Motors Acceptance Corporation*, 38 Ga App 463; 144 SE 327 (1928), holding that a disclaimer of warranty clause applied only to express warranties, thus letting in a fair implied warranty; *Andrews Bros v. Singer & Co.* [1934] 1 KB 17, holding that where a car with substantial mileage was delivered instead of a 'new' car, a disclaimer of warranties, including those 'implied', left unaffected an 'express obligation' on the description, even though the Sale of Goods Act called such an implied warranty; *New Prague Flouring Mill Co. v. G.A. Spears*, 194 Iowa 417; 189 NW 815 (1922), holding that a clause permitting the seller, upon the buyer's failure to supply shipping instructions, to cancel, ship, or allow delivery date to be indefinitely postponed 30 days at a time by the inaction, does not indefinitely postpone the date of measuring damages for the buyer's breach, to the seller's advantage; and *Kansas Flour Mills Co. v. Dirks*, 100 Kan 376; 164 P 273 (1917), where under a similar clause in a rising market the court permitted the buyer to measure his damages for non-delivery at the end of only one 30 day postponement; *Green v. Arcos Ltd* (1931) 47 TLR 336, where a blanket clause prohibiting rejection of shipments by the buyer was restricted to apply to shipments where discrepancies represented merely mercantile variations; *Meyer v. Packard Cleveland Motor Co.*, 106 Ohio St 328; 140 NE 118 (1922), in

which the court held that a 'waiver' of all agreements not specified did not preclude implied warranty of fitness of a rebuilt dump truck for ordinary use as a dump truck; *Austin Co. v. J.H. Tillman Co.*, 104 Or 541; 109 P 131 (1922), where a clause limiting the buyer's remedy to return was held to be applicable only if the seller had delivered a machine needed for a construction job which reasonably met the contract description; *Bekkevold v. Potts*, 173 Minn 87; 216 NW 790; 59 ALR 1164 (1927), refusing to allow warranty of fitness for purpose imposed by law to be negated by clause excluding all warranties 'made' by the seller; *Robert A. Munroe & Co. v. Meyer* [1930] 2 KB 312, holding that the warranty of description overrides a clause reading 'with all faults and defects' where adulterated meat not up to the contract description was delivered.

2. Under this section the court, in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability, or it may strike any single clause or group of clauses which are so tainted or which are contrary to the essential purpose of the agreement, or it may simply limit unconscionable clauses so as to avoid unconscionable results.

3. The present section is addressed to the court, and the decision is to be made by it. The commercial evidence referred to in subsection (2) is for the court's consideration, not the jury's. Only the agreement which results from the court's action on these matters is to be submitted to the general triers of the facts.³¹

It seems that the section itself, which has in almost all states been enacted as law, is always printed together with the comment, which does not have the force of law. The enacted section has three obvious features. The first is that there is no attempt to define the meaning of "unconscionable". Persons using the section are therefore presumably expected to supply the meaning of the word from their prior knowledge of it in legal contexts. In this respect, the section, although perhaps leaving its subject matter pretty much at large, does not on the face of it change the pre-existing law. The second point is that subsection 1 confers power on a court, wider than previously available in common law or in equity,³² to permit only so much of a contract to be enforced as the court thinks consistent with what is conscionable. The third point is that the court is bound to receive evidence bearing on the question of the contract's alleged unconscionability, in a way probably permitting the admission of a wider range of evidence than would otherwise be permissible.

The official comment then proceeds to indicate the purposes of the section in a way least pejoratively described as oblique. The second paragraph of the comment seems to be giving illustrations of what in the first paragraph was described as "adverse construction of language", "manipulation of the rules", or "determinations that the clause is contrary to public policy ... or ... the dominant purpose of the contract".³³ The comment implies that these techniques enabled courts to prevent a party enforcing an unconscionable clause in a contract and that the section was

31 UCC s.2-302; the UCC was first published in an Official Text in 1952. The first state to enact it was Pennsylvania in 1953. Revised Official Texts have been published, the latest in 1987. It was 1957 before a second state, Massachusetts, adopted the Code but in 1960 a number did so and by 1968 virtually all.

32 Or, if previously available, only in obscure and not well understood fashion. At the very least, the UCC makes clear what was previously doubtful.

33 UCC s.2-302.

designed to enable courts to do directly what they had in the past done indirectly.

The principle on which this direct intervention is to be justified is said to be “the prevention of oppression and unfair surprise” and *Campbell Soup Co. v. Wentz*³⁴ is referred to, presumably by way of illustration. Negatively, the principle is said not to be that of “disturbance of allocation of risks because of superior bargaining power”.³⁵ *Campbell Soup* does not altogether support the principle asserted, nor altogether negate the principle denied. In the case, the Third Circuit Court of Appeals refused to exercise equity jurisdiction to order specific performance of a contract between Campbell Soup and a carrot grower. The contract was on Campbell Soup’s printed form, “obviously drawn by skilful draftsmen with the buyer’s interests in mind”, on the ground that the bargain embodied in the contract was “too hard ... and too one-sided ... to entitle the plaintiff to relief in a court of conscience”.³⁶ One provision of the contract tied the grower up so tightly as to “carry a good joke too far”.³⁷ The court said that the contract was not illegal, nor was there any excuse for the grower who deliberately broke it, but:

a party who has offered and succeeded in getting an agreement as tough as this one is, should not come to a chancellor and ask the court to help in the enforcement of its terms. That equity does not enforce unconscionable bargains is too well established to require elaborate citation.³⁸

The court then cited only Pomeroy, *Equity Jurisprudence*³⁹ and Williston, *Contracts*.⁴⁰

The paragraph referred to in Pomeroy contains the following passage:

[t]he elements which peculiarly affect the equitable character of the agreement and of the remedy are the following: The contract must be perfectly fair, equal, and just in its terms and in its circumstances. If, then, the contract itself is unfair, one-sided, unjust, unconscionable, or affected by any other inequitable feature; or if its enforcement would be oppressive or hard on the defendant, or would prevent his enjoyment of his own rights, or would work any injustice; or if the plaintiff has obtained it by sharp and unscrupulous practices, by overreaching, by trickery, by taking undue advantage of his position, by non disclosure of material facts, or by any other inconstancies means - then a specific performance will be refused.⁴¹

In the paragraph referred to from Williston, there is the following:

the jurisdiction of equity is generally called discretionary. More exactly it may be said that wherever a contract though legally valid is grossly unfair, or its enforcement opposed to good policy for any reason, equity will refuse to enforce it, and though certain kinds of unfairness may be classified, equity declines to make an exact inventory of what amounts to such unfairness or impropriety as will preclude relief, but leaves a borderland where the court can consider the particular facts of each case and deal with it on its merits. In certain cases, though

34 172 F 2d 80, 3d Cir 1948 (hereafter *Campbell Soup*).

35 Note 33 *supra*.

36 Note 34 *supra*, 83.

37 *Ibid*.

38 *Ibid*.

39 J.N. Pomeroy, *Equity Jurisprudence* (5th ed., 1941) (hereinafter *Pomeroy*).

40 S. Williston, *Contracts* (Rev. ed., 1937) (hereafter *Williston*).

41 Note 39 *supra*, para. 1405a.

the circumstances may be insufficient to warrant rescission or cancellation, the court in its discretion may refuse specific performance. So, if the contract is unconscionable in its terms, equity will not enforce it.⁴²

I have set the above passages out to show what an American trial judge will find if he tries, by following up the Official Comment, and with the limited time available to trial judges, to get an idea of what the statutory provision concerning unconscionability and binding on him, means. To go as far as I have gone will have taken him a little time, and will have presented him with a smorgasbord of standards, not all clashing, but certainly overlapping, by which to judge the case in front of him. The passage from Pomeroy does not refer to any case law. However, the passage from Williston does, and the diligent judge will find if he traces through the cases a variety of examples arguably referable to one or more of the standards visible in the text of the comment, the *Campbell Soup* case, and the very wide statements in the two texts. Moreover, he will have to bear in mind that not all of the statements in the two texts were unambiguously directed towards the idea of the unconscionable. If the judge, with his limited time, happens to consult Kessler Gilmore he will note that section 2-302 has its counterpart in *Restatement, Second, Contracts* section 208.⁴³ If he then turns to that section he will find that it is in substance the same as sub-section (1) of section 2-302. It also has a comment which both refers to the UCC section and acknowledges that that section was its source. The comment however leaves a somewhat different impression from that created by the UCC section and comment. Although in the end it manages to refer to a similar smorgasbord of standards there is much greater reference to the restrictive aspect of unconscionability doctrine. In fact, the first case referred to is *Hume v. United States*⁴⁴ in which the Supreme Court took as its starting point the passage in Lord Hardwicke's decision in *Earl of Chesterfield v. Janssen*.⁴⁵ There Lord Hardwicke said that one class of fraud was that in which the bargain itself was

such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other; which are unequitable and unconscientious bargains.⁴⁶

Clearly, if unconscionability were confined to that passage in *Chesterfield* the unconscionability doctrine would be applicable to a much narrower range of situations than those mentioned in Pomeroy and Williston. However the remainder of the comment in the *Restatement, Second, Contracts* discusses *Campbell Soup*. This commentary, which is lengthy, proceeds to alternate between narrower and broader statements

42 Note 40 *supra*, para. 1425.

43 Note 10 *supra*, 561 fn. 40.

44 132 US 406 (1889).

45 Note 26 *supra*.

46 *Id.*, 155.

of the doctrine. For example:

Inadequacy of consideration does not of itself invalidate a bargain, but gross disparity in the values exchanged may be an important factor ...⁴⁷

Theoretically it is possible for a contract to be oppressive taken as a whole, even though there is no weakness in the bargaining process and no single term which is in itself unconscionable. Ordinarily, however, an unconscionable contract involves other factors as well as overall imbalance.⁴⁸

A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party. But gross inequality *etc.*⁴⁹

Then finally, on this aspect of the matter there is the following, which more or less puts the matter on the footing that emerges from *Commercial Bank of Australia v. Amadio*:⁵⁰

[f]actors which may contribute to a finding of unconscionability in the bargaining process include the following: belief by the stronger party that there is no reasonable probability that the weaker party will fully perform the contract; knowledge of the stronger party that the weaker party will be unable to receive substantial benefit from the contract; knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors.⁵¹

This statement of the relevant factors involves a stronger party and a party in a position of weakness as against the stronger, together with the stronger party's knowledge of the weaker party's inferior situation and a deliberate taking advantage of it.

The conclusion from all this is that there is scope for great flexibility in the United States. The judge dealing with an unconscionability answer to a contract claim can find authorities justifying refusal of any recourse to the doctrine unless the bargain was made by a person, on the disadvantaged side, out of his senses, and on the advantaged side neither honest nor fair. At the other end of the scale, he can find authorities apparently permitting equitable intervention on the ground of unconscionability unless the bargain was perfectly fair and just in both its terms and circumstances. He will of course be influenced by the trend of decision in the final appellate court in his particular court hierarchy. That trend itself, however, is more likely to be flexible in a country having so many final appellate courts and where the sources of authority and information tend to heap up cases from all the jurisdictions on particular subject matters with, in most cases, little attempt to distinguish between the jurisdictions or to classify any different trends in each.⁵²

47 *Restatement, Second, Contracts* s.208; 28 ER 82, 108.

48 28 ER 82, 108.

49 *Id.*, 109.

50 Note 25 *supra*.

51 28 ER 82, 109.

52 There is plenty of classification in the texts, but it tends to be of the 'the following states follow such a line and the following this other line' variety: there simply is neither space nor time to deal with states individually, although this is what students, become practitioners, will have to do.

Another matter which practitioners in the United States have learned to be wary of, and which Australian practitioners will have to become accustomed to looking out for, is illustrated in this area of the law. The current edition of White and Summers was published in 1980.⁵³ Chapter 4 deals with unconscionability. It is there stated⁵⁴ that section 2-302 has enshrined the doctrine of unconscionability in the statutory law of all but three states, adding in a footnote,⁵⁵ that California omits section 2-302. In the West Publishing Company's 1989 publication of the *Uniform Commercial Code Official Text and Comments*⁵⁶ there is a note to section 2-302 saying California omits the section.⁵⁷ Kessler Gilmore (published 1986) is on this point more accurate. It is there said that California initially omitted the section but later incorporated it in the California Civil Code.⁵⁸ Even this however does not tell the full story. On going to the California Civil Code one finds section 1670.5 which reproduces section 2-302 verbatim, and also reproduces the comment in almost the same terms. However, the section appears under Title 4, "Unlawful Contracts" California Civil Code Pt II Div. 3 which deals with contract in general. In the comment, the sentence beginning "The basic test" has been changed to leave out the references to the commercial nature of the contract so that it reads

[t]he basic test is whether, in the light of the general background and the needs of the particular case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.⁵⁹

The section was added to the California Civil Code in 1979.

The existence of section 1670.5 prompts several observations. One is the simply mechanical one that it is necessary to take care with United States materials. The next is that California, with a population and economy significantly larger than that of Australia, must generate contract case law, potentially of interest to Australian lawyers, in great abundance. It seems to me undoubtedly to be important to know, when using non-UCC contract cases coming from different states in the United States, that the California ones have an added ingredient in them that perhaps all and certainly most of the other states do not have. I earlier mentioned the existence, in Australian jurisdictions, of statutes having much the same effect as section 1670.5, although not yet in respect of the entirety of contract law.⁶⁰ In pointing out the difference in the Californian situation, I am not suggesting that it necessarily leads to any marked difference in results in Californian case law from those in other states. Indeed, it seems

53 Note 16 *supra*.

54 *Id.*, 149.

55 *Id.*, 149 fn.10.

56 *Uniform Commercial Code Official Text and Comments* (1989), Vol. 1A.

57 *Id.*, 17.

58 Note 10 *supra*, 561 fn. 439.

59 California Civil Code s.1670.5.

60 See above, discussion accompanying note 30.

inevitable that the existence of section 2-302 as a factor in all UCC contracts will be bound to influence the reaction of judges familiar with that section when dealing with contracts not affected by the Code. I am suggesting, however, that it is important to know of its existence in general contract law in California and its invitation to judges to use the smorgasbord approach encouraged by the Comment.

An example in the American case books of the way in which judges dealing with problems not falling under the UCC will nevertheless be affected by section 2-302 is *Williams v. Walker-Thomas Furniture Co.*⁶¹ In this case Judge Skelly Wright, giving judgment for the District of Columbia Circuit Court of Appeals, applied section 2-302 although it had not been in force in the District of Columbia at the time when the contract was made. The decision presents an interesting example of what may happen in one of the United States' jurisdictions. The court observed that there was no prior authority on the point and went on to say:

in view of the absence of prior authority on the point, we consider the Congressional adoption of section 2-302 persuasive authority for following the rationale of the cases from which the section is explicitly derived.

In a footnote to this observation they referred to the Comment to section 2-302. That is, they were saying that the section was derived from the cases referred to in the Comment. My own earlier comment would indicate my opinion that this is a very generous observation, correct only in the most general sense. The note also referred to a Law Review article⁶² published in 1959 in which the point I am now making was predicted, namely that the rule of section 2-302 would be followed by analogy in cases involving contracts not specifically covered by the section.⁶³ It is interesting to see that they connected this last observation with some remarks of Professor Llewelyn who is generally accepted as having been the draftsman of section 2-302.⁶⁴ The Court in the passage following that earlier quoted, went on to discuss unconscionability in terms introducing both the wide and the narrow approaches I have earlier described as a smorgasbord of standards. The case itself reinforces the smorgasbord approach to unconscionability. White and Summers refer to it as still one of the pre-eminent cases under the section.

B. GOOD FAITH

A feature of the sales Article of the UCC (Article II) and hence of much United States contract law is the explicit recognition and statement of the obligation of good faith upon contracting parties in the performance and enforcement of contracts. This seems to be a marked distinction from the

61 350 F 2d 445 (DC Cir, 1965).

62 *Id.*, 449.

63 Note (1959) *Va L Rev* 583, 590.

64 State of New York Law Revision Commission, *Report and Record of Hearings on the Uniform Commercial Code* (1954), 108-10.

Australian position, where the authoritative cases and commonly used texts have never recognised the good faith component in the common law of contract.⁶⁵ The positions may not be so far apart as appears at first sight.

Chapter 1 of the UCC contains definitions. Section 1-201 (19) defines “[g]ood faith” as meaning “honesty in fact in the conduct or transaction concerned.” Section 1-203 says “[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.” Throughout Article II there are direct or indirect references to the obligation of good faith. I here mention two of them. Section 2-305(1) provides that parties can conclude a contract for sale without settling the price. Subsection 2 says that “[a] price to be fixed by the seller or buyer means a price for him to fix in good faith.” Section 2-311(1) says that an agreement for sale otherwise sufficiently definite is not invalid by leaving particulars of performance to be specified by one of the parties. It then continues “[a]ny such specification must be made in good faith and within limits set by commercial reasonableness.” *Restatement, Second, Contracts* adopted section 1-203 of the UCC almost verbatim. It had not appeared in *Restatement, First, Contracts*. Section 205 of *Restatement, Second, Contracts* is headed “Duty of Good Faith and Fair Dealing.” It says “[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.” Thus, sales contracts in all states are subject to the statutory rule of UCC section 1-203, and all contracts are subject to the non-statutory but persuasive authority of *Restatement, Second, Contracts* section 205.

United States cases dealing with good faith in contract, both before and since UCC and Restatement articulation, are as many as the sands of the sea. No one has critically analysed them all with a view to reconciliation or classification.⁶⁶ Two well-known cases may give some idea of the way in which the idea of good faith has been used and developed. Neither falls within the sales article of the UCC. *Fortune v. National Cash Register Co.*⁶⁷ was a decision of the final appellate court of the Commonwealth of Massachusetts, delivered by Abrams J.

65 This position, as it was in English and Australian law thirty years ago was well described by Professor R. Powell in “Good Faith in Contracts” (1956) 9 *Current Legal Problems* 16-38. That the position remained essentially unchanged in Australia in 1986 is shown in two chapters in P. D. Finn (ed.) *Essays on Contract* (1987): see P.D. Finn, “Equity and Contract”, 106-114 and H.K. Lücke, “Good Faith and Contractual Performance”, 155-182. Since then ‘good faith’ has crept into the index of one Australian text, *Cheshire & Fifoots Law of Contract* (5th Australian ed., 1988), but the editors cannot really take the matter further than Professor Powell did in 1956. They end by saying, “[t]he role of good faith and fair dealing in our contract law is in urgent need of further judicial articulation” *id.*, 151.

Fortune was a salesman of National Cash Register Co. (NCR). His written contract of employment was terminable at will without cause by either party on written notice. The contract also provided a system of bonuses for sales, part of the bonus being payable to him only if he was still employed by NCR at the time of delivery of the products sold. Fortune became entitled to bonuses in respect of products he delivered over a period. His employment contract was terminated by NCR before the delivery of some of the products, and thereafter he did not receive the part of the bonus he would have received if still employed by NCR at the date of delivery. At the trial it was argued for NCR that there was no evidence of any breach of contract. However, the trial judge ruled that Fortune could recover if the termination had been in bad faith and that question was submitted to the jury, who answered it in Fortune's favour. In the final appeal, the Court recognised that under the express terms of the contract Fortune had received all the bonus to which he was entitled and that according to a literal reading of the contract NCR was right in saying it had not been in breach of it. The Court, however, held that the contract contained an implied covenant of good faith and fair dealing and that a termination not in good faith was a breach of the contract. The Court acknowledged the practical necessities of the employer as an employer:

and that an employer needs flexibility in the face of changing circumstances. We recognise the employer's need for a large amount of control over its workforce.⁶⁸

66 Summers made a very extensive survey in 1968 of the case law in examining the question, 'in what circumstances do case law and the Code provisions on sales impose obligations of good faith?': see R. Summers, "Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code" (1968) 54 *Virginia L R* 195-6. An idea of the difficulty caused by the volume of cases and the number of jurisdictions is given by what he said: "cases have been discovered which, if taken as a whole rather than by states, require good faith at every stage of the contractual process from preliminary negotiation through performance to discharge, and in nearly all kinds of contracts. This is not to say that all cases agree as to when a duty of good faith should be imposed, for they do not. Nor, of course, is it to say that the jurisdictions are more or less uniform in the extent to which they require good faith. On some questions there is a fair sprinkling of decisions from different states, but on others - for example, whether contract negotiations must be conducted in good faith - case law is scant. Further research would probably turn up more cases, but it has not been possible to do a comprehensive survey of all the cases in which good faith could have figured ... The cases discovered reveal that good faith is a highly versatile doctrine ..." (*id.*, 216). This article, which was very influential, put forward an interpretation of section 1-203 which became one of the two chief theories as to its meaning. For the other, and for references to the intervening literature, see S.J. Burton, "More on Good Faith Performance of a Contract: A Reply to Professor Summers" (1984) 69 *Iowa L R* 497. It is not my purpose in this paper to embark on a discussion of the two views (which plunge readers deep into what these days is called 'hermeneutics') but to draw attention to yet another strand of variety in the United States scene.

67 364 NE (2d) 1251 (1977) (hereafter *Fortune*).

In the Court's view, however, in cases such as that before them where:

commissions are to be paid for work performed by the employee, the employer's decision to terminate its at-will employee should be made in good faith. NCR's right to make decisions in its own interest is not, in our view, unduly hampered by a requirement of adherence to this standard.⁶⁹

The Court went on to say that good faith and fair dealing between parties were pervasive requirements in the law of Massachusetts and that parties to contracts or commercial transactions were bound by this standard. Reference was then made to section 1-203 of the UCC (although the language used was the slightly wider language of section 205 of *Restatement, Second, Contracts*). Significantly, however, the Court went on to reinforce its statement of the standard by the citation of many cases (all from Massachusetts) showing that a requirement of good faith had been assumed or implied in a variety of contractual situations. The cases reached as far back as 1924, when the standard depended wholly upon implication.

The other case is *Thompson v. St Regis Paper Co.*⁷⁰ a decision of the highest appellate court in the State of Washington. The Court (speaking through Brachtenbach J.) faced a similar issue to that in *Fortune*, and reached the same result, but by a different method. Thompson was an at-will employee of St Regis, which ran an Incentive Compensation Plan. St Regis terminated his employment, giving no other reason than that he "stepped on somebody's toes." At first instance, St Regis obtained summary judgment against Thompson's claim for breach of the employment agreement. The appellate Court agreed with the lower Court's conclusion that the employment was terminable by the employer at-will and not only for just cause. The court then discussed the employment at-will doctrine and the criticism that it was formulated in the Nineteenth Century to accommodate *laissez-faire* concepts of economic individualism which, in modern eyes, allowed the employer to take unfair advantage of employees. It noted that such criticism had led to many state courts modifying the 'terminable at-will' rule. The court regarded the issue before it as whether they would also modify the common law rule. In discussing this issue they referred to cases, including *Fortune*, where courts had held that in every employment contract there is an implied covenant of good faith and fair dealing limiting the employer's discretion to terminate the employment of an at-will employee. They refused to adopt this approach, accepting the view of the Hawaiian Supreme Court in *Parnar v. Americana Hotels*⁷¹ that

to imply into each employment contract a duty to terminate in good faith would ... subject each discharge to judicial incursions into the amorphous concept of bad faith.⁷²

68 *Id.*, 1256.

69 *Ibid.*

70 685 P 2d 1081 (1984) (hereafter *Thompson*).

71 652 P 2d 625, 629 (1982).

In *Thompson*, however, the Court went on to discuss the situation which arises when employers issue documents to their employees setting out the employer's policies relevant to the employee's work. They also noted that in some circumstances the issuing of what amounted to directives to employees could affect the terms of the contractual relationship between them. They did not hold that in the case before them there had been any contractual term created by any handbooks issued by St Regis. They went on, however, that:

absent specific contractual agreement to the contrary, we conclude that the employer's act in issuing an employee policy manual can lead to obligations that govern the employment relationship.⁷³

They took the view that the reason for employers issuing such manuals was to create an environment in which the employees believed that each employee would be treated fairly. This could create an atmosphere where employees justifiably relied on the expressed policies and justifiably expected the employers to do the same. They said,

[o]nce an employer announces a specific policy or practice, especially in light of the fact that he expects employees to abide by the same, the employer may not treat its promises as illusory.⁷⁴

Some readers may wonder why this course of events between employer and employee would not produce actual contractual terms between them. However, it seems to be clear from various statements by the Court that at this point they were assuming the correctness of the trial Court's view that the employment contract contained no term preventing the employer terminating the employee's employment at will. Having made this assumption the Court reached its conclusion in the following terms:

[t]herefore, we hold that if an employer, for whatever reason, creates an atmosphere of job security and fair treatment with promises of specific treatment in specific situations and an employee is induced thereby to remain on the job and not actively seek other employment, those promises are enforceable components of the employment relationship. We believe that by his or her unilateral objective manifestation of intent, the employer creates an expectation, and thus an obligation of treatment in accord with those written promises. See *Restatement, Second, Contracts* s.2 (1981). (Promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promise in understanding a commitment has been made).⁷⁵

On this basis (and on one other, not presently relevant) the appellate Court reversed the trial Court's entry of summary judgment. Material issues of fact to be determined at trial were the effect of the manual issued by St Regis in relation to the employment relationship; whether anything in it amounted to promises of specific treatment in specific situations; and if so, whether *Thompson* justifiably relied on any of the promises. They

72 Note 70 *supra*, 1086.

73 *Id.*, 1087.

74 *Id.*, 1088.

75 *Ibid.*

also stated that while they had determined that there was no implied contract to terminate only for cause, they could not determine on the record before them whether the parties may have contractually agreed that statements within the manual were to be part of their employment contract. Therefore the court was of the opinion that “under traditional contract analysis” a material issue of fact to be tried could be whether any provisions of the employment manual were part of the employment contract.

These two cases give an Australian lawyer food for thought in various ways. They illustrate how different state courts will handle similar problems differently, although in each case by reference to ideas immediately recognisable in Australian contract law. *Thompson* shows both a readiness to make use of what the court called “traditional contract analysis” as also what seems to be a development of estoppel or reliance theory which, without any discomfort, they regard as different from contract theory. *Fortune* shows both a readiness to rely on provisions contained in the UCC in a field outside the operation of that Act and also a readiness to use pre-UCC common law contractual ideas arising from implication of terms.

By reference to the last mentioned idea, I come to the Australian situation. As already mentioned, Australian law does not, in terms, acknowledge a good faith doctrine. It has however at all times recognised the idea embodied in what Lord Blackburn said in *Mackay v. Dick*.⁷⁶ Lord Blackburn there said:

where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.⁷⁷

This statement has been applied in Australian cases. In particular, the High Court, in *Secured Income Real Estate v. St Martins Investments Pty Ltd*⁷⁸ has taken up Lord Blackburn’s statement and given it a general operation not confined to the kind of facts of the case in which it was made. In the *Secured Income* case, Mason J., in reasons with which all members of the Court agreed, said of Lord Blackburn’s statement,

[i]t is not to be thought that this rule of construction is confined to the imposition of an obligation on one contracting party to cooperate in doing all that is necessary to be done for the performance by the other party of his obligation under the contract.⁷⁹

In what could be a statement fruitful for future use of the implied term technique, Mason J. went on to make applicable to Lord Blackburn’s statement what Griffith C.J. said (when Chief Justice of the Queensland Supreme Court) in *Butt v. M’Donald*⁸⁰

76 (1881) 6 App Cas 251.

77 *Id.*, 263.

78 (1979) 144 CLR 596 (hereafter *Secured Income*).

79 *Id.*, 607.

80 (1896) 7 QLJ 68.

[i]t is a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract.⁸¹

This formulation does not in so many words go as far as the good faith formulations in the United States materials. Furthermore, Mason J. went on to stress that in many cases the correct interpretation would depend not so much on the application of the general rule as on the intention of the parties as manifested by the contract itself.⁸² However, it seems very arguable that the ideas behind the use by Mason J. of the dictum of Griffith C.J. in the circumstances of the *Secured Income* case is that Australian law has reached the point where terms may readily be implied into contracts, having substantially the same effect as the good faith formulation in the United States.

C. ESTOPPEL AND CONTRACT

I mentioned at the beginning of this paper that Australia is now free to decide what its contract law is and will be. In saying this I had in mind that until the Australia Act 1986 (Cth) came into operation, the English common law of contract was still being imposed, in a binding way, upon the courts of the various Australian states. This happened because a litigant could choose to appeal from a decision of the final court of appeal in each state either to the Privy Council or the Australian High Court. Until 1968 no incongruity followed from this situation, because the Privy Council had jurisdiction to grant leave to appeal in state law matters from decisions of the High Court, which accordingly considered itself bound by Privy Council decisions in such cases. Between 1968 and 1987, however, no appeal lay to the Privy Council from the High Court, although the right of the litigant to appeal direct to the Privy Council from the final appellate court in the state remained. Thus, for that period, there were two final courts of appeal in state common law matters, each of which sensibly sought to avoid conflict with the other. So, although the High Court was not bound from 1968 onwards to follow English authority, there were two powerful reasons why English decisions retained high persuasive value before the High Court. One was the wish to avoid conflicting decisions and the other was the powerful consideration that common law in the various Australian states was directly founded on English common law and for a very long time had been regarded for all practical purposes as being substantially the same as it. This meant that: English case law was constantly being accepted in Australian courts as completely authoritative; English case law provided the leading authorities for the common law as accepted in the Australian states; and lawyers and judges knew no other system. Since the Australia Act 1986 (Cth), English case law

81 *Id.*, 70-1.

82 Note 78 *supra*, 607-8.

can no longer provide binding precedent upon any Australian court. All the reasons, however, which previously made English authority persuasive in Australian courts, remain. This means that English thinking in regard to such matters as the relationship of common law and equitable estoppel to contract, and the doctrine of consideration in contract, have heavily influenced and will continue to influence, decisions by Australian courts involving these matters.

*Jorden v. Money*⁸³ was a decision of the House of Lords, which together with later English decisions, led to Australian courts taking up two propositions regarding estoppel and contract. One was that to make out a case of common law estoppel by representation, the representation had to be of an existing fact. A promise or representation as to future conduct would not do. The second was that equitable estoppel was defensive only and could not operate to permit the party asserting it to succeed as plaintiff against the other party as defendant. These propositions were never very fully worked out, at least in Australian cases, and were frequently questioned. It was difficult to extract from a consideration of the cases completely satisfactory principles, or any clear indication of what separated common law from equitable estoppel.⁸⁴

The practical effect of the two propositions went pretty much by the board with the High Court's decision in *Waltons Stores (Interstate) Ltd v. Maher*.⁸⁵ The result of the case was that a promise or representation as to future conduct was held to be sufficient to enable the party to whom it was made to succeed as plaintiff against the other party as defendant in enforcing the promise or representation, either by way of obtaining a decree for specific performance, or failing that, by damages. Three of the five judges (Mason C.J. and Wilson J., who wrote a joint opinion, and Brennan J.) achieved this result by basing the decision on equitable estoppel, and did so by sharply distinguishing the basis of equitable estoppel from that of common law estoppel. Equitable estoppel was said to be based upon equity's intervention to prevent unconscionable conduct, while common law estoppel was said to be grounded upon the making good of representations. The ratio of the opinion of the fourth judge (Deane J.), was that the facts of the case justified the decision in the plaintiffs' favour on the footing of what the first three judges had classified as common law estoppel. However, he also explained in detail his view that before the introduction of the Judicature Acts system a general doctrine of estoppel by conduct had been clearly established at law and in equity. In his view, as estoppel *in pais* embraced promissory estoppel,

83 (1854) 5 HLC 185.

84 Sir Owen Dixon seemed to have a coherent theory see "On Judicial Method" (1955-56) 29 *ALJ* 468, 475. But this theory really only worked if *Jorden v. Money*, *ibid.* was treated as wrongly decided. Sir Owen Dixon was not in a position (because of the then precedent rules) to say openly that that was his opinion. But he laid the groundwork.

85 (1988) 164 CLR 387 (hereafter *Waltons Stores*).

there was no reason why the general doctrine of estoppel could not be applied as effectively in relation to a representation or assumption of a future state of affairs as to one of an existing state of affairs and finally, that *Jorden v. Money*⁸⁶ and its successors were no longer good law in Australia.⁸⁷ Further, in his view, the notions of good conscience and fair dealing underlay what he had called the general doctrine of estoppel by conduct. However, he did not think it necessary for the decision of the case in hand to base himself on that view, saying it was “preferable to proceed, at least for the time being, with the development of the law in that area on a more cautious basis.”⁸⁸ The fifth judge, Gaudron J., accepted the distinction between common law and equitable estoppel, but held that what had been established in the case justified a remedy on the basis of common law estoppel.

The three judges who decided the matter on the basis of equitable estoppel all indicated (and Deane J. also noted) that upon this approach less violence was done to the doctrine of consideration in contract than by the unified view. Mason C.J. and Wilson J. mentioned this factor when, in referring to promissory estoppel in the United States, they said the development of the doctrine there should be viewed with some caution. I will touch on their treatment of that aspect of the law in the United States, but first will state briefly what had happened there.

The *Restatement, First, Contracts*, published in 1932, included section 90:

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

This section took that form notwithstanding that section 75 defined consideration in fully orthodox terms. One version of the history of how these two sections assumed their form in 1932 is given by Gilmore in *The Death of Contract*.⁸⁹ Gilmore described the coexistence of these sections in the *Restatement, First, Contracts*, as an example of the schizophrenia which appeared in various places therein. He said the two sections were contradictory and in the end one must swallow the other up. In his view the years following the publication of the *Restatement, First, Contracts*, showed the success of section 90 and the effective dismantling of the form and system of classical contract theory. His view was that the consideration element of that system had been effectively undone by section 90.⁹⁰

86 Note 83 *supra*.

87 In effect, his Honour was making Sir Owen Dixon's views explicit.

88 Note 85 *supra*, 452.

89 G. Gilmore, *The Death of Contract* (1974), 62-5; That the Williston-Corbin polarity may have been less dramatic than Gilmore recounted is suggested by Williston's argument in support of section 90 before the American Law Institute. See R.S. Summers, R.A. Hillman, *Contract and Related Obligations* (1987), 91-92; see also *id.*, 297-8.

90 Gilmore, *id.*, 65,72.

In the *Restatement, Second, Contracts*, section 90 reads:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Gilmore in *Death of Contract* says that when section 75 and section 90 are read in the *Restatement, Second, Contracts*, with the amplifying commentary, it is clear that the unresolved ambiguity in the relationship between them in the *Restatement, First, Contracts*, has been resolved in favour of section 90 “which has, in effect, swallowed up the bargain principle of section 75.”⁹¹ In Kessler Gilmore the same point is made less dogmatically when it is said that the end result of the existence of section 90:

is that the law of contractual liability is today a two-track system, one track resting on the notion of bargain and the other on the ‘vaguely delictual’ idea that an act of reasonable reliance can create liability for a subsequent loss.⁹²

The topic is one about which there has been a very considerable amount of commentary in the United States legal literature.⁹³

The caution with which Mason C.J. and Wilson J. in *Waltons Stores* viewed the development of section 90 doctrine in the United States, followed from their statement⁹⁴ that section 90, on its face, reflects a closer connection with the general law of contract than the doctrine of promissory estoppel in Australia, with its origins in the equitable concept of unconscionable conduct, might allow. This in part was because in the United States promissory estoppel had become in effect a substitute for consideration in contract formation. This was inconsistent with the explanation of equitable estoppel upon which they were founding their decision in *Waltons Stores*. Hence, their caution in treating the United States and Australian positions as equivalent. Nevertheless, Mason C.J. and Wilson J. gave readers some reason to think they were not fully satisfied with the theoretical basis upon which they resolved the issue in *Waltons Stores*. Their Honours⁹⁵ indicated that they would have been prepared to consider an argument that common law estoppel arose where there was a mistaken assumption as to future events, if the party arguing for the estoppel remedy in the case had been prepared to challenge *Jorden v. Money*.⁹⁶ They remained non committal about the result if such a

91 *Id.*, 72.

92 Note 10 *supra*, 281.

93 I note without further amplification here, that another source of variety in the United States is that some sections of *Restatement, First, Contracts* and *Restatement, Second, Contracts* are significantly different, and some states adhere to the former while others have moved on to the latter.

94 Note 85 *supra*, 402.

95 *Id.*, 399.

96 Note 83 *supra*.

challenge had been made, saying that the reversal of *Jorden v. Money*⁹⁷ would be a formidable exercise because of its repeated acceptance over the years by courts of the highest authority. However, they also referred to the powerful dissent of Lord St Leonards in that case. The other, perhaps clearer, indication that although it was their theory of the dichotomy between common law and equitable estoppel that impelled them to counsel caution in assimilating United States and Australian positions, they nevertheless felt the dichotomy was less clear cut than would logically follow from their theoretical analysis. That indication is found in their reference to the fact that section 90 in making the promise binding only if injustice could not otherwise be avoided, made it clear that pursuant to the section the promise was only enforced in circumstances where departure from it would be unconscionable.

Foran v. Wight,⁹⁸ decided in the High Court on 15 November 1989, was a conveyancing case in which Mason C.J. reached a different result from the majority. One reason for the difference involved the application of an estoppel within the area discussed in *Waltons Stores*. In discussing this estoppel Mason C.J. referred to what he and Wilson J. had said in *Waltons Stores* about *Jorden v. Money*⁹⁹ and continued:

[o]n further reflection it seems to me that we should now recognize that a common law estoppel as well as an equitable estoppel may arise out of a representation or mistaken assumption as to future conduct. To do so would give greater unity and consistency to the general doctrine of estoppel. Moreover, the clear acceptance by the Court in *Waltons Stores* of the doctrine of promissory estoppel makes this course inevitable. After all, it was the apprehension that representations as to future conduct, unsupported by consideration, would invade the territory of promises for valuable consideration that led to the confinement of common law estoppel to representations of existing fact. Given the recognition of promissory estoppel and the fact that the doctrine may preclude the enforcement of rights at least between parties in a pre-existing contractual relationship, the dam wall has fractured at its most critical point with the result that we should accept that a representation or a mistaken assumption as to future conduct will in appropriate circumstances create a common law estoppel as well as an equitable estoppel.¹⁰⁰

In strictness, this statement in a dissenting opinion does not affect the theory of the present position in Australia. On the other hand, what his Honour says about the effect of *Waltons Stores* seems, with respect, clearly right. Whether the result in that case is put on one theoretical basis or another, it produced a remedy on a factual situation most simply explained in line with what Mason C.J. now suggests. Further, in *Foran* Deane J. (among the majority) said he was now prepared to take the step he had refrained from taking in *Waltons Stores*, and rested his decision on the unified doctrine.¹⁰¹ The other judges did not deal with the common law/equitable estoppel issue directly, but Dawson J., by his references to

97 *Ibid.*

98 (1989) 64 ALJR 1.

99 Note 83 *supra*.

100 Note 98 *supra*, 12.

101 Note 98 *supra*, 22.

*Legione v. Hately*¹⁰² (in which Mason and Deane JJ. had, in a joint opinion, argued in a way supporting the unified doctrine) seems to have very guardedly indicated that he could also support the unified doctrine in a suitable case.¹⁰³

The result of *Legione*, *Waltons Stores* and *Foran* may well lead Australian lower courts to feel, when dealing with promissory estoppel in contractual-type situations, some hope of being safe if they act on the basis that the present position in Australia is as Mason C.J. and Deane J. have indicated in *Foran*. If that is so, the way would seem to be open for Australian lawyers to make freer use from now on of the ideas that have developed in the United States from experience with section 90. One result of this could be to reduce reliance upon the distinction between the ideas of making representations good and restraining unconscionable conduct. There is little sign of this distinction in the United States cases and texts. Another result would be the need to re-evaluate the distinctions drawn between common law and equitable remedies. The blurring of these distinctions was a latent aspect of Sir Owen Dixon's approach and would come more clearly to the surface with the general acceptance of the unified doctrine of estoppel.

III. ONE UNDERLYING UNIFYING THEME?

In the United States Professor Eisenberg (among others) has been exploring the shortcomings of the bargain theory of contract and proposing what he sees as a better descriptive and normative explanation of what is happening and ought to happen in contracts cases.¹⁰⁴ In 1982 he said that traditionally the bargain principle was taken as paradigmatic in explaining the enforcement of promises.¹⁰⁵ He further said,

[u]ntil recently, courts have tended either to apply the bargain principle to cases raising such problems, despite the difficulties this application presents, or to deal with these difficulties in covert and unsystematic ways. Over the past thirty years, however, a new paradigmatic principle - unconscionability - has emerged. This principle explains and justifies the limits that should be placed upon the bargain principle on the basis of the quality of a bargain.¹⁰⁶

He then suggests that the new paradigm explains a variety of contract concepts that otherwise seem distinct. The three doctrinal aspects I have touched on in this paper can all readily be explained by this paradigm. So too (at least arguably and perhaps with different degrees of ease/difficulty) can other concepts recently dealt with in the High Court: mistake,¹⁰⁷

102 (1983) 152 CLR 406 (hereafter *Legione*).

103 Note 98 *supra*, 29.

104 M. A. Eisenberg: "Donative Promises" (1979) 47 *Univ of Chic L Rev* 1; "The Bargain Principle and its Limits" (1982) 95 *Harv L Rev* 741; "The Principles of Consideration" (1982) *Cornell L Rev* 640; and "The Responsive Model of Contract Law" (1984) 36 *Stan L Rev* 1107.

105 Eisenberg "The Bargain Principle and its Limits" *id.*, 798.

106 *Id.*, 799.

107 *Taylor v. Johnson* (1983) 151 CLR 422.

restitution,¹⁰⁸ penalties,¹⁰⁹ relief against forfeiture,¹¹⁰ the enforceability of the rights of third party beneficiaries.¹¹¹ These areas roughly coincide with those referred to by Eisenberg in the discussion in his article which follows the passages I have referred to.

Has unconscionability, its hour come round at last, slouched to Australia to be reborn? It may be that to try and see all these cases linked by this common principle involves stating the principle in such general terms as to be of little practical significance. It may be that it will be fruitful. Either way, a close examination of Eisenberg's suggestion should cast light on what is actually going on in contracts in Australia today, and use of United States materials should help to make that light brighter.

IV. FINAL THOUGHT

If, as I expect, Australian lawyers make increasing use of United States contract materials, and if unconscionability continues to be examined in both jurisdictions as a possibly central and controlling idea, it will become increasingly necessary to see what differences there are in the jurisdictions of the two countries in the granting of equitable remedies. What is in this country abjured by some respected authorities as the "fusion fallacy" is, I think, orthodoxy in many United States jurisdictions. The administration of law and equity in the one court (whether it be called a concurrent or fused administration) began a little earlier in the United States than in England or Australia and the crossover of remedies is more advanced. This provides both another reason for caution in using United States materials and another source of ideas for possible use in Australia. One intriguing thought is that eventually Australia may be able to take fusion further than can presently be done in the United States where constitutional requirements enforce a continued division of common law and equity by making jury trials mandatory in many common law cases.¹¹²

If Australians are to make the best possible use of United States contract experience, much work lies ahead of us.

108 *Muschinski v. Dodds* (1985) 160 CLR 583; *Baumgartner v. Baumgartner* (1987) 164 CLR 137.

109 *Amev-UDC Finance Limited v. Austin* (1986) 162 CLR 170.

110 *Stern v. McArthur* (1988) 165 CLR 489.

111 *Trident General Insurance Ltd v. McNiece Bros Pty Ltd* (1988) 165 CLR 107.

112 The 7th Amendment to the United States Constitution says that "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved". Many state constitutions have similar provisions.