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SOUTHAMPTON STUDENT LAW REVIEW
2019 VOLUME 9, ISSUE 1

UNIVERSITY OF
Southampton

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SOUTHAMPTON STUDENT LAW REVIEW
2019 VOLUME 9, ISSUE 1



Southampton Student Law Review

Southampton Law School

Published in the United Kingdom
By the Southampton Student Law Review
Southampton Law School

University of Southampton
SO17 1BJ

In Affiliation with the University of Southampton, Southampton
Law School
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www.southampton.ac.uk/law/lawreview

ISSN 2047 – 1017

This volume should be cited (2019) 9 (1) S.S.L.R

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Acknowledgments

The editors wish to thank William S. Hein & Co., Inc. and HeinOnline for publishing the Southampton Student Law Review on the world's largest image-based legal research collection.

The Editors also wish to thank all members of Southampton Law School who have aided in the creation of this volume.

*Yuqing Zhao and Aygun Mammadzada
Southampton Student Law Review, Editors-in-Chief
August 2019*

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Foreword

Looking Forward and Back in Time of Transitions

All times are exciting, but some times are more exciting than others. This edition of the Southampton Student Law Review, comprised of pieces from former and current students at Southampton Law School, reveals just how exciting our times are. From the political tumult of Brexit and the continual developments in a post-colonial global order to technical advances in medicine and transportation, this issue of the SSLR explores the full breadth of pressing contemporary legal developments.

This issue illustrates how law sits on the temporal boundary of these dramatic social transitions. Even as many of the topics look to the future – the status of law in international and transnational contexts, and how law must address shifting practices due to changing norms and technologies – the issue remains thoroughly grounded in the history-minded method of common law. Thus we have articles that look to the impact of a former Supreme Court justice’s attitude on the development of contemporary law and how new struggles in areas of law mirror struggles of the past. Moreover, many of the articles themselves are thoroughly grounded in the tensions that emerge from applying established law to new developments. Statutes and case law do not evolve of their own accord to keep pace with new social and technical developments. It is the role of lawyers to interpret law so that it can face new challenges even as it maintains coherence and continuity with its past. This project is perpetual, but it happens to be a time in human history when the depth and scale of this interpretive challenge is especially great.

The students who write these pieces are not merely commentators of the moment. They are the future solicitors, barristers, and academics who will guide this continued development of law to face new challenges in a variety of contexts. The diversity and depth of this issue reveals that we should feel ourselves to be in good hands.

Jacob Eisler

Associate Professor of Public Law

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August 2019

Does a Choice of Law Bind a Claimant in a Direct Action? An Analysis in Relation to Insurance Contracts in a Maritime Law Context

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Abstract

This article examines the application of European Union rules on a choice of law in relation to direct action claims, with a focus on insurance contracts in a maritime setting. This is an important legal matter which needs to be addressed, since, in cases of insolvent tortfeasors, third parties may be left without a remedy for damages incurred.

The analysis will look into the most recent case law which has shaped direct action claims. For example, the Court of Justice of the European Union, in the recent case of *Assens Havn v Navigators Management (UK) Ltd*, confirmed that jurisdiction clauses are not binding on the third parties. Thus, this article will assess how the subsequent case law within the EU Member States have been developed, and will consider whether it has been harmonised - in order to conclude that the right to direct action against the insurers is of high significance to third parties - especially when the insured becomes insolvent.

Introduction

This paper is going to consider whether the choice of law applicable in direct action claims is binding on claimants in insurance contracts in the light of the current legal framework. In order to understand the position, which we are facing in today's globalised world, where majority of commercial transactions are commenced and concluded by the international parties, we must understand the position of the injured parties.

In terms of jurisdiction clauses, the Court of Justice of the European Union (CJEU) in the recent case of *Assens Havn v Navigators Management (UK) Ltd*¹ confirmed that jurisdiction clauses are not

¹ *Assens Havn v Navigators Management (UK) Ltd* [2017] ECLI:EU:C:2017:546.

binding on the third parties. Given the link between conflict of laws rules of the Brussels Regulation (jurisdiction clauses) and the Rome Regulations (governing law clauses) in the European Union (EU) level it would only make sense to understand whether third parties to the insurance contracts also have no rights, including direct rights, under the governing law clauses.

This paper will start with considering what is direct action and how the characteristics of the applicable law influence the third parties' rights. Secondly, it will be analysed why there was a need for harmonised instrument regulating the choice of law amongst the Member states. Moreover, we will look at the recent case law (*The Hari Bhum (No 1)*,² *The Yusuf Cepnioglu*,³ *The Prestige*,⁴ *Prüller-Frey v Brodnig and another*,⁵ and *Keefe v Mapfre*⁶) what they tell us about the choice of law binding the third parties in the direct claim actions. Lastly, it will be concluded that in accordance with the governing law clauses and courts' interpretation, third parties are bound by choice of law clauses in direct action claims.

Direct Action

When it comes to the right of direct-action, rules vary from one EU member state to another. A direct claim, as described by Johanna Hjalmarsson, is 'one filed by an affected person directly against the insurer without suing the insured'.⁷ The automatic thought by many may be that this is not possible, or should not be possible because an affected person is very unlikely to have any direct contractual relationship with an insurer of the insured. Thus, making a direct action against a person or institution, which did not contribute to the damages or loss suffered, impossible. However, if we look at it from a commercial perspective, it would be unfair if an injured party could not be compensated because the insured went bankrupt, became insolvent, or simply is in a jurisdiction, which the third party cannot access for financial or other reasons. For this reason, the purpose of this paper is to analyse and

² *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum (No 1))* [2004] EWCA (Civ) 1598; [2005] 1 Lloyds' Rep 67.

³ *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret AS (The Yusuf Cepnioglu)* [2016] EWCA Civ 386; [2016] 2 All ER 851.

⁴ *London Steamship Owners Mutual Insurance Association Ltd v Spain (The Prestige)* [2015] EWCA Civ 333; [2015] 2 Lloyd's Rep 33.

⁵ *Prüller-Frey v Norbert Brodnig, Axa Versicherung AG* ECLI:EU:C:2015:567.

⁶ *Mapfre Mutualidad Compania De Seguros Y Reaseguros SA v Keefe* [2015] EWCA Civ 598; [2016] 1 WLR 905.

⁷ Johanna Hjalmarsson, 'Direct Claims Against Marine Insurers in the English Legal System' (2010) 18 Asia Pacific Law Review 259, 261.

understand to what extent these third parties can claim directly from the insurer. In order to understand whether the claimants have a right to direct right of action against the insurer, they need to consider the applicable law because a direct action against the insurer ‘is not automatic and universal’.⁸

Direct Actions in Various European Jurisdictions

In English law the Third Parties (Rights Against Insurers) Act 2010 tells us that it gives third parties a right of direct action, but the third parties cannot enforce the rights of direct action against the insurer of insolvent person if the liability of the insured was not established.⁹ In contrast, under the Norwegian Insurance Act, direct actions are generally permitted.¹⁰ Position is once again different under § 115 of the German Insurance Act,¹¹ which tells us that direct actions are allowed where there is a compulsory liability insurance, the insured is insolvent, and/or insured’s whereabouts is unknown. It is evident that rules on direct actions vary so much within different Member States, in this globalised world where many big contractual deals happen between parties from different Member States, it makes sense to consider European choice of law rules on this matter.¹²

European Law Applicable to Insurance Contracts and Direct Action

The Rome I Regulation¹³ is applicable to all ‘contractual obligations’ in the case of conflict of laws in commercial and civil matters; including insurance contracts, but excluding social security systems and insurances organised by public law.¹⁴ This is a result of a need for further harmonisation in the EU, namely to ensure and facilitate the mutual recognition of judgments¹⁵ and the functioning of the internal market.¹⁶

⁸ *ibid.*

⁹ Third Parties (Rights against Insurers) Act 2010, s 1(3).

¹⁰ The Norwegian Insurance Act (Act-1989-06-16-69), §§ 7–6.

¹¹ *Versicherungsvertragsgesetz*, 23 November 2007 (BGBl I S 2631).

¹² Vibe Ulfbeck, ‘Direct Actions Against the Insurer in a Maritime Setting: the European Perspective’ (2011) *LMCLQ* 293, 295.

¹³ Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (‘Rome I’).

¹⁴ Regulation (EC) No 593/2008 of the European Parliament and of the Council, Article 1(1).

¹⁵ *ibid* Recitals (4), (6).

¹⁶ *ibid* (n 13) Recital (6).

Article 7 of Rome I combined the rules of the Insurance Directives and Rome Convention, making Rome I Regulation a more effective and coherent instrument for the EU members.¹⁷ The Rome I Regulation, specifically Article 7(2), gives the parties a right to make a choice of applicable law to their insurance contract in accordance with Article 3 of Rome I, in situations where the risk qualifies as a ‘larger risk’.

The Rome II Regulation¹⁸ applies to ‘non-contractual obligations’. Thus, as we have two different sets of rules that may govern insurance contracts, we have to consider characterisation of the right to direct action claims (whether it is a contractual or non-contractual claim) in order to decide which regime, Rome I or Rome II applies. If Rome II applies, it is fairly clear of what a lawyer representing a claimant trying to enforce direct action should do – simply rely on the Article 18 of the Rome II if it is a tortious claim, which states that a person who suffered damage may bring a direct action claim against the liability insurer of the person ‘liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides’.¹⁹ This therefore demonstrates the importance of the governing law clauses not only for contracting parties, but also for the third parties. This is because it will determine the rights third parties have against the insurers in their tortious claims.

On the other hand, the Rome I does not tell us anything about direct action in contractual claims. Thus, the situation is much more complicated in these circumstances. Because the Rome I is silent about such actions, the only option left to the parties is to look at the governing law of the contract.

Direct Action as a Contractual Right

¹⁷ Paul Torremans, Ugljesa Grusic, Christian Heinze, Louise Merrett, Alex Mills, Carmen Otero García-Castrillón, Katarina Trimmings, Zheng Sophia Tang, and Lara Walker, *Cheshire, North & Fawcett: Private International Law* (15th edn, Oxford University Press 2017) 703.

¹⁸ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (‘Rome II’).

¹⁹ *ibid* Article 18.

Dicey, Morris and Collins argued that in English law, the right of direct actions is a right based on insurance contract – a contractual right.²⁰ This view has been supported a significant, recent maritime law case – *The Hari Bhum (No 1)*.

The Hari Bhum (No 1)

In this case goods being carried from Calcutta to Moscow via Finland had been lost in transit. The shipper of the goods made a claim against his insurer. After the claim became settled the insurer was allowed to exercise the shipper's rights, and to claim against the carrier, who unfortunately became insolvent. Thus, the insurer of the shipper claimed against carrier's liability insurer under Finnish insurance contract law. The liability insurer contested these proceedings by claiming that the shipper's insurer should have relied on arbitration clause, thus asking for an injunction.

The shipper's insurer argued that under the Regulation 44/2001, Article 27 the Finnish court was the first court seised, and it was not caught by the arbitration clause between the carrier and its insurer. The English court held that the purpose of the Finnish Insurance Act, s 67²¹ 'is to enforce the terms of the contract'.²² The court held that the foreign proceedings in the present case were not vexatious or oppressive, thus rejecting to grant anti-suit injunction simply because the arbitration clause, which falls outside the scope of the Regulation 44/2001, did not bound the shipper's insurance because it was not part of the insurance contract. Thus, we can see that the English law defines direct action claims as contractual ones.

The Yusuf Cepnioglu

Here, when the vessel ran a ground while carrying a cargo issued by the charterer under the bill of lading. The charterer started the proceedings under the London arbitration clause against the owner of the vessel. The owner was a member of P&I Club, which provided for 'pay-to-be-paid' clause, and was protected against the third party claims. Later, charterer has also started the proceedings

²⁰ Michael Duggan, *Dicey, Morris & Collins on The Conflict of Laws* (14th edn, Sweet & Maxwell 2006) [35.043].

²¹ Finnish Insurance Contract Act 1994, s 67.

²² *The Hari Bhum (No 1)*, [19(ii)] (Clarke LJ).

attempting to add the club's assets under the Turkish Insurance Law 2012, which allowed a direct action against the club.

The Court of Appeal granted an anti-suit injunction to the club in order to stop a Turkish charterer from pursuing a direct action, in a situation where the charterer claimed to be a victim of tortious incident of a sunken ship committed by the ship-owner. The court stated that the right claimed was characterised as a contractual one. Thus, although the charterer was not a party to the insurance contract, it was subject to London arbitration clause because English law was governing the contract. As a result of proceedings in Turkey the charter was in breach of a contract and an anti-suit injunction was granted.²³

According to Longmore LJ the main consideration in this case is whether English law is an appropriate law to be used in order to determine the issues in the present case, or some other legal system was at a better position to determine that.²⁴ When discussing Turkish statute, the court stated that the right conferred was 'to a large extent circumscribed by the contractual provisions'.²⁵ The court's analysis indicates an attempt to determine whether the right of the third parties resemble the right of the insured to the extent that it is 'essentially the same obligations as those that could have been enforced by the insured or whether the statute has created a new and independent right which is not intended to mirror insurer's liability under the contract of insurance'.²⁶

Although the court was right by trying to establish the most suitable applicable law in this case, it seems surprising that it did not refer to the Rome Regulations because the court could have potentially have more guidance and in turn more clarity on whether a direct action is, or should be available in this case. Andrew Dickinson referencing and supporting Longmore LJ judgment suggested that the courts, if invited to decide the governing law of anti-suit injunctions, the court must have started its analysis by looking at the obligations in question in the English proceedings to determine whether, and if yes, how the Rome Regulations applied in the present case. If it was already evident that the English rules apply in regards to anti-suit injunction issues, then these rules in favour of granting the anti-suit

²³ *The Yusuf Cepnioglu* (n 3) [20]-[21], [33] (Longmore LJ); [45]-[50] (Moore-Brick LJ).

²⁴ *The Yusuf Cepnioglu* (n 3) [14] (Longmore LJ).

²⁵ *The Yusuf Cepnioglu* (n 3) [20]-[21] (Longmore LJ).

²⁶ *The Yusuf Cepnioglu* (n 3) [1] (Longmore LJ)

injunction should have been determined, prior to considering the subject matter relevant to the Turkish proceedings in question.²⁷ He went on further to suggest that in the present case the court should have considered whether the anti-suit injunction claim was a procedural or evidential claim, and if so, excluded from both, the Rome I and the Rome II Regulations. If the anti-suit injunction claim would be regarded to be a matter of substance then, the court should proceed to consider whether the claim classifies as a contractual (the Rome I) or non-contractual (the Rome II) obligation.²⁸

Lastly, a significant point made by Dickinson was that in the light of insurers, the Rome Regulations are only a small stretch, if any at all, because the insurer has already promised in a contractual obligation to treat the insured free of liability incurred to the victim of tort, thus treating insurer's obligations being freely passed on from the insured to the victim, 'at least if the victim is afforded a legal right by the law applicable to the contract to claim or intercept the indemnity payment and chooses to exercise that right'.²⁹

The outcome of *The Yusuf Cepnioglu* may be argued to be a victory for the insurers because the court chose to prioritise the P&I club's contractual right to London' arbitration over direct right of action under the Turkish Insurance law. However, in the future the courts should be careful when considering *The Yusuf Cepnioglu* case because as evidenced by the judgment and scholarly literature the absence of the Rome Regulations' consideration might have lead the court to the result which did not take into consideration both parties' (insurer and a victim) interests.

This therefore means that if we characterise direct claims as insurance claims in the EU, we are left with dealing only with the Rome I. This may sound straight forward, however, it raises an issue of what are the third parties' rights, who are not subject to the contract. Vibe Ulfbeck explains that if the applicable law clause in the contract between the contracting parties would also bind third parties, it would be against the privity of contract. Therefore, it must be assumed that the Rome I regulation is a starting point in direct action claims 'unless it is possible to argue that the claimant, by suing directly,

²⁷ Andrew Dickinson, 'The Right to Rome? The Law Applicable to Direct Claims against Insurers, and Anti-suit Injunctions' (2016) *Law Quarterly Review* 536, 537.

²⁸ *ibid* 538.

²⁹ *ibid* 539.

“steps into the shoes” of the insured...’³⁰

The Prestige

The Prestige sank off the west coast of Spain and as a result polluted the Atlantic coastline of France and Spain.

France and Spain started the proceedings against the ship officers, its owners and their indemnity and liability insurance (P&I club) for the damages caused by the pollution. The claim against the club for vicarious liability was brought under The Spanish Penal Code, Article 117, which allows the injured parties to start the direct-action proceedings against the defendant’s insurers.

The Club attempted to enforce its claim that France and Spain were bound by London arbitration clause. France and Spain contested it by arguing that the rights that they are trying to enforce in Spain were not the rights under the Insurance policy in question, but rather independent rights under the Spanish law. The Court of Appeal was faced with a question of whether France and Spain are trying to enforce a contractual or statutory right. This is important because this is an aspect, which would determine if they were bound by arbitration clause. The court agreed with the club that a right to direct action arose from the club’s policy, and not the Spanish statute. Therefore, as the contract was governed by the English law and fell within the arbitration clause in the club’s policy.³¹ The underlying nature of the direct action right derived from the club’s policy thus, it should be enforced in the light of it, including arbitration agreement. It was held that only if ‘the legislation prevents the insurer from relying in defence of a claim on important provisions which define the scope of his liability, one may be driven to the conclusion that the legislation has created a new right...’³² and this right ‘is not intended to mirror in substance the insurer’s liability under the contract’.³³

Similarly to the *Yusuf Cepnioglu* case the court in the current case argued that because the contracts sets the limit for the insurer’s obligation, its effect is to ‘enable the third party to enforce against the

³⁰ Vibe Ulfbeck, ‘Direct Actions against the Insurer in a Maritime Setting: the European Perspective’ (2011) LMCLQ 293, 300.

³¹ *The Prestige* (n 4) [26] – [30] (Moore-Bick LJ).

³² *The Prestige* (n 4) [25] (Moore-Bick LJ).

³³ *The Prestige* (n 4) [25] (Moore-Bick LJ).

insurer the same obligations as those that could have been enforced by the insured himself.³⁴ This therefore shows that the insurers, in fact, already have a fair protection, therefore it would only make sense for the courts to continue to protect weaker parties, as exemplified in *Odenbreit*. This can be more effectively achieved if in courts would give more credit and took into consideration the Rome Regulations.

Direct Actions as a Tort

There are also those who see direct action claim as a claim under the tort law. This is because the gist, which gives rise to direct action in cases of the insurer and the injured party, is a tortious act.³⁵ If this position is accepted the Rome II, Article 18 will be considered in direct action claims.

Keefe v Mapfre

In this recent case law, we saw a direct action being pursued in a tortious claim rather than contractual claim. This is interesting because the previous case law explained direct action to be a contractual right. We shall now analyse whether characterising a direct claim as tortious would make the claimants bound by the choice of law.

Here the claimant, domiciled in England, suffered severe injuries to his eye and brain while on holiday in Tenerife, Spain. He alleged that the hotel owner, domiciled in Spain, was liable in tort for the injuries suffered. Later it came to be known that there was a limit under insurance policy. Mr Keefe joined the hotel owner to the proceedings in England to recover uninsured part, relying on the Regulation 44/2001, Article 11(3).

The hotel owner challenged it by arguing that the insured can only be joined to the right of direct action against the liability insurance in two cases if a claim against insured was related to policy matter or some other insurance dispute; and there was a chance of irreconcilable judgments.

It was recognised in this case that, according to the Regulation 44/2001,³⁶ relying on Articles 9 and

³⁴ *The Prestige* (n 4) [25] (Moore-Bick LJ).

³⁵ *Ulfbeck* (n 30) 301.

³⁶ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

11(2), that a claimant may bring a direct action claim against the liability insurer of the insured ‘where such actions were permitted’³⁷ in the courts where the claimant was domiciled.

Relying on the Court of Justice of the European Union case – *Odenbreit*,³⁸ Mr Keefe brought proceedings against the insured’s liability insurer in England. Here Article 11(2) of the Regulation 44/2001 as to mean that a third party has a right to direct action in the court of his domicile (as well as to join the insured party to the proceedings) subject to a condition that ‘a direct action must be permitted under the national law’,³⁹ thus it did not matter if direct action was regarded as one in tort or contract because it is the insurance action, which under the Recast Regulation, section 3⁴⁰ argued for insurance contracts to be interpreted generously. Therefore, the present case has further reinforced the idea of protecting a weaker party.⁴¹ The hotel’s claim that it could not be joined to the direct claim actions because it was a claim for uninsured excess failed.

It is significant because Article 11(3) of Regulation 44/2001,⁴² which allowed a joinder of the insured in circumstances where the applicable law governing direct action allowed it. In the present case Spanish law permitted a joinder of the insured.⁴³ If it was concluded otherwise it may have resulted in separate proceedings in different Member States, which may lead to irreconcilable judgments.⁴⁴

It should be remembered that a tortious accident happened before the Rome II was enacted, therefore the courts relied on the provisions of Part III of the Private International (Miscellaneous Provisions) Act 1995 (PILA), section 11 in relation to the tort committed. According to this Act, a general rule is that the applicable law is the law where a tortious event occurred.⁴⁵ In its interpretations of PILA, the court considered *Harding v Wealands*,⁴⁶ which provided that in the proceedings which started in England, but the tortious event occurred in a foreign country, the heads of recoverable loss would be

³⁷ *ibid* Article 11(2).

³⁸ *FBTO Schadeverzekeringen NV v Jack Odenbreit*, ECLI:EU:C:2007:792.

³⁹ *FBTO Schadeverzekeringen NV v Jack Odenbreit*, [30].

⁴⁰ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (‘recast’), section 3.

⁴¹ *Keefe v Mapfre* (n 6) [44] (Gloster LJ).

⁴² Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Article 11(3).

⁴³ *Keefe v Mapfre* (n 6) [54]-[55] (Gloster LJ).

⁴⁴ *Keefe v Mapfre* (n 6) [49] (Gloster LJ).

⁴⁵ Private International Law (Miscellaneous Provisions) Act 1995, s 11(1).

⁴⁶ [2006] UKHL 32; [2007] 2 AC 1.

determined by the substantive law of that foreign country, and the procedural questions would be considered in accordance to the English law.⁴⁷

In the present case Gloster LJ argued that under the English law the result with which we are now provided under the Rome II would be achieved without the Rome II regulation because English private international law rules would have characterised a direct action claim as a substantive law issue, rather than procedural one.⁴⁸ This therefore contradicts the view that Rome II contributed towards the clarity and predictability of the EU judgments.

Furthermore, Gloster LJ concluded that the claimant had a right to direct action against the liability insurer because under ‘the national law’ of forum, which was regarded to be English law for the purposes of the Regulation 44/2001 Article 11(2), which stated that applicable law is the one where the tortious event occurred, in this case it was Spanish law.⁴⁹ This therefore means that a recent case law related to applicable law in insurance contracts on direct actions does not really provide the claimants with a new and stronger protection to ensure that they can be compensated for damage caused to them.

Therefore, it seems for the present case that the choice of law applicable in tortious claims allow direct actions to the claimants, even if the Rome II Regulation was not used in the present case.

Prüller-Frey v Brodnig and another

In this case German insurer attempted to challenge direct action on the ground which arose under Spanish tort law by invoking German law clause, which did not provide for direct action claim. Here the CJEU interpreted Article 18 of the Rome II as allowing third parties to bring a direct action against the liability insurer when the applicable tort law allows to do so, ‘regardless of the provision made by the law that the parties have chosen as the law applicable to the insurance contract’.⁵⁰ The court argued that the Article 18 of the Rome II aims to protect the rights of the weaker parties by ‘granting that party the benefit of the most favourable rules and enabling him or her to bring a claim directly against the

⁴⁷ *Keefe v Mapfre* (n 6) [7] (Gloster LJ).

⁴⁸ *Keefe v Mapfre* (n 6) 926 (Gloster LJ).

⁴⁹ *Keefe v Mapfre* (n 6) [37] (Gloster LJ).

⁵⁰ *Prüller-Frey v Brodnig and another* (n 5) [87].

insurer'.⁵¹ In addition, the court argued that this European instrument on applicable law took into consideration not only third parties' rights, but also insurers rights by making it clear that the direct action claims that may be brought against them were limited to two scenarios: first, non-contractual obligations; second, insurance contracts.⁵²

Looking at the post-Rome II case law it is evident that it is not clear whether it is achieving its aim set out in Recital 6 of the Rome II, which argues for predictability, certainty because from the case law considered it is evident that we are facing different interpretations of this instrument.

Conclusion

It is evident that a right of direct action against the insurer is important to third parties, especially when the insured becomes insolvent. It would be unfair if a person who suffered damage would not be able to prevent them from recovering damages from the insured's liability insurer. As it was considered by the case law of *The Yusuf Cepnioglu* and *the Prestige* explained that it seems reasonable to allow third parties to claim against the liability insurers because the insurance contract would mean only a minuscule stretch to the insurance contract because the extent to which the insurer is liable to leave the insured free from any claims remain the same.

The Rome Regulations play a key role in determining claimants' right to a direct action. Although the Rome I is silent in terms of direct action, when considering governing law clauses in a recent case law it is clear that the courts do not reject an idea that third parties may be bound by applicable law clauses in direct right actions, however, the analysis of these cases show that do not always prioritise the weaker parties' needs as in *Odenbreit* or *Keefe v Mapfre*, and tend to lack consideration of applicable law rules. In both, *The Yusuf Cepnioglu* and *the Prestige* the courts decided that a direct action is a contractual right and thus the third parties were bound by the insurance policy, including arbitration clauses. Although the arbitration clauses are outside of the Rome I, the arbitration clauses were in effect because the English law was the one governing the contracts. Thus, as arbitration clauses were binding on the claimants it may be concluded that under the English law at least the choice of law is

⁵¹ *Prüller-Frey v Brodnig and another* (n 5) [85].

⁵² *Prüller-Frey v Brodnig and another* (n 5) [85].

binding on the claimants in direct actions against the insurers.

The situation is a little bit less complicated when it comes to direct claims that are characterised as tortious. This is because the Rome II, Article 18 provides that the claimants can sue the liability insurer if the law of non-contractual obligation allows to do so. As exemplified by the case law of *Keefe v Mapfre* it is clear that the choice of Spanish law, which permitted a direct action was reason why a third party was able to claim directly against the liability insurer.

Don't Go Taking My Heart: A New Model for Organ Donation Law and Consent

Hay-Ching Tang

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Abstract

In light of continued disparity between registered organ donors and patients in need of a transplant, this article seeks to evaluate purported solutions as enacted by the UK and other governments, with particular focus on the current explicit consent and proposed presumed consent models. The article seeks to view Organ Donation law in the UK through a wide lens, focusing not only on results achieved but also on policy underpinning the law and effect on public perception and trust in the aftermath of Alder Hey. The explicit consent system (Human Tissue Act 2004) falls short of delivering sufficient organs for transplant; and the presumed consent system (Organ Donation (Presumed Consent) Act 2019) falls short of meeting policy objectives and individual autonomy. A third solution is proposed here: mandated choice with multiple donation options, coupled with full reform to the registration system and introducing a duty for politicians to publicly educate.

I. Introduction

As an issue which necessitates planning for the eventuality of death, Organ Donation is a topic which many people understandably shy away from in their everyday lives; only 49% of people have discussed the topic with others.¹ Donating organs and the discussion around doing so are however of increasing importance. In 2018 alone, over 1,000 people died in the UK while awaiting transplant.² With an ageing population demographic, this figure is only set to rise.³

¹ 'Hundreds of Transplants Missed Each Year Because Families Don't Know What Relatives Wanted' *NHS Organ Donation* (5 September 2015) <<https://www.organdonation.nhs.uk/news-and-campaigns/news/hundreds-of-transplants-missed-each-year-because-families-don-t-know-what-relative-wanted/>> accessed 1 August 2018.

² NHS Blood and Transplant, *Organ Donation and Transplantation: Activity Report 2017/18* (NHS Blood and Transplant, 2018) 2.

³ NHS Blood and Transplant, *Taking Organ Transplantation to 2020: A Detailed Strategy* (NHS Blood and Transplant, 2013) 10.

With the exception of Wales, the UK position on Organ Donation currently remains an ‘explicit consent’ system. Initiation of the Consent process is in the hands of the individual. Whereby, if an individual chooses to sign up their name will appear in the National Organ Donation Register (‘ODR’). Current figures show that 24.9 million people in the UK are registered donors.⁴ While this is to be applauded, there remains an enormous imbalance between the number of actual deceased donors and the number of patients awaiting a transplant; over 6,000 people remain on the waiting list.⁵

Within that group, people from a Black, Asian or Minority Ethnic (BAME) background are disproportionately affected due to higher proclivity towards certain diseases, but with a lower proportion of registered donors.⁶ Since a viable organ match is more likely to come from someone from a similar ethnic background, in the most extreme case, an Asian patient will wait close to 3 years for a lung transplant; a white patient may wait 8 months.⁷ For BAME patients therefore the disparity is magnified.

Despite the stark statistics, the UK position has greatly improved over the past decade. The Organ Donation Taskforce (‘ODT’), a government-commissioned unit, was set up in 2006 to identify barriers to Organ Donation. A report followed in 2008⁸ with policy-based recommendations including better identification of potential donors, increased donation-specific staff and a nationalised (rather than regionalised) system. This led to a holistic overhaul of the practical donation system. A consequent NHS report attributed the dramatic 50% increase in deceased organ donors by 2016 to the implementation of these recommendations, specifically the introduction of specialist nurses and centralisation of the system.⁹ However, the same report determined that the UK is still far from hitting Organ Donation targets for 2020. It has therefore been argued by activists that new shifts in law and policy must be enacted to progress further. The Organ Donation (Deemed Consent) Act is due to bring presumed consent into force in 2020. This paper is divided into two parts. The first part of this paper

⁴ NHS Blood and Transplant, *Organ Donation and Transplantation: Activity Report 2017/18* (n 2) 115.

⁵ *ibid* 2.

⁶ *ibid* 17.

⁷ NHS Blood and Transplant, *Organ Donation and Transplantation data for Black, Asian and Minority Ethnic (BAME) communities* (NHS Blood and Transplant, 2018) <<https://nhsbt.dbe.blob.core.windows.net/umbraco-assets/1849/bame-organ-donation-and-transplantation-data-2017-18.pdf>> accessed 10 August 2018, 15.

⁸ Organ Donation Taskforce, *Organs for Transplants: A Report from the Organ Donation Taskforce* (London: Department of Health, 2008).

⁹ NHS Blood and Transplant, *Taking Organ Transplantation to 2020* (n 3) 1.

will analyse the moral and ethical arguments surrounding a movement to a presumed consent model of Organ Donation. To do this I will explain how the model of consent under the current Law is ethically appropriate. Then, this paper will then go on to examine the structure of the model under the new Act; and conclude that it should be rejected due to incompatibility with the established principles of Consent in English law, the potential for causing mistrust between the medical profession and the public, and ultimately, that these outcomes are not proportionate with the debateable effectiveness of a presumed consent model. In the second part of the article, I set out a new model of Organ Donation, arguing in the remainder of the article how it is both ethically preferable and practically achievable.

II. A balancing act

Organ Donation is perhaps unique in the sense that the individual Autonomy of the deceased is weighed against the net societal benefit of lives saved by increasing organs available for transplant.¹⁰ The government-proposed presumed consent system takes a utilitarian approach; justifying a restriction in the freedom surrounding the legal mechanism for self-determination (in a free and individually initiated choice), based on an argument of increased societal welfare. In this regard the government often takes a paternalistic role, the mandatory seatbelt requirement¹¹ being one such example. State control however is only tolerable so far as it does not impede autonomy. English law harbours a deep-seated respect for individual autonomy and bodily ownership which continues even after death. Hence, for example, the criminal offence of necrophilia;¹² it is presumed the deceased did not consent to the desecration of their body, even though a corpse cannot be ‘harmed’. In healthcare law particularly, the very idea of patient autonomy and informed consent is key.¹³ English law also distinguishes between acts and omissions, placing greater emphasis on the former; hence why active euthanasia is not permitted but withholding treatment is permissible.¹⁴ By extension, therefore, an active and explicit expression of consent to Organ Donation is ethically more valid than a mere failure to object (presumed). Arguably, an active consent is the only legal mechanism which ensures an

¹⁰ R Gillion, ‘Ethics Needs Principles – Four Can Encompass the Rest – and Respect for Autonomy Should Be the “First among Equals”’ (2003) 29 *Journal of Medical Ethics* 307-312.

¹¹ The Motor Vehicles (Wearing of Seat Belts) Regulations 1993.

¹² Sexual Offences Act 2003, s 70.

¹³ TL Beauchamp and JF Childress, *Principles of Biomedical Ethics* (4th edn, Oxford University Press 1994).

¹⁴ *Airedale NHS Trust v Bland* [1993] AC 789.

individual's right to self-determination.¹⁵ For example, we do not require patients to waive their right to consent for treatment.¹⁶ If consent is to act as a 'defence' to Battery, or Negligence, it must be given to the doctor positively; with intentionality, with a reasonable standard of understanding and with substantial non-control (eg moral duress).¹⁷ However, the present explicit consent system, whilst favouring the principle of individual autonomy, results in a low donor registration response; which is to the detriment of wider society.

This paper proposes a better option, which avoids the binary of Autonomy/ Justice, through the implementation of a 'soft' mandated choice model of consent to Organ Donation. This would achieve a balance between individual autonomy and state control; maintaining the principle of individual consent while facilitating increased donor registration.¹⁸ Adults would be required to register a decision on the Organ Donation Decision Register ('ODDR') which would introduce a broader range of options than currently available to account for uncertainty and religious permissibility. The reform as proposed in its entirety tackles barriers to donation without jeopardising individual autonomy as the basis of the law of consent.

III. Current law: Appropriate Consent

Current Organ Donation law revolves around explicit Consent. In England and Northern Ireland, the current legislative framework for consent to human tissue use is found in the Human Tissue Act 2004 ('the 2004 Act'); transplantation is one of the purposes expressly provided for under Schedule 1. The Human Tissue (Scotland) Act 2006 serves a similar purpose in Scotland while the Welsh legislature recently introduced presumed consent,¹⁹ amending the 2004 Act as applicable in Wales. The primary purpose of the 2004 Act is to codify the principle of 'appropriate consent' in English law.²⁰ Although

¹⁵ *Scholendorff v New York Hospital* 105 NE 92 (NY 1914).

¹⁶ See, *Sidaway v Bethlem Royal Hospital* [1985] 1 All ER 643; *Montgomery v Lanarkshire Health Board* [2015] UKSC 11.

¹⁷ See RR Faden and TL Beauchamp, *A History and Theory of Informed Consent* (Oxford University Press 1986).

¹⁸ J Saunders, 'Bodies, Organs and Saving Lives: the Alternatives' (2010) 10 *Clinical Medicine* 26.

¹⁹ Human Transplantation (Wales) Act 2013.

²⁰ D Price, 'The Human Tissue Act 2004' (2005) 68(5) *MLR* 798.

the relative differences between consent and mere lack of objection were previously discussed in common law,²¹ prior to the 2004 Act no such distinction was made at a legislative level.

Previous to the 2004 Act, the use of human tissue was governed by The Human Tissue Act 1961, the Anatomy Act 1964 and the Human Organ Transplants Act 1989; none of which made provision for informed consent, or indeed, for sanctions for breach. This provided medical practitioners with loopholes, allowing them to bypass any form of consent and, thus, undermine patient autonomy.²² It was against this piecemeal legal background, in 1999, that the scandals at Alder Hey Children's Hospital²³ and Bristol Royal Infirmary²⁴ were uncovered. The former Inquiry discovered the unauthorised preservation of deceased children's organs, body parts; even foetuses and stillborn babies which were taken during post-mortem procedures and stored for research purposes without parental consent or knowledge.²⁵ The discovery caused great distress and public outrage. These events highlighted a clear shortcoming in the then-existing legal framework and cultivated a lack of trust in public institutions and the medical profession. The ensuing Redfern Report recommended *inter alia* the introduction of an independent body to oversee regulatory matters, and new legislation on informed consent.²⁶ As a result, the 2004 Act was structured towards achieving a clear notion of 'appropriate consent', replacing all previous Acts and establishing the Human Tissue Authority ('HTA').²⁷

A. *The regulatory structure of the Human Tissue Act 2004*

The 2004 Act sets out how 'appropriate consent' may be obtained. The person in question²⁸ may have registered their consent on the ODR. On their death, medical staff will check the ODR to determine if this is the case. Alternatively, a nominated representative ('NR') may have been appointed to consent on their behalf, in which case the NR is contacted for their consent.²⁹ Should neither of these situations apply, consent is sought from the 'closest qualifying person';³⁰ hierarchy of which is detailed in the

²¹ *AB and Others v Leeds Teaching Hospital NHS Trust and Another* [2004] EWHC 644 (QB).

²² Price (n 20) 799.

²³ Department of Health, *The Royal Liverpool Children's Inquiry Report* (Stationery Office Books, 2001).

²⁴ Department of Health, *Learning from Bristol* (Crown, 2002).

²⁵ Price (n 20) 798.

²⁶ Department of Health, *The Royal Liverpool Children's Inquiry Report* (n 23).

²⁷ Human Tissue Act 2004.

²⁸ *ibid* s 3(6)(a).

²⁹ *ibid* s 3(6)(b).

³⁰ *ibid* s 3(6)(c).

2004 Act.³¹ Affirmative consent from one member of the highest qualifying rank is sufficient³² ‘appropriate consent’; allowing organs to be retrieved efficiently, without third party objections, or the need to contact multiple family members. This is beneficial given the short viability timescale involved in transplantation.

Section 9 of the 2004 Act also creates a ‘prohibition of activities without consent’; enshrining a right to autonomous consent within the Criminal Law. A person found guilty of removing organs without appropriate consent may receive a prison sentence of up to three years or a fine. In certain instances both punishments may apply as well as tortious liability for damages in negligence, trespass or conversion.³³ The only defence available is if the offender holds the reasonable belief that appropriate consent was in place.³⁴ It is self-evident that the aim of this section is to deter the reoccurrence of the sequence of events at Alder Hey.

To satisfy the Redfern Report recommendation of independent regulatory oversight, the 2004 Act legislated for the creation of a HTA with wide-ranging powers to regulate the removal, use, and storage of human tissue.³⁵ The HTA specifically regulates organisations carrying out human tissue activities and is responsible for creating Codes of Practice and ensuring adherence. This arrangement allows impartial regulation of the human tissue sector, with transparent Codes which ensure accountability.

B. The operation of the Human Tissue Act 2004

According to NHS Blood and Transplant,³⁶ when an individual’s decision was known, families consented to donation in 91.9% of cases; when the patient’s wish was unknown, this figure almost halved to 48.5%. The main reasons given for family objection were uncertainty over whether the individual would have agreed, or that they had previously expressed a wish not to donate.³⁷ Donors who do register mainly do so through the DVLA³⁸ with the primary intention of renewing their driving

³¹ *ibid*, s 27(4).

³² *ibid* s 27(7).

³³ *AB and Others v Leeds Teaching Hospital NHS Trust and Another* [2004] EWHC 644 (QB).

³⁴ Human Tissue Act 2004, s 5(1)(a).

³⁵ *ibid* s 13 – s 15.

³⁶ NHS Blood and Transplant, *Organ Donation and Transplantation: Activity Report 2017/18* (n 2) 122.

³⁷ *ibid* 136.

³⁸ DM Shaw, ‘The Consequences of Vagueness in Consent to Organ Donation’ (2017) 31(6) *Bioethics* 424, 425.

licence – followed by an Organ Donation prompt. In this context it is possible donor registration is an afterthought and given that licences are renewed once a decade,³⁹ rarely revisited. This raises the question of whether such consent is informed or appropriate. If a person is not a registered donor, it is even harder to ascertain whether they were actively withholding consent, apathetic, or even perhaps wholly ignorant of the Organ Donation system. The lack of conversation around death and Organ Donation, between next of kin, mean that they are often reluctant to make proxy consents; thus, when there is not a recent positive autonomous choice, indicated by a legally valid consent, Organ Donation rates plummet.

The figures are indicative of the present ethical problems associated with a system which operates a ‘double veto’.⁴⁰ Whilst an individual’s explicit decision not to consent takes precedence even if the family consents,⁴¹ objection from the family, though not legally enshrined, means in practice a donation may not go ahead even with the individual’s affirmative consent.⁴² In 2017-18, there were 101 such ‘family veto’ cases.⁴³ Ambiguity and familial objection translate to a decrease in the number of organs available for transplant overall. While the 2004 Act is admirable and successful in uniting previous legislation, regulating tissue use and codifying appropriate individual consent, it evidently falls short when considered against the purpose of facilitating Organ Donation.

IV. The 2019 Act: Presumed Consent

In response to the need for more organs and shortcomings of the 2004 Act, the Organ Donation (Deemed Consent) Act⁴⁴ (‘2019 Act’) comes into force in 2020. It would amend the 2004 Act and reframe ‘appropriate consent’. Under the 2019 Act, if a person has not ‘opted out’, they will be presumed in law to have consented to the donation of their organs. This system mirrors that which was introduced in Wales in 2015⁴⁵ and aims to tackle the low proportion of registered donors as compared

³⁹ Road Traffic Act 1988, s 99.

⁴⁰ TM Wilkinson, ‘Individual and Family Consent to Organ and Tissue Donation: Is the Current Position Coherent?’ (2005) 31 J Med Ethics 587.

⁴¹ Human Tissue Act 2004, s 3(6)(a).

⁴² AM Rosenblum, LD Horvat, LA Siminoff, V Prakash, J Beitel and AX Garg, ‘The Authority of Next-of-kin in Explicit and Presumed Consent Systems for Deceased Organ Donation: An Analysis of 54 Nations’ (2012) 27(6) Nephrol Dial Transplant 2533.

⁴³ NHS Blood and Transplant, *Organ Donation and Transplantation: Activity Report 2017/18* (n 2) 122.

⁴⁴ Organ Donation (Deemed Consent) Act 2019.

⁴⁵ Human Transplantation (Wales) Act 2013.

to organ demand. It is too soon to judge the impact of the Welsh presumed consent system. However, early figures suggest an increase in registration but no effect on actual donor numbers.⁴⁶ Proponents of the move point, however, to the success of other countries such as Spain.

The Spanish model,⁴⁷ the international gold standard, is often, incorrectly, referred to as a presumed consent system.⁴⁸ The reality is that while presumed consent in Spain led to a temporary increase in donor numbers, success in Spain and countries with similar models⁴⁹ is more reliant on the implementation of practical changes.⁵⁰ Such changes include increased investment into dedicated transplant centres and medical training, and orienting the donation process to be more family-sensitive; the family consent rate in Spain is 84%⁵¹ compared to 67% in the UK.⁵² The effectiveness of presumed consent alone is debateable since it is not a central factor; in fact Spain does not even operate an opt-out mechanism.⁵³

In addition to questionable effectiveness, the amendments carried by the 2019 Act juxtapose and wholly undermine the ethical purpose of the 2004 Act: to obtain explicit consent. Ignoring this legal safeguard means that once adopted in England, the presumed consent model risks repeating the scandal of Alder Hey. Subsequently, a presumed consent model is likely to damage public trust with a risk of deterring donor consent.⁵⁴

⁴⁶ JA Parsons, 'Ensuring Appropriate Assessment of Deemed Consent in Wales' (2019) 45 J Med Ethics 210; A Albertsen, 'Deemed Consent: Assessing the New Opt-out Approach to Organ Procurement in Wales' (2018) 44 J Med Ethics 314.

⁴⁷ C Gil-Diaz, 'Spain's Record Organ Donations: Mining Moral Conviction' (2009) 18(3) Camb Q Healthc Ethics 256, 260.

⁴⁸ J Fabre, 'Presumed Consent for Organ Donation: A Clinically Unnecessary and Corrupting Influence in Medicine and Politics' (2014) 14(6) Clinical Medicine 567, 569.

⁴⁹ A Rithalia, C McDaid, S Suekarran, L Myers and A Sowden, 'Impact of Presumed Consent for Organ Donation on Donation Rates: A Systematic Review' (2009) British Medical Journal 338.

⁵⁰ Gil-Diaz (n 47) 257.

⁵¹ NHS Blood and Transplant, *Taking Organ Transplantation to 2020: A Detailed Strategy* (n 3) 29.

⁵² NHS Blood and Transplant, *Organ Donation and Transplantation: Activity Report 2017/18* (n 2) 122.

⁵³ Nuffield Council on Bioethics, *Human Bodies: Donation for Medicine and Research* (London: Nuffield Council on Bioethics, 2011) 7.

⁵⁴ 'Nuffield Council on Bioethics Raises Concern over the Lack of Evidence to Support Government's Planned Move to Opt-out Organ Donation' *Nuffield Council on Bioethics* (23 February 2018)

<<http://nuffieldbioethics.org/news/2018/nuffield-council-bioethics-raises-concern-lack-evidence-support>> accessed 10 August 2018.

Beyond the legal mechanism of consent, some of the practical measures in the 2019 Act⁵⁵ are, however, more welcome. These include an option for individuals to record their faith, the introduction of an NHS app⁵⁶ and a year-long communications campaign. Whilst these measures alone do not overcome the safeguard of informed consent, they could go some way towards ensuring that patients' autonomous wishes are respected; especially in combination with the mandated choice system as proposed below.

V. Reform Proposal

Both the present and future positions therefore present their own challenges. Other proposals also have their own pitfalls. An incentivised system for donation can lead to patients' families 'gaming' the system;⁵⁷ while appeals for living donors can be seen as manipulative marketing.⁵⁸ Payment of donors raises ethical concerns over financially vulnerable donors,⁵⁹ while the advancements in xenotransplantation result in bioethical concerns over the creation of chimeras.⁶⁰ A full discussion of all available options for reform extend beyond the scope of this paper. Instead this section will focus on setting out this author's own novel proposal for legal reform, explaining why it is ethically justified, and suggesting a workable methodology for implementation.

A. Mandated choice

To overcome these challenges and tackle the low number of registered donors, the next section proposes a 'third' way. A system of 'soft' mandated choice would be introduced. This would reform the registration system moving from the binary 'yes' and 'no' consent to a multi-option system of

⁵⁵ Department of Health and Social Care, *The New Approach to Organ and Tissue Donation in England: Government Response to Public Consultation* (Department of Health and Social Care, 2018)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/731913/govt-response-organ-donation-consent.pdf> accessed 7 August 2018.

⁵⁶ UK Department of Health, 'New NHS App Will Make It Quicker and Easier to Access Health Services' *Department of Health* (2 July, 2018) <<https://www.gov.uk/government/news/new-nhs-app-will-make-it-quicker-and-easier-to-access-health-services>> accessed 4 August 2018.

⁵⁷ C Berzon, 'Israel's 2008 Organ Transplant Law: Continued Ethical Challenges to the Priority Points Model' (2018) 7(1) *Isr J Health Policy Res* 11.

⁵⁸ G Moorlock and H Draper, 'Empathy, Social Media, and Directed Altruistic Living Organ Donation' (2018) 32(5) *Bioethics* 289.

⁵⁹ CA Erin and J Harris, 'An Ethical Market in Human Organs' (2003) 29(3) *J Med Ethics* 137.

⁶⁰ C Munthe, 'Price of Precaution of Human-pig Chimeras for Transplantation Purposes' (2019) 45 *J Med Ethics* 447.

donation choices. This system would also include a family veto as an ethical safeguard. This maintains individual consent and a wide degree of autonomy, while increasing registration rates.

Surveys conducted by NHS Blood and Transplant found that while over 80% of people support Organ Donation,⁶¹ only 38% of people register.⁶² Mandated choice remedies this shortfall. In Australia for example, voting is mandatory. The state does not dictate how people should vote; only that they do. Democracy is of such importance that not voting is viewed as socially ‘irresponsible’.⁶³ Similarly, Organ Donation should be viewed as a crucial lifesaving resource which necessitates obligatory public engagement. Mosely and Stoker suggest mandated choice is effective in increasing donor rates, without the unethical implications of a ‘Big Brother’ presumed consent state.⁶⁴ This solution is intended to capture the middle ground between government intervention and individual autonomy.

All adults over the age of 18 would be compulsorily required to register an Organ Donation Decision (‘ODD’). Currently only New Zealand operates mandated choice for Organ Donation, with 100% of adults registered.⁶⁵ A registration rate of 100% is not the sole aim of the proposed prerogative however, though it is of course desirable. The process is designed to engage individuals through a conscious thought process, facilitate discussion with others and lead to greater clarity overall.

B. Multiple Options

The Organ Donor Register is purposefully rechristened the Organ Donation Decision Register (‘ODDR’). The reformed Register would be more comprehensive with four options rather than two to minimise ambiguity,⁶⁶ whilst a choice would require the same sort of individualistic consent as enshrined in the 2004 Act. ‘Donation Decision’ replaces ‘Donor’ to minimise the risk of alienating people who choose not to donate or are undecided. ‘Decision’ reflects the importance of individual

⁶¹ ‘Hundreds of Transplants Missed Each Year Because Families Don’t Know What Relatives Wanted’ *NHS Organ Donation* (5 September 2015) <<https://www.organdonation.nhs.uk/news-and-campaigns/news/hundreds-of-transplants-missed-each-year-because-families-don-t-know-what-relative-wanted/>> accessed 1 August 2018.

⁶² NHS Blood and Transplant, *Organ Donation and Transplantation: Activity Report 2017/18* (n 2) 116.

⁶³ P Chouhan and H Draper, ‘Modified Mandated Choice for Organ Procurement’ (2003) 29 *J Med Ethics* 157, 159.

⁶⁴ A Mosely and G Stoker, ‘Putting Public Policy Defaults to the Test: The Case of Organ Donor Registration’ (2015) 18(2) *IPMJ* 246 <<https://doi.org/10.1080/10967494.2015.1012574>> accessed 10 Aug 2018.

⁶⁵ AM Rosenblum, A Ho-Ting Li, L Roels, B Stewart, V Prakash, J Beitel, K Young, S Shemie, P Nickerson and AX Garg, ‘Worldwide Variability in Deceased Organ Donation Registries’ (2012) 25(8) *Transpl Int* 801, 809.

⁶⁶ This would require an amendment to section 3(6) Human Tissue Act 2004.

autonomy and informed choice. To minimise external pressure, the decision is strictly confidential; viewable only by the individual and NHS staff (post-death).

The ODDR seeks to end the yes/no dichotomy imposed by the previous register. An ‘undecided’ option allows those who are genuinely unsure to register ambivalence. It would also provide the option of appointing an NR; similar to that already found under Section 4 of the 2004 Act. An individual can appoint an NR to either make a proxy decision or ratify a previously indicated decision upon the register; as a means to safeguard their best interests. Whilst the former option is already in force, this provision remains underutilised at present; only 86 people opted to do so in 2017-18.⁶⁷ The mandated choice model is likely to cause NR to be used more often as a way to waive individual choices if, for example, the individual at that time cannot decide, is currently (purposefully) under-informed, or has intermittent capacity. For instance, donors who, for religious or cultural reasons, wish to donate but are unsure of conflict with their culture or beliefs,⁶⁸ can request consent or affirmation from a third party. This change can be easily accommodated in the current 2004 legislation, through an amendment to Section 3(6) of the 2004 Act after paragraph (a), with the following wording:

Where the person concerned has died and the activity is not one to which subsection (4) applies, ‘appropriate consent’ means –

a) if a decision of his to consent to the activity, or a decision of his not to consent to it, was in force immediately before he died, his consent;

b) if –

paragraph (a) applies, and

a decision of his to consent to the activity is conditional upon affirmation of consent from a named person or religious representative,

⁶⁷ NHS Blood and Transplant, *Organ Donation and Transplantation: Activity Report 2017/18* (n 2) 115.

⁶⁸ Organ Donation Taskforce, *The Potential Impact of an Opt out System for Organ Donation in the UK* (2008) 29.

his consent and affirmation of consent given by the person or religious representative named;

c) *if–*

paragraph (a) does not apply, and

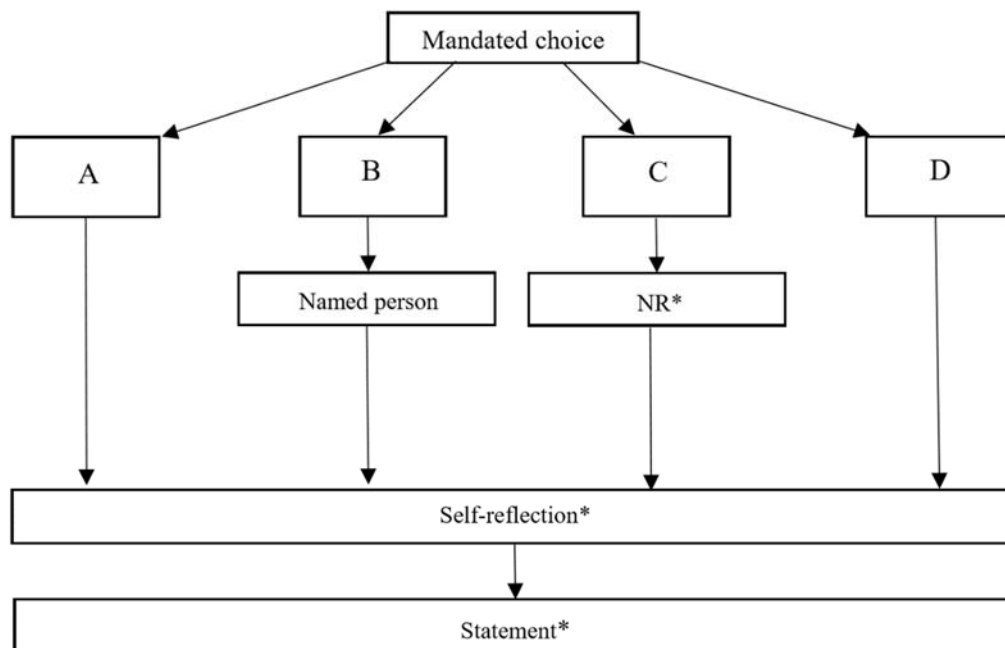
he has appointed a person or persons under section 4 to deal after his death with the issue of consent in relation to the activity,

consent given under the appointment;

d) *if neither paragraph (a) nor paragraph (b) **nor paragraph (c) apply, or if a person falling under paragraph (b) is not practicably contactable,** the consent of a person who stood in a qualifying relationship to him immediately before he died.*

The ODDR presents four alternative ODD options to choose from (alphabetised for present purposes only), following the framework below:

- A. Yes, I would like to donate my organs.
- B. Yes, I would like to donate my organs, but only with consent from [named person].
- C. I am currently undecided.
- D. No, I would not like to donate my organs.



(* = optional)

A: An individual consents to donation and indicates either a general will to donate, or specifies which of their organs they consent to donate. This presents no changes from the 2004 Model.

B: An individual consents as before, with the additional stipulation that a named person must also consent. The individual will be asked to provide contact details for their preferred person; alternatively, they may opt for 'closest qualifying relative' or name a religion or religious representative in lieu of a named person. The Israeli Organ Donation register operates a similar religion-permitting option which caters to a religious population including Orthodox Jews, who hold very narrow views on Organ Donation.⁶⁹ This option is important as it helps allay uncertainty from individuals who wish to donate their organs but do not wish to upset family members, or are unsure whether Organ Donation is permitted by their religion. One potential drawback, which has been seen in Israel, is the extra time to contact a religious representative, given the short window of viability for transplantable organs. This

⁶⁹ AM Rosenblum, A Ho-Ting Li, L Roels, B Stewart, V Prakash, J Beitel, K Young, S Shemie, P Nickerson and AX Garg, 'Worldwide Variability in Deceased Organ Donation Registries' (n 65) 803.

could be mitigated by having ‘go-to’ statements from key religious groups in the UK, and could be facilitated easily through a simple amendment to Subsection 3(6) of the Human Tissue Act 2004.

If the named person or representative is not practicably contactable within the short timeframe dictated by organ transplantation needs, individuals will not be presumed to have consented under the current explicit consent system. Instead the closest qualifying relative ranked by degrees of separation per Section 6(3)(d) of the 2004 Act as proposed (currently Section 6(3)(c)), will be consulted. As is the case currently, consent from one member of the highest rank is sufficient.

C: An individual can indicate that they are undecided. Currently, such people are likely to abstain from registering. A mandated choice system with an ‘undecided’ option allows individuals to indicate their uncertainty. They can change this at any time. Versions of this option are employed in Denmark and the Netherlands with success.⁷⁰ However, the risk remains that if a patient dies and is registered as ‘uncertain’, the opportunity to donate their organs will be lost. Under the ‘soft’ mandated choice proposed here, consent is not presumed; instead, as it good practice now, the individual’s family should be consulted. The difference is that it is clear here that the individual was genuinely unsure and the family may take this into consideration, rather than speculating, when coming to a decision on whether they should provide a proxy consent to Organ Donation.

Under these three options, the individual will be asked to appoint up to three NRs under Section 4 of the 2004 Act. The ODDR will record the names and details of the three NRs (ranked as first, second and third preference), and will be ratified by a witness whose only responsibility is to ensure valid appointment of the NR. When called upon to make an ODD, each NR will hold full responsibility in preference order, whereby the second NR will only be called upon if the first is unavailable or unable to provide a proxy (under option A and C) or ratify consent (under option B). There is already a minimum input requirement of one NR and one witness, in accordance with the conditions prescribed by the 2004 Act.⁷¹

Under both B and C, named persons, religious representatives, NRs and witnesses will be contacted by post or email, as indicated by the individual, and asked to sign and confirm by return. If no

⁷⁰ *ibid.*

⁷¹ Human Tissue Act 2004, s 4.

confirmation is forthcoming within five working days, the appointment will be held invalid and the individual will be notified and must choose again. This time frame is chosen to maintain suitable urgency, while providing ample opportunity for meaningful dialogue and for the notices to traverse the postal system. Clear but specific guidance will be available to individuals during this stage to ensure the appointment is valid. If an NR is not practicably contactable, again consent is not presumed and medical professionals will default to consultation with family.

D: an individual does not consent to donation of their organs. This objection is registered on the ODDR, and it is unlawful⁷² to remove their organs for transplantation purposes against their clear registered lack of consent. This would be the case both in an explicit consent system and a presumed consent system.

C. Post consent: Reflection and Statements

Consent decision notwithstanding, all individuals then proceed to two further optional stages which are not legally binding. The first will not be visible to medical staff but is a tool for individual self-reflection. Individuals will be asked to list up to five friends and family members who they would like to discuss their ODD with while they are alive. This allows individuals a chance to reflect and use this as a springboard to start conversations with family and friends about donation. This section therefore, while optional and non-binding, can prove valuable in the delicate dialogue surrounding Organ Donation. This is particularly the case if the individual has indicated that they are ‘undecided’.

After the period of reflection, the final stage allows individuals to record a short statement of wishes in plain text or audio (which will be limited in length and easily playable on NHS tablets), to express their wishes; if they are so inclined.

D. Additional safeguards: Familial Veto

Post-Alder Hey, the government and the NHS must be wary of creating public mistrust with its detrimental impact on donor rates. For this reason, the proposed mandated choice is ‘soft’; family are still consulted as a safeguard and those who do not register will be reminded but not penalised. In this

⁷² Human Tissue Act 2004, s 9.

‘soft’ mandated choice model families can continue to veto the decision of the patient. However, it is hoped the period of reflection would allow a family time for discussion and thus cause families to respect the individual’s wishes, to gain insight into their thought process, should someone else be required to make a decision on their behalf.

The creation of a statement of wishes is also likely to be persuasive in familial decisions about Organ Donation. Observations have shown that suicide notes detailing a wish to donate organs are persuasive due to ‘immediate availability’ of the note to family and medics alike.⁷³ This increases family consent when compared to deaths without a note. It is hoped that this statement, should an individual choose to record one, would have a similar effect.

VI. Practical implementation

All proposed changes would apply to adults over the age of 18 with currently registered donors invited to re-register their intentions. Children under 18, adults without capacity,⁷⁴ and adults with less than 12 months’ ordinary residence in the UK are omitted from the scope of this reform. A provision detailing excepted persons to this effect would be added to the 2004 Act.

All qualifying UK adults would receive a letter one month before attaining the age of 18. The scheme will initially roll out over 12 months to avoid any possible system overload caused by the entire UK adult population simultaneously attempting to register. Adults already over the age of 18 would receive letters a month before their next birthday, as registered with the NHS. The letter would include a summary of the new initiative, signposts to further information, instructions on how to register, and NHS number. This will be used to link the ODDR to their NHS summary care record. It will also act as their unique log-in number, though on first registration individuals will be asked to confirm personal details and create a password for data security purposes. They will be able to log in and update their decision at any time; each decision will be date-stamped in the event there is a question of capacity pertaining to the time of the decision. On death, medical staff will be able to securely view the ODDR via the NHS mainframe, with technical system backups in place in the event of a system failure.

⁷³ C Behera, K Krishna and R Kumar, ‘Suicide Notes and Cadaveric Organ Donation’ (2016) 84(3) MLJ 145, 148.

⁷⁴ Mental Capacity Act 2005.

The UK currently offers more ways to sign up as an organ donor than any other country.⁷⁵ Accordingly, these options would be available as alternative ways to register an ODD under mandated choice, including but not limited to: website, app, telephone, text and email, with a paper form available upon request. To further increase access and visibility, secure access points could be made available in GP and dental clinics, hospital waiting rooms and even public libraries. It is hoped the broad range of choice will offer greater convenience to a greater number of people when registering on the ODDR.

The implementation of these proposed reforms will be coupled with targeted public health campaigns to provide information on the ODDR before its implementation, to consistently educate individuals on Organ Donation in general, and increase understanding to ensure informed choice. Studies from the Cabinet Office Behavioural Insights Team show the public respond most positively to messages conveying reciprocity: ‘If you needed an organ transplant, would you have one? If so, please help others’.⁷⁶ It is therefore imperative that campaigns are similarly themed. The power of social media campaigning should not be underestimated;⁷⁷ running costs are low and messages can be targeted towards certain demographics. Adjusted messages sensitive to religious and cultural differences and grass-roots partnerships in tandem with community leaders and influential groups should continue in BAME communities.⁷⁸

To emphasise the importance of sustained public health campaigns, a duty will be created placing responsibility on ministers to promote information and support campaigns. The implementation of reforms with such a noticeable impact must be promoted in a transparent manner, with all information made available to all members of the public. Ministers might choose to incorporate Organ Donation in school curricula, following the success of NHS ‘Give and Let Live’ education packs.⁷⁹ Special care

⁷⁵ AM Rosenblum, A Ho-Ting Li, L Roels, B Stewart, V Prakash, J Beitel, K Young, S Shemie, P Nickerson and AX Garg, ‘Worldwide Variability in Deceased Organ Donation Registries’ (n 65) 808-9.

⁷⁶ Cabinet Office Behavioural Insights Team, *Applying Behavioural Insights to Organ Donation: Preliminary Results from a Randomised Controlled Trial* (London: Cabinet Office and Department of Health, 2013) <<https://www.gov.uk/government/publications/organ-donor-registrations-trialling-different-approaches>> accessed 4 Aug 2018.

⁷⁷ AM Cameron, AB Massie, CE Alexander, B Stewart, RA Montgomery, NR Benavides, GD Fleming and DL Segev, ‘Social Media and Organ Donor Registration: The Facebook Effect’ (2013) 13(8) *Am J Transplant* 2059.

⁷⁸ Department of Health and Social Care, ‘Campaign to Increase Number of Organ Donors Announced’ <<https://www.gov.uk/government/news/campaign-to-increase-number-of-bame-organ-donors-announced>> accessed 4 Aug 2018.

⁷⁹ NHS, ‘Give and Let Live’ teaching resource available at: <<https://www.edcomsteachers.com/resource-library/give-and-let-live/>> accessed 12 August 2018.

must be taken to reach groups who may miss publicity, such as non-English speakers, prisoners and homeless individuals. This ministerial duty is a provision in both Wales and Scotland, but notably lacking in the 2004 Act. Public health campaigns, perhaps in conjunction with Organ Donation week every September,⁸⁰ are also preferable when reminding individuals to update or confirm their decision. A reminder alert will also be visible when logging on to the ODDR.

VII. Conclusion

From a holistic perspective, many of the problems associated with the current Organ Donation regime require policy-based approaches. The reforms proposed here, however, can be used as a stepping stone. Mandated choice and the ODDR help ameliorate family uncertainty arising when individuals are not registered donors.⁸¹ Higher certainty is proven by NHS Blood and Transplant to positively influence family consent rates.⁸² In a ‘soft’ opt-out mechanism such as that carried in the 2019 Act, an individual’s wishes would be just as unclear and family objection would remain an obstacle.⁸³ ‘Soft’ mandated choice would offer more clarity and lower family objection rates, therefore increasing organ donor numbers.

As a central factor, appropriate consent should be informed and must extend beyond ticking a box on a driving licence form.⁸⁴ The combination of mandated choice, the restructured ODDR and public campaigns are designed to guide individuals through an informed thought process. The purposeful lack of sanctions, in addition to protecting public trust, also allow uninformed individuals the chance to research and discuss with family and friends before making a decision.

Statutory provision for a religious or traditional context respects the fundamental right to freedom of religion while allowing individuals to clarify their appropriate consent. This is a vital instrument in

⁸⁰ ‘Save the Date! Organ Donation Week 2018’ *NHS Organ Donation* (24 Nov 2017) <<https://www.organdonation.nhs.uk/news-and-campaigns/news/save-the-date-organ-donation-week-2018/>> accessed 6 August 2018.

⁸¹ Chouhan and Draper (n 63).

⁸² NHS Blood and Transplant, *Organ Donation and Transplantation: Activity Report 2017/18* (n 2) 122.

⁸³ Y Lin, M Osman, AJL Harris and D Read, ‘Underlying Wishes and Nudged Choices’ (advance online publication 2018) *J Exp Psychol Appl*

<<https://qmro.qmul.ac.uk/xmlui/bitstream/handle/123456789/43991/Osman%20Underlying%20wishes%20and%20nudged%20choices%202018%20Accepted.pdf?sequence=1&isAllowed=y>> accessed 16 August 2018.

⁸⁴ Shaw (n 38) 425.

tackling the disproportionately low number of registered BAME donors. In such communities, individual autonomy is often balanced against the importance of family, tradition or religion. Although it is common for medical staff to consult with relatives, best practice guidelines are not mandated by law. Religious uncertainty may also prevent potential donors from registering their consent. Although religious leaders and groups such as the Muslim Law Council⁸⁵ and Jewish Board of Deputies⁸⁶ have voiced their support for Organ Donation, individuals may not be aware. Providing a religious safeguard allows individuals to rest assured that donation will only ensue if confirmed to be religiously compatible; while the option to obtain additional consent from a family member operates a belt and braces approach.

The European Court of Human Rights recently held⁸⁷ that states giving legal rights to relatives must prescribe authorities' obligations to inform relatives of said rights.⁸⁸ It is suggested a similar approach, obligations to inform the public, is taken with mandated choice. The inclusion of ministerial duties binds Organ Donation law and policy.

The proposed reforms here seek to address the holes in the current legislation. The 2004 Act, while commendable, leaves room for improvement when tackling Organ Donation for transplantation purposes. However, any solutions must be carefully assessed both in terms of practical and legal impact. Introducing presumed consent would implement exactly that which the 2004 Act seeks to avoid; lack of objection cannot equate to appropriate consent.⁸⁹

The introduction of a mandated choice system as proposed here would produce an equilibrium between individual autonomy and public welfare. The connected structure of reforms to be implemented alongside mandated choice is predicted to increase registration and consent while decreasing family

⁸⁵ Journal of Medical Ethics News and Notes, 'UK's Muslim Law Council Approves Organ Transplants' (1996) 22(2) J Med Ethics 99.

⁸⁶ Board of Deputies for British Jews, *Opt-Out Organ Donation: Jewish Concerns and Interests* (London, 2018) <<https://www.bod.org.uk/wp-content/uploads/2018/02/Briefing-for-website-20-02.pdf>> accessed 2 Aug 2018.

⁸⁷ *Elberte v Latvia* (Application no. 61243/08) [2015] ECHR 1.

⁸⁸ ES Dove, AG Mitra, GT Laurie, C McMillan and S Taylor-Alexander, 'Elberte v. Latvia: Whose Tissue Is It Anyway – Relational Autonomy or the Autonomy of Relations?' (2015) 15(2-3) Med Law Int 77, 92.

⁸⁹ Price (n 20) 799.

objections. This would tackle barriers to donation while reinforcing the cornerstone of appropriate consent.

The Law of Illegality and Trusts: A New Mess for the Old One

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Abstract

In *Patel v Mirza*,¹ the Supreme Court overruled the highly controversial judgment of the House of Lords in *Tinsley v Milligan*.² The new ‘range of factors’ test adopted by the landmark decision, which replaced the narrow ‘reliance’ test formulated in *Tinsley v Milligan*, however does not produce different results in every single case. This article highlights the impact of the law on illegality of contracts and its application to trusts. It seeks to identify whether factual scenarios like those of *Tinsley v Milligan* would be decided differently today. Upon analysis of the relevant matters and case law, it is submitted that the outcome would remain unchanged, but not the reasoning.

Introduction

When the ‘range of factors’ test applies to a particular set of circumstances like those in *Tinsley*, the reasoning would be different under present law. This is because the issue is no longer whether Ms Milligan had to rely upon her own illegality to establish a claim. Nevertheless, the result would stay the same as the policy-based approach conferring judicial discretion provides a wider scope than the previous rule-based approach. The outcome does not depend upon whether it is a case of resulting trust or constructive trust, whether a presumption of resulting trust, advancement or *Stack v Dowden* is invoked,³ and whether an illegal activity has been wholly or partly performed. In all cases, the starting point is that illegality will not prevent a civil claim.

In order to develop a deeper understanding of the status quo, this article first discusses the historical development of the illegality defence. The second part explores different approaches taken by the Court of Appeal and House of Lords in *Tinsley* and analyses the ‘reliance’ test advocated in *Tinsley*

¹ [2016] UKSC 42.

² [1994] 1 AC 340 (HL).

³ [2007] UKHL 17.

and the ‘range of factors’ test laid down in *Patel*. Following the application of the new test, it is concluded that the decision in *Patel* constitutes a new mess for the old one, despite its attempt to resolve the longstanding debate on the illegality defence.

1. The Development of the Illegality Defence

Illegality cases are ‘notoriously difficult’,⁴ not only for law students attempting to grapple with the concept but also for practitioners.⁵ The common law doctrine of *ex turpi causa*, based on the principle of public policy, is derived from Lord Mansfield’s dictum in *Holman v Johnson* that ‘[n]o court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act’.⁶ No clear principles for this illegality defence have emerged as Lord Hoffman envisages that it is more of a policy, rather than a principle.⁷ Such a policy is ‘not based upon a single justification but on a group of reasons which vary in different situations’.⁸ Hence, it is arguable that the absence of clear principles and policies has shaped the complexity and inconsistency in the current state of the law on illegality.

Having analysed the courts’ position in the past centuries, the degree of judicial discretion is deemed to be the main factor for overruling or rejecting a previous test. There are largely two positions favoured by the courts: a discretionary approach and a rule-based approach. A discretionary approach such as the ‘range of factors’ test approved by the Supreme Court in *Patel* and the ‘public conscience’ test suggested by the Court of Appeal in *Tinsley* confers discretion and flexibility to judges, which could create complexity and judicial uncertainty.⁹ By contrast, a rule-based approach such as the rigid ‘reliance’ test applied by the House of Lords in *Tinsley* does not give much room for judicial discretion nor flexibility, with procedural issues.¹⁰ Thus, it brings simplicity and relatively greater certainty in its application.¹¹

2. Discretionary Approach vs Rule-Based Approach

⁴ R Buckley, ‘Social Security Fraud as Illegality’ (1994) 110 LQR 3, 3.

⁵ *Patel v Mirza* [2014] EWCA Civ 1047 [47] (Lord Gloster).

⁶ (1775) 1 Cowp 341, 343.

⁷ *Gray v Thames Trains Ltd* [2009] AC 1339 [30]-[32] (Lord Hoffman).

⁸ *Patel* (n 1) [29].

⁹ *Patel* (n 1) [112], [261], [265].

¹⁰ *ibid* [110] (Lord Toulson).

¹¹ *Jetivia SA v Bilta (UK) Limited* [2015] UKSC 23 [62].

To further examine the two distinct approaches endorsed in *Tinsley* and *Patel*, it is essential to explore the similar position advanced by the Court of Appeal and the House of Lords in *Tinsley*: the ‘public conscience’ test and the ‘reliance’ test.

2.1. Analysis of *Tinsley v Milligan*

Traditionally, as in *Gascoigne v Gascoigne*,¹² a claimant who committed an unlawful act was not entitled to a resulting trust, pursuant to the equitable maxim ‘He who comes to equity must come with clean hands’. However, the House of Lords in *Tinsley* formulated the reliance principle, also known as the *Bowmakers* rule.¹³ This rule-based approach entails that the claimant with a proprietary interest, legal or equitable, is allowed to succeed in his claim if there is no reliance on illegality, notwithstanding that the title is acquired in the course of an illegal transaction.¹⁴ Therefore, under such circumstances, a claimant whose past conduct was improper would not be denied an equitable remedy.

In the present case, a couple, Tinsley and Milligan, directly contributed to the purchase price of a guesthouse together as a joint business venture. On the mutual understanding that they were joint beneficial owners, the property was conveyed into Tinsley’s sole name as a legal owner to defraud the housing benefit system. Milligan, who was convicted later, confessed the frauds and made amends. When the couple separated, Tinsley claimed possession asserting sole legal and beneficial ownership over the property. Milligan argued that no gift was intended to Tinsley and thus she was entitled to an equitable interest on resulting trust in proportion to her contribution to the purchase price.¹⁵ In other words, Tinsley held it on resulting trust for both of them in equal shares unless a presumption of resulting trust is rebutted by evidence.¹⁶ Where the presumption of resulting trust arises, the burden of proof is on the transferee.¹⁷ The onus shifts to the transferor in a presumption of advancement case.¹⁸ As for resulting trust, the word ‘result’ originates from the Latin *resalire*. If Milligan succeeds, her equitable share of the property will ‘jump back’ to her.¹⁹ Thus, Tinsley counter-claimed that a purchase

¹² [1918] 1 KB 223 (CA).

¹³ *Bowmakers Ltd v Barnett Instruments Ltd* [1945] KB 65 (CA).

¹⁴ *Tinsley* (n 2) 371B (Lord Browne-Wilkinson).

¹⁵ *Dyer v Dyer* [1778] EWHC Exch J8; *Gissing v Gissing* [1970] UKHL 3; *Lloyds Bank plc v Rosset* [1990] UKHL 14.

¹⁶ Jamie Glister and James Lee, *Hanbury & Martin Modern Equity* (20th edn, Sweet & Maxwell 2015) 252.

¹⁷ *Lowson v Coombes* [1999] 3 WLR 720 (CA); *Collier v Collier* [2002] EWCA Civ 1095.

¹⁸ *Gascoigne* (n 14); *Tinker v Tinker* [1970] P 136 (CA).

¹⁹ William Swadling, ‘Explaining Resulting Trusts’ (2008) 124 LQR 72, 72.

price resulting trust could not operate for Milligan as a result of her wrongdoing. The court, however, took a formalistic approach by favouring Milligan's claim. There was common understanding concerning ownership and she had previously obtained an equitable proprietary right by way of her contribution to the purchase price of the property without reliance on the illegality.²⁰ To put it simply, she could pursue her claim by giving rise to a resulting trust since it was unnecessary for her to come to equity for assistance.

Nevertheless, the fact that a bare majority of the House of Lords²¹ upheld a bare majority decision of the Court of Appeal²² illustrates that Tinsley had a slight chance of success. What the House of Lords unanimously agreed on was the rejection of the subjective 'public conscience' test invoked by Lord Nicholls. This test enables the court to weigh or balance the adverse consequences of granting relief against those of refusing relief to assess how unclean the claims are in cases relating to public policy.²³ This balancing exercise required that the 'clean hands' maxim should not prevent the court from giving effect to the balance with judicial discretion.²⁴ According to Lord Bingham in *Saunders v Edwards*, the law must steer a 'middle course' between these two opposite positions as it is unacceptable for the court to refuse all necessary assistance to a party 'no matter how serious his loss nor how disproportionate his loss to the unlawfulness of his conduct'.²⁵ Would this flexible policy-based approach produce justice in this particular scenario? The majority in the Court of Appeal had already taken this approach, found for Milligan who would otherwise have lost all her assets, and precluded Tinsley's unjust enrichment as a conspirator for the illegal activity.

It is quite interesting to observe how the Court of Appeal and the House of Lords applied the equitable maxim differently. As aforementioned, the House of Lords unanimously rejected this discretionary approach on the basis that the test would confer excessive discretion that is inappropriate to the

²⁰ *Tinsley* (n 2) 376E.

²¹ Lords Jauncey, Lowry and Browne-Wilkinson, and Lords Keith and Goff dissenting.

²² Lords Nicholls and Lloyd, and Lord Ralph Gibson dissenting.

²³ *Tinsley v Milligan* [1992] Ch 310 (CA) 319 (Lord Nicholls).

²⁴ *ibid* 340 (Lord Lloyd).

²⁵ [1987] 1 WLR 1116, 1134.

determination of property rights.²⁶ Lord Goff found it difficult to see how this test can be applied to distinguish between ‘degrees of iniquity’ in extreme cases.²⁷

Lord Browne-Wilkinson in the majority agreed with the Court of Appeal decision because whether Milligan came to equity with clean hands did not affect her proprietary right if there was no need for her to rely on the illegality. On the contrary, Lord Goff in the minority endorsed Lord Ralph Gibson’s dissenting opinion in the Court of Appeal.²⁸ Following Lord Eldon’s ‘let the estate lie where it falls’ principle,²⁹ he was of the view that Tinsley’s legal property right must be protected and thus Milligan’s claim should fail pursuant to the ‘clean hands’ doctrine.

Evidently, it would be wrong to let a criminal like Milligan abuse the equitable doctrine and invoke a resulting trust to recover her property. Nonetheless, she purchased the house with legitimate money acquired from the joint business, not from drug dealing.³⁰ Furthermore, denying Milligan’s equitable interest would be a disproportionate response to her illegality as the fraudulently obtained money was an insignificant part of the purchase price of the property. Even Lord Goff, who delivered the dissenting judgment, acknowledged that the consequences would have been too harsh for Milligan.³¹

The decision in the House of Lords was by a bare majority as was the case in the Court of Appeal. Surprisingly, Milligan faced the same consequences under the ‘reliance’ rule, meaning that the different approaches produced the same result. ‘If a particular outcome is correct, then the mere fact that the same outcome could have been arrived at on a wrong basis’ does not make it the wrong decision.³² Hence, the *Tinsley* case has been heavily criticised ‘for its reasoning rather than its result’.³³

2.2 Analysis of *Patel v Mirza*

²⁶ *Tinsley* (n 2) 363B, 371A.

²⁷ *ibid* 362G, 362H.

²⁸ *Tinsley* (n 2) 363D; *Tinsley* (n 23) 334.

²⁹ *Muckleston v Brown* (1801) 6 Ves Jun 52, 69.

³⁰ The Proceeds of Crime Act 2002; Alastair Hudson, *Great Debates in Equity and Trusts* (Palgrave 2015) 143.

³¹ *Tinsley* (n 2) 363G.

³² *Patel* (n 1) [171].

³³ *ibid* [20].

Recent authorities on the illegality defence confirm that the court has divided sharply between a policy-based approach and a rule-based approach.³⁴ Such divergence of opinion reached a peak. Lord Neuberger ultimately stated that this complex issue should be addressed as soon as possible by seven or nine Justices to reach a definite conclusion.³⁵ For the first time in English law, the reasoning of the House of Lords decision in *Tinsley* was directly called into question by *Patel*.

In this case, Patel had transferred £620,000 to Mirza to invest in a bank's shares through the existing information. That information did not materialize, but Mirza refused to return the money. Patel issued a claim against Mirza who argued that his claim should fail owing to his illegality. The Supreme Court unanimously dismissed Mirza's appeal and applied the *Tribe v Tribe* exception where the illegal purpose was no longer capable of being performed.³⁶ By a 6:3 majority,³⁷ the court favoured the 'range of factors' test over the 'reliance' test. Lord Toulson and Lady Hale, who previously worked for the Law Commission, implemented the policy-based approach reflecting their reform proposals which were not accepted by the government in 2012.³⁸ The commercial lawyers in the minority preferred the orthodox rule-based approach.³⁹ Lord Neuberger concurred with the minority view regarding the utility of restitution, as well as with the majority view in broader circumstances.

To determine whether the public interest would be harmful to the integrity of the legal system by granting relief,⁴⁰ the judges need to assess the purpose of the prohibition breached, the public policy engaged, and what the proportionate response of the court should be.⁴¹ Moreover, it is vital to consider various factors: the seriousness of the conduct, its centrality to the contract, whether it was intentional, and whether there was marked disparity in the parties.⁴²

3. Application of the New 'Range of Factors' Test

³⁴ *Hounga v Allen* [2014] 1 WLR 2889 [42] (Lord Wilson); *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55.

³⁵ *Bilta (UK) Ltd v Nazir (No 2)* [2015] UKSC 23 [15].

³⁶ *Tribe v Tribe* [1995] 3 WLR 913 (CA); *Q v Q* [2008] EWHC 1874 (Fam); *Painter v Hutchison* [2009] EWHC 758 (Ch).

³⁷ Lords Toulson, Kerr, Wilson, Hodge and Neuberger, and Lady Hale.

³⁸ Paul Davies, 'The Illegality Defence: Turning Back the Clock' (2010) 4 Conv 282; Law Commission, *The Illegality Defence* (Law Com No 320, 2010).

³⁹ Lords Mance, Clarke and Sumption.

⁴⁰ *Patel* (n 1) [120].

⁴¹ *ibid* [101] (Lord Toulson).

⁴² *ibid* [107].

This policy-based approach, which resembles the ‘public conscience’ test in its nature, will lead to the same outcome decided by the previous rule-based approach.⁴³ The issue in *Tinsley* was whether the illegality defence should apply to claims for recovering property transferred under illicit transactions which have already been performed. Under the broad discretionary approach, Milligan can easily pursue her claim as the outcome does not rely on whether it is a case of resulting trust or constructive trust⁴⁴, whether a presumption of resulting trust, advancement⁴⁵ or *Stack v Dowden* applies, and whether one wholly or partly performed an illegal act.⁴⁶ Even if Milligan did not make peace with the Department of Social Security, it would be disproportionate to have prevented her from enforcing her equitable property right and conversely to have left *Tinsley* unjustly enriched.⁴⁷ In any event, a claim will not be not barred by illegality.⁴⁸

Conclusion: A New Mess for the Old One⁴⁹

The law of illegality has been a mess with no solid justifications, even after *Patel v Mirza*. The ‘range of factors’ test appears to have revived the ‘public conscience’ test to give back the judicial discretion taken away by the strict ‘reliance’ test. Unless a sufficient number of Dworkinian Hercules judges exist, such unfettered discretion may produce considerable uncertainty and unpredictability.⁵⁰ What was controversial about *Tinsley v Milligan* was not so much the reliance rule itself.⁵¹ The outcome was rightly decided.⁵² After two decades, the losing counsel in *Tinsley*, James Munby QC, successfully convinced the Supreme Court as he was Chairman of the Law Commission which criticised the reliance principle. Hence, debates over what approach and degree of judicial discretion is relevant could continue to take turns.

⁴³ Anthony Grabiner, ‘Illegality and restitution explained by the Supreme Court’ [2017] CLJ 18, 19.

⁴⁴ *Barrett v Barrett* [2008] EWHC 1061; *O’Kelly v Davies* [2014] EWCA Civ 1606.

⁴⁵ *Heseltine v Heseltine* [1971] 1 WLR 342 (CA).

⁴⁶ *Tribe v Tribe* [1995] 3 WLR 913; *Painter v Hutchison* [2009] EWHC 758 (Ch); *Q v Q* [2008] EWHC 1874 (Fam); *Patel v Mirza* (n 1).

⁴⁷ *Patel* (n 1) [112].

⁴⁸ Ben McFarlane and others, *Land Law* (4th edn, OUP 2017) 142.

⁴⁹ *Patel* (n 1) [265] (Lord Sumption).

⁵⁰ James Goudkamp, ‘The End of an Era? Illegality in Private Law in the Supreme Court’ (2017) 133 LQR 14, 19.

⁵¹ Nicholas Strauss, ‘Ex Turpi Causa Oritur Actio?’ (2016) 132 LQR 236, 254.

⁵² Buckley (n 4) 6.

Modern Day Illegality: Mance LJ and the Range of Factors Approach

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Abstract

The longstanding principles underpinning equitable and common law proprietary claims in relation to illegality have recently been reconsidered in the Supreme Court, the outcome of which was a change of approach in assessing reliance on illegality. This paper explores Mance LJ's (as he then was) distaste of abiding by established illegality doctrines and the extent to which his view was echoed and adopted when the scope of the illegality principle was deliberated. Analysis of the coherence and appropriateness of the different approaches to illegality will be provided in this paper. Further, the application of the new approach in illegality will be reflected upon.

Analysis

The issues of illegality, presumption of advancement¹ (POA) and *locus poenitentiae* have caused uncertainty in trusts, all of which were addressed through Mance LJ's dissent in *Collier*.² In *Collier*, a father granted his daughter leases over properties and options to purchase the freehold of the premises. Subsequently, a dispute arose as to who should benefit from the properties.

The father, to assert title over the properties, referred to a letter signed by the daughter's mother confirming that the daughter had no interest in the properties. The letter was deemed irrelevant,³ and judges' opinions differed as to whether an agreement as to where the beneficial interests should lie existed between the parties. Nevertheless, whether the judges perceived that a trust existed⁴ or not,⁵ it

¹ *Ford Lord Grey v Katherine Lady Grey* (1677) 36 ER 742.

² *Collier v Collier* [2002] EWCA Civ 1095 (CA).

³ *Collier* (n 2) [35] (Aldous LJ); [68] (Chadwick LJ); [87] (Mance LJ).

⁴ *Collier* (n 2) [36] (Aldous LJ); [88] (Mance LJ).

⁵ *Collier* (n 2) [70] (Chadwick LJ).

was not convincing that the transfer of leases was for inheritance tax purposes: the objective was to evade creditors.

Upon this illegal purpose, illegality was assessed. Generally, following the equity maxim that ‘he who comes into equity must come with clean hands’, ‘No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act’,⁶ but instead will ‘Let the estate lie where it falls’.⁷ Subsequently, this maxim leads to the emergence of the reliance principle, where ‘A party to an illegality can recover by virtue of a legal or equitable property interest if, but only if, he can establish his title without relying on his own illegality.’⁸ Referring to the reliance principle,⁹ the majority concluded that whether or not an agreement and therefore a trust, existed between the parties, in either case the father would have had to rely upon his ‘dishonest plot’¹⁰ and forced to ‘disclose his dishonest or fraudulent purpose’¹¹ which is ‘not permissible’.¹²

Nonetheless, Mance LJ identified faults with the ‘formalistic and restrictive nature’¹³ of the reliance principle. The ‘arbitrary, confusing and unsatisfactory’¹⁴ issue is that *Tinsley*¹⁵ created a ‘crucial difference’¹⁶ between depending upon an illegal agreement and an illegal agreement that entails ‘some objectively provable and apparently neutral fact’.¹⁷ As Mance LJ alluded,¹⁸ reference to the parties’ ‘common understanding’¹⁹ of the beneficial interest of the house in *Tinsley* implies that the floodgates of the reliance principle could potentially extend to situations where no purchase price contribution exists. Therefore, claiming that the reliance principle produces certainty is ‘extremely far-fetched’,²⁰ as inconsistent results would occur, ‘which had nothing to do with the underlying policies’.²¹

⁶ *Holman et Al' v Johnson, alias Newland* (1775) 1 Cowper 341.

⁷ *Muckleston v Brown* (1801) 31 ER 934 [69] (Lord Eldon).

⁸ *Tinsley v Milligan* [1994] 1 AC 340 (HL) [375C] (Lord Browne-Wilkinson).

⁹ *Collier* (n 2) [37] (Aldous LJ); [79] (Chadwick LJ).

¹⁰ *Collier* (n 2) [27] (Aldous LJ).

¹¹ *Collier* (n 2) [80] (Chadwick LJ).

¹² *Collier* (n 2) [20] (Chadwick LJ).

¹³ Graham Moffat, *Trusts Law* (5th edn, Cambridge University Press 2009) 314.

¹⁴ Paul S Davies, ‘The Illegality Defence: Turning Back the Clock’ [2010] Conv 282, 285.

¹⁵ *Tinsley* (n 8).

¹⁶ Graham Virgo, *The Principles of Equity & Trusts* (2nd edn, Oxford University Press 2016) 270.

¹⁷ *Collier* (n 2) [105] (Mance LJ).

¹⁸ *Collier* (n 2) [103] (Mance LJ).

¹⁹ *Tinsley* (n 8) [376F] (Lord Browne-Wilkinson).

²⁰ *Patel v Mirza* [2016] UKSC 42, [2017] AC 467 [136] (Lord Kerr).

²¹ *Patel* (n 20) [87] (Lord Toulson).

Additionally, illegal claims may succeed, provided that an alternative right exists, as in *Bowmakers*.²² Whilst in that case it was suggested that the outcome ‘could have been different had the items themselves been intrinsically unlawful’,²³ such as obscene books,²⁴ there is a general concern that the reliance principle is ‘getting precious close to enforcing an illegal contract’.²⁵ Therefore, Mance LJ was ‘tempted’²⁶ to adopt a ‘severely limited view’²⁷ of ‘reliance’,²⁸ but was bound by case law.

Mance LJ’s notion that case law did not support divergence from the reliance principle in *Collier*²⁹ was endorsed in *Patel*.³⁰ In *Patel*, the issue was whether money paid under an illegal contract was required to be returned to the transferor. Whilst the presumption of resulting trust (PRT), POA and *locus poenitentiae* remained relevant, the main analysis concerned the law on illegality, with the majority favouring a range of factors (ROF) approach³¹ and the dissenting judges, although agreeing that the transferor should receive his money, opting for a rule-based approach.³²

As the law regarding reliance ‘was already fraught with uncertainties’,³³ as demonstrated by the judges’ disagreement in *Collier*, the acceptance of the ROF approach in *Patel*, which echoes Lord Toulson’s dissent in *Apotex*,³⁴ ostensibly appears to provide a solution. For example, the first consideration of the ‘more flexible [ROF] approach’³⁵ is the ‘underlying purpose of the prohibition which has been transgressed’.³⁶ Whilst this can be considered ‘inconsistent’³⁷ with ‘basic principles going back nearly 250 years’,³⁸ it can be argued that consideration of prohibitions generates consistency throughout the law. For example, in *Gray*,³⁹ since the claimant pleaded guilty to

²² *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65 (CA).

²³ Jonathan Mance, ‘Ex Turpi Causa – When Latin Avoids Liability’ [2014] Edin LR 174, 180.

²⁴ *Bowmakers* (n 22) *Bowmakers* 72 (Lord du Parcq).

²⁵ *Patel* (n 20) [171] (Lord Neuberger).

²⁶ *Collier* (n 2) [106] (Mance LJ).

²⁷ *ibid.*

²⁸ *Nelson v Nelson* [1995] HC 25 [27] (Justice Dawson).

²⁹ *Collier* (n 2) [101] (Mance LJ).

³⁰ *Patel* (n 20) [87] (Lord Toulson).

³¹ *Patel* (n 20) [101] (Lord Toulson).

³² *Patel* (n 20) [233-244] (Lord Sumption).

³³ Ernest Lim, ‘Ex Turpi Causa: Reformation Not Revolution’ [2017] MLR 927, 936.

³⁴ *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55, [2015] AC 430.

³⁵ *Patel* (n 20) [81] (Lord Toulson).

³⁶ *Patel* (n 20) [101] (Lord Toulson).

³⁷ *Patel* (n 20) [216] (Lord Clarke).

³⁸ *Patel* (n 20) [187] (Lord Mance).

³⁹ *Gray v Thames Trains Ltd* [2009] UKHL 33, [2009] 1 AC 1339.

manslaughter and ‘the civil law must not undermine the criminal law’,⁴⁰ appreciation of legal prohibitions appears to coincide with the principle of consistency. Applying to *Collier*, consideration of the prohibition of defrauding creditors would be required. Subsequently, as allowing the daughter to hold title would promote deception of the creditors, the father would be likely to receive title to the properties. Nevertheless, there are concerns that the ROF approach brings ‘greater problems and uncertainties’⁴¹ such as ‘where the illegal activity was expressly included in the contract’,⁴² but ‘only time will tell’⁴³ as to whether consideration of the purpose of prohibitions will produce legal certainty.

The second aspect that Mance LJ disagreed with concerned the PRT to rebut the POA. Whilst the majority dismissed the presumptions as consideration was given for the properties,⁴⁴ Mance LJ criticised both as he disbelieved the daughter’s claim that there was no agreement and there was no burden⁴⁵ such as rent paid.⁴⁶ As seen in case law,⁴⁷ the POA prevails and illegality prevents the use of the PRT to rebut this, even if both parties are parties to illegality.⁴⁸ However, Mance LJ questioned if illegality is ‘fatal to enforcement of the trust’,⁴⁹ why, conversely, ‘it should be any less necessary to displace the ostensible legal position’⁵⁰ of the POA. This is of particular concern as the POA operates on a ‘historical, but outdated basis’,⁵¹ producing a ‘discriminatory effect’⁵² as a PRT arises when a husband makes a voluntary transfer to his wife, but not vice versa. Despite changes in the law⁵³ so that the POA applies equally, these have yet to be put into force and continue to contravene human rights.⁵⁴ With the POA being given ‘an overriding importance which it was never intended to have’,⁵⁵ Mance LJ disliked that a trivial presumption with no plausible justification for its application in the modern

⁴⁰ Paul S Davies, ‘The Illegality Defence and Public Policy’ [2009] LQR 556, 559.

⁴¹ *Patel* (n 20) [179] (Lord Neuberger).

⁴² *ibid.*

⁴³ *Lim* (n 33) 936.

⁴⁴ *Collier* (n 2) [64] (Chadwick LJ).

⁴⁵ *Chettiar (ARPL Palaniappa) v Chettiar (PLAR Arunasalam)* [1962] AC 294 (Privy Council (Federated Malay States)).

⁴⁶ *Collier* (n 2) [91] (Mance LJ).

⁴⁷ *Tinker v Tinker (No 1)* [1970] 2 WLR 331 (CA).

⁴⁸ *Gascoigne v Gascoigne* [1918] 1 KB 223 (HC).

⁴⁹ *Collier* (n 2) [97] (Mance LJ).

⁵⁰ *Collier* (n 2) [99] (Mance LJ).

⁵¹ Beth Richards-Bray, ‘Farewell to the Presumption of Advancement’ [2010] Cov LJ 27, 29.

⁵² *Virgo* (n 16) 267.

⁵³ Equality Act 2010, s 199.

⁵⁴ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Article 5 Protocol 7.

⁵⁵ *Patel* (n 20) [24] (Lord Toulson).

day could determine the outcome of a case, outweighing significant aspects of the parties' conduct, such as seriousness of their illegality.

However, through the ROF approach, this is arguably resolved through the consideration of 'any other relevant public policies which may be rendered ineffective or less effective by denial of the claim'.⁵⁶ In the name of 'public interest'⁵⁷ and 'preserving the integrity of the justice system',⁵⁸ Lord Toulson held that the 'law should strive for the most desirable policy outcome'.⁵⁹ Whilst this may be criticised as 'revolutionary',⁶⁰ providing judges with discretion regarding 'factors such as seriousness of the illegality involved and the proportionality of denying relief'⁶¹ have been in contemplation since *Tinsley*. Since the Law Commission's recommendations,⁶² subsequent case law⁶³ has also recognised the importance of public policy. Particularly, in *Hounga*,⁶⁴ consideration of public policy meant that the law did not 'encourage illegal employment and even discrimination'.⁶⁵

Yet, it must be noted that whilst Mance LJ was unhappy with the application of the reliance principle in *Collier*, he also disagreed with the consideration of public policy in *Patel*'s ROF approach. Although public policy is a relevant factor⁶⁶ behind illegality in established case law,⁶⁷ there is 'no clear guidance as to when judges could exercise this power and on what grounds'.⁶⁸ Consider the criminal law, for example. As it 'is in almost every case the source of the relevant illegality, [it] is a critical source of public policy'.⁶⁹ As seen in *Sigsworth*,⁷⁰ there is a public policy consideration that 'a person should not be allowed to profit from his own wrongdoing'.⁷¹ Ostensibly then, upon 'the consideration of

⁵⁶ *Patel* (n 20) [101] (Lord Toulson).

⁵⁷ *Patel* (n 20) [109] (Lord Toulson).

⁵⁸ *ibid.*

⁵⁹ *Patel* (n 20) [91] (Lord Toulson).

⁶⁰ *Patel* (n 20) [261] (Lord Sumption).

⁶¹ Law Commission, *The Illegality Defence: A Consultative Report* (Law Com No 189, 2009) para 1.4.

⁶² *ibid.*

⁶³ *Bakewell Management Ltd v Brandwood* [2004] UKHL 14, [2004] AC 519; *Bilta (UK) Ltd (In Liquidation) v Nazir* [2015] UKSC 23, [2016] AC 1.

⁶⁴ *Allen v Hounga* [2014] UKSC 47, [2014] 1 WLR 2889.

⁶⁵ *Lim* (n 33) 934.

⁶⁶ *Holman* (n 6) [343] (Lord Mansfield).

⁶⁷ *Holman* (n 6) 343 (Lord Mansfield).

⁶⁸ *Hall v Herbert* [1993] 2 SCR 159 (Justice McLachlin).

⁶⁹ *Patel* (n 20) [262] (Lord Sumption).

⁷⁰ *Re Sigsworth* [1935] Ch 89.

⁷¹ *Patel* (n 20) [99] (Lord Toulson).

preventing injustice and the enrichment of one party at the expense of the other',⁷² the daughter 'should not be better off'⁷³ from the illegal transactions and the father would hold title to the properties. However, the public policy principle 'does not of itself provide any sure guidance to the solution of a problem'.⁷⁴ If 'the courts would not enforce a right [...] if the right arises out of an act committed by the person asserting the right',⁷⁵ as demonstrated in *Sigsworth*, then public policy can equally lead to the opposite outcome. Here, the father may be prevented from asserting his right to the properties due to his act of defrauding creditors. Therefore, whilst 'the law must aspire to be a unified institution'⁷⁶ and can achieve this by bringing illegality in trusts in line with 'contract, unjust enrichment and tort claims [where] it is open for the courts to develop'⁷⁷ the law, creating such 'harmony'⁷⁸ opens up the potential for inconsistency, as public policy 'is far too vague and potentially far too wide to serve as the basis on which a person may be denied his legal rights'.⁷⁹

The third aspect that displeased Mance LJ in *Collier* was the analysis of *locus poenitentiae*, should the 'primary rule'⁸⁰ of illegality fail. As a party's 'mere intention to effect an illegal object [...] does not deprive the assignor of his right to recover the property',⁸¹ this 'enables the court to do justice'⁸² when the fraudulent purpose of a transaction has not been carried out,⁸³ aiming to 'encourage withdrawal'.⁸⁴ This is demonstrated in *Tribe*.⁸⁵ Whilst all judges agreed that *locus poenitentiae* could not assist the father⁸⁶ as there was 'no voluntary withdrawal'⁸⁷ and the 'creditors have been successfully deceived over a number of years',⁸⁸ Mance LJ also expressed dissatisfaction with this line of analysis. The law of *locus poenitentiae* has shifted to withdrawal, as 'genuine repentance is not

⁷² *Nelson* (n 28) [45] (Justice Toohey).

⁷³ *Patel* (n 20) [176] (Lord Neuberger).

⁷⁴ *Attorney General v Observer Ltd* [1990] 1 AC 109 (HL) 286 (Lord Goff).

⁷⁵ *Hardy v Motor Insurers' Bureau* [1964] 2 QB 745 (CA) 767 (Lord Diplock).

⁷⁶ *Hall* (n 68) 176 (Justice McLachlin).

⁷⁷ Law Commission: *The Illegality Defence* (n 61) para 1.6.

⁷⁸ *Patel* (n 20) [230] (Lord Sumption).

⁷⁹ *Patel* (n 20) [217] (Lord Clarke).

⁸⁰ *Tribe v Tribe* [1996] Ch 107 (CA) [124E] (Millett LJ).

⁸¹ *Symes v Hughes* (1869-70) LR 9 Esq 475, 478 (Lord Romilly MR).

⁸² *Tribe* (n 80) [133G] (Millett LJ).

⁸³ *Taylor v Bowers* (1876) 1 QBD 291 (QB & CA).

⁸⁴ *Tribe* (n 80) [134B] (Millett LJ).

⁸⁵ *Tribe* (n 80).

⁸⁶ *Collier* (n 2) [82] (Chadwick LJ).

⁸⁷ *Collier* (n 2) [48] (Aldous LJ).

⁸⁸ *Collier* (n 2) [111] (Mance LJ).

required’,⁸⁹ but this is not simple. Even within *Collier*, it was only after comprehensive deliberation of the father’s illegal activity⁹⁰ that Mance LJ concluded that the father did not withdraw from the illegal transaction. As *Tribe* was interpreted ‘liberally’,⁹¹ and ‘must also be read in context’,⁹² withdrawal can be said to now depend upon whether there was ‘any actual deception had been practised on the transferor’s creditors’.⁹³ It is upon this basis that Mance LJ, whilst agreeing that the father did not withdraw from the transaction, suggests that *locus poenitentiae* should be further extended to take into account the ‘legitimate consideration’⁹⁴ of third party interests which the illegal agreement was directed at.

In *Patel*, the consideration of third parties was embodied in the third consideration of proportionality, ‘keeping in mind the possibility of overkill’,⁹⁵ especially as flexibility is ‘necessary to give proper effect to the underlying policy factors’.⁹⁶ As penalties should not be ‘disproportionate to the seriousness of the breach’,⁹⁷ contemplation of proportionality in *ParkingEye*,⁹⁸ where ‘the legally objectionable letter was only a small part of the intended performance of the contract and was not essential to it’⁹⁹ meant that the court did not achieve a ‘disproportionate result’¹⁰⁰ and illegality was not applied ‘mechanistically’.¹⁰¹ This permits the ability to distinguish between ‘deliberate and serious’¹⁰² and accidental and ‘technical’¹⁰³ illegality.

As ‘it is simply not possible to identify a more helpful or rigorous test’,¹⁰⁴ its application to *Collier* will be considered. In *Patel*, the transferee was a ‘finance professional’¹⁰⁵ and the transferor ‘would

⁸⁹ *Tribe* (n 80) [135D] (Millet LJ).

⁹⁰ *Collier* (n 2) [107-109] (Mance LJ).

⁹¹ Paul S Davies, ‘The Illegality Defence – Two Steps Forward, One Step Back?’ [2009] Conv 182, 205.

⁹² *Collier* (n 2) [109] (Mance LJ).

⁹³ Mark Pawlowski, ‘Constructive Trusts, Illegal Purpose and Locus Poenitentiae’ [2009] Conv 145, 152

⁹⁴ *Collier* (n 2) 111] (Mance LJ).

⁹⁵ *Patel* (n 20) [101] (Lord Toulson).

⁹⁶ *ParkingEye Ltd v Somerfield Stores Ltd* [2012] EWCA Civ 1338 (CA) 53 (Toulson LJ).

⁹⁷ *Nelson* (n 28) [612] (Justice McHugh).

⁹⁸ *ParkingEye* (n 96).

⁹⁹ *Patel* (n 20) [68] (Lord Toulson).

¹⁰⁰ *ParkingEye* (n 96) 850 (Sir Robin Jacob).

¹⁰¹ *Patel* (n 20) [101] (Lord Toulson).

¹⁰² Law Commission, *The Illegality Defence* (Law Com No 320, 2010) para 1.3.

¹⁰³ *ibid.*

¹⁰⁴ *Patel* (n 20) [176] (Lord Neuberger).

¹⁰⁵ *Patel* (n 20) [225] (Lord Sumption).

not necessarily have known that insider dealing was illegal’,¹⁰⁶ which meant that it was proportional that the transferor received the money. Unlike *Patel*, both parties in *Collier* knew of the illegal transaction and were at fault, so proportionality may not necessarily alter the outcome. However, it may be argued that it is not the ‘proportionality of its impact upon the claimant’,¹⁰⁷ that needs to be considered, but ‘the public interest as against the interests and legal rights of the parties’.¹⁰⁸ From this perspective, similar to the transferor who is ‘seeking to unwind the arrangement, not to profit from it’,¹⁰⁹ in addition to it potentially being disproportionate that the daughter in *Collier* would have ‘wrongful retention’¹¹⁰ of the properties, the father may retain title to the properties.

Overall, Mance LJ was displeased in *Collier* with the application of the reliance principle on several grounds, such as its formalistic application. Despite a wider approach being adopted in *Patel*, the ROF approach takes into consideration uncertain principles such as public policy and proportionality, factors dependent upon ‘the judge’s gut instinct’.¹¹¹ However, if applied to *Collier* today, there are sufficient grounds upon which the father would hold title to the properties.

¹⁰⁶ *ibid.*

¹⁰⁷ *Patel* (n 20) [262] (Lord Sumption).

¹⁰⁸ *ibid.*

¹⁰⁹ *Patel* (n 20) [115] (Lord Toulson).

¹¹⁰ *Patel* (n 20) [127] (Lord Kerr).

¹¹¹ *Patel* (n 20) [262] (Lord Sumption).

Can the Prospect of Unmanned Ships Stay Afloat under the Current Collision Regulations?

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Abstract

The prospect of unmanned shipping was previously confined to fiction, however, technological developments over the last decade have firmly established their place in the future of the Shipping industry. This essay focuses on unmanned ship's ability to comply with the 1972 Collision Regulations (COLREGs). This essay will discuss whether unmanned ships can satisfy the existing COLREGs, whether enforcement of the COLREGs will need to be adapted and, finally, what reform is currently ongoing to rectify the issues that are thrown up in the course of this analysis. In conclusion, it is submitted that alterations to the current COLREGs will be required in order to allow application to unmanned ships; this change should take place quickly though through a Convention and not be left to gradual change through the Courts. This will provide sufficient certainty and confidence for those looking to invest in unmanned vessels and this will allow a smooth transition into the new era of the shipping industry.

1.0 Introduction

The concept of unmanned ships is by no means a new phenomenon. This prospect though is now becoming a reality, with 'prototypes... currently being developed by a range of protagonists to develop unmanned container carriers and passenger liners of comparable size and operational capability as manned ships performing these functions'.¹

It is predicted that the impact this will have will be comparable to that of 'the introduction of steel construction and steam propulsion...in the nineteenth century'.² From the beginning however, there

¹ R Veal, 'Unmanned Ships and the International Regulatory Framework' (2017) JIML 23(2) 100.

² E Van Hooydonk, 'The Law of Unmanned Merchant Shipping - An Exploration' (2014) JIML 20(3) 403, 408.

have been reservations as to their compatibility with existing maritime law. The ‘long history’³ that maritime law is famous for is both the Achilles heel for unmanned shipping but also a potential helping hand to facilitate their introduction. Case law interpreting the COLREGs and the overarching duty of good seamanship are detrimental to the prospects of unmanned ships as they require a crew onboard in order for the rules to be satisfied. This is because they were decided many years ago, when the prospect of having an unmanned ship was confined to fiction. However, for this very same reason, these laws are arguably out of date with the very different context we find ourselves in today. The capabilities of technology are growing at an exponential rate and the expectations are far different today. It is therefore highly likely that Judges will take a different stance when cases inevitably find themselves in the courts.

These arguments will form the cornerstone of this article, which assesses the compatibility of unmanned ships with the COLREGs. A collection of these rules will be assessed closely and the question of whether it is possible for unmanned ships to comply will be tackled with each. This article will then assess how issues of enforcement of COLREGs against unmanned ships can arise and how they should be tackled. Ultimately, it will reach the conclusion that changes are needed but these changes should come in the form of adjustments to the existing framework and not with a completely new law. To this extent, it agrees with the findings of Veal and Tsimplis,⁴ however, there is a further stipulation that this should not be done gradually, as cases come to Court, it should be done with a Convention that adjusts the COLREGs in order for unmanned ships to comply and to set sail alongside manned ships that currently operate. There is also an exception to this in regard to enforcement of the COLREGs, which will need to be re-written in order to include unmanned ships with minimal complexity.

Before the minutiae of the issues raised here are tackled, it is important to address the question: what is meant by the term ‘unmanned ship’? This was defined by Veal as ‘those which are capable of controlled, self-propelled movement on the water in the absence of any onboard crew’.⁵ There are, however, two forms of unmanned ships that are currently in production. The first is a remote-controlled

³ *ibid.*

⁴ R Veal and M Tsimplis ‘The Integration of Unmanned Ships into the Lex Maritima’ (2017) LMCLQ 303.

⁵ Veal (n 1) 100.

ship which is ‘controlled by a controller from either the shore or a ‘mother vessel’ using a desktop computer and joystick’.⁶ The second are those which can operate completely autonomously, which

are pre-programmed by shore-side programmers and thereafter use a combination of sonar radar, advanced computer software and control algorithms to perform a predetermined nautical course without any human interaction whatsoever.⁷

This distinction will be drawn later as they are affected differently by the COLREGs.

2.0 Are unmanned ships, ships?

Before assessing whether unmanned ships will comply with the COLREGs, we must first ask whether they apply at all. Across admiralty law, there has, rather helpfully, not been a clear definition of what constitutes a ‘ship’. The United Nations Convention on the Law of the Sea (hereinafter referred to as ‘UNCLOS’), for example, does not provide a definition of the term ‘ship’ or the term ‘vessel’ and UNCLOS uses the terms interchangeably. It also prescribed the responsibility of ‘flagging’ ships to member states, thereby allowing them to define in their own terms what constitutes a ship in their legislation. This, of course, causes inconsistency and makes this rather simple question quite complex in practice. It is necessary to note the approaches taken by different states to see if unmanned ships are recognised by any.

The Merchant Shipping Act 1995 provides the English stance, which defined a ship as any ‘vessel used in navigation’.⁸ In *R v Goodwin*,⁹ it was held by Lord Phillips that ‘ordered progression over the water from one place to another’¹⁰ was the key requisite of navigation and that the construction did not matter and nor did the fact that navigation was not its primary role. In the Netherlands, the key question is whether the machinery is intended exclusively or principally for floating on the sea,¹¹ which is far broader than the UK’s. In Germany, anything more than insignificant size capable of floating, provided with a hollow, the purpose of which is to be moved on water will constitute a ship.¹² In the

⁶ *ibid.*

⁷ *ibid.*

⁸ Merchant Shipping Act 1995, s 313(1).

⁹ *R v Goodwin* [2006] 1 Lloyd’s Rep. 432.

¹⁰ *ibid* [33] (Lord Phillips).

¹¹ Art 194 of the Burgerlijk Wetboek, BW art 8:2(1).

¹² Bundesgerichtshof in 1951, (I ZR 84/51 (1951) [1952] Neue Juristische Wochenschrift 1135).

USA, the case of *Lozman*¹³ defined the test as ‘whether a reasonable observer, looking to the home’s physical characteristics and activities would consider it designated to a practical degree for carrying people or things over water’.¹⁴ The key aspect here being the ability to carry people or things across water. This was a requirement that was rejected by the supreme court in *R v Goodwin* as it held that navigation did not need to be its primary role, which was used in *Clark v Perks no.2*,¹⁵ where an oil rig was accepted as a ship.

It is therefore clear that the state’s definitions do not clarify the issue. Academic work groups factors from all the case law stated in order to develop a class that a potential ship would need to fall into. Gahlen argues that there are various essential characteristics which define ‘ships’. These are: floatability; capability of controlled movement on water; capability in the carriage of persons or goods beyond its own mass; and engagement in maritime (rather than inland water or river) navigation,¹⁶ and Bork adds the condition that it must not be of an insignificant size.¹⁷

Whether having a lack of definition of a ship is a good thing is arguable. Hooydonk stated that it was beneficial because ‘The prospect of unmanned merchant shipping once again shows that it is wise to make statutory definitions that can be easily adapted so that the status of specific devices can be regulated’.¹⁸ Lowe agrees by stating that the lack of definition gives the term the ability to develop and adapt in line with the particular regulatory context.¹⁹

The preferable position is to have a universal definition for what constitutes a ship because it makes no sense for states to collectively agree rules at conventions but fail to agree on the determining factor of whether the rules will apply. It is agreeable that the definition should be flexible but, above all, it should be consistent. The current status quo is anything but consistent and this will make the introduction of unmanned ships more complex as they will be recognised as ships under one state’s legislation and not under another; a clear example of this can be seen in the controversial removal of

¹³ *Lozman v City of Riviera Beach* (2013) 133 S Ct 735; 2013 AMC.

¹⁴ *ibid* [5].

¹⁵ *Perks v Clark* [2001] EWCA Civ 1228; [2001] WLR 17; [2001] 2 Lloyd’s Rep 431.

¹⁶ S Gahlen, ‘Ships Revisited: A Comparative Study’ (2014) 20 JIML 252.

¹⁷ K Bork and others, ‘The Legal Regulation of Floats and Gliders—in Quest of a New Regime?’ (2008) 39 ODILA 3.

¹⁸ Hooydonk (n 2).

¹⁹ Professor Lowe’s report on the interpretation of the term ‘ship’ in the 1992 Civil Liability Convention, September 2011, paras 78-92 (IOPC/OCT11/4/4, Annex 1).

a US ‘UUV’ from the seas by the Chinese People’s Liberation Army.²⁰ Among political tensions, one of the issues here was whether the UUV did in fact constitute a ship and could be afforded freedom of navigation rights. The US believed it could and China disagreed. The potential need to accommodate for oncoming developments may be the perfect opportunity to establish a universal definition. This is further supported by the fact that, as will be shown, the COLREGs specifically will need to be amended in order to accommodate unmanned ships.

Despite these inconsistencies, Rule 1 of the COLREGs states that the rules apply to ‘all vessels upon the high seas and in all waters connected therewith navigable by seagoing vessels’.²¹ ‘Vessels’ is defined by Rule 3 as ‘every description of water craft ... used or capable of being used as a means of transportation on water’.²² This is a very broad definition, and in the absence of no crew requirement, it can be presumed for the purposes of the COLREGs and this article, that unmanned ships are in fact ships. In the larger picture, it

may be concluded with a considerable degree of certainty that having a crew on board, including a master, is not generally regarded as an essential part of the notion of a ship in the regulatory definitions of the ship available to us.²³

3.0 Compatibility with the COLREGs

3.1 The overarching duty of seamanship

Rule 2 is considered to be the most important²⁴ as it puts the duty of good seamanship on a statutory footing as an ‘overarching standard’²⁵ to be considered when interpreting the COLREGs. The rule states that ‘Nothing in these Rules shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to comply with these Rules or of the neglect of any precaution which may be required by the ordinary practice of seamen’.²⁶ This requires seamen to adhere to this

²⁰ ‘Statement by Pentagon Press Secretary Peter Cook on Return of U.S. Navy UUV’ (*U.S. Department of Defense*, 19 December 2016) <<https://dod.defense.gov/News/News-Releases/News-Release-View/Article/1034224/statement-by-pentagon-press-secretary-peter-cook-on-return-of-us-navy-uuv/>> accessed 15 July 2019.

²¹ COLREGs 1972, Rule 1a.

²² COLREGs 1972, Rule 3a.

²³ Hooydonk (n 2) 409.

²⁴ Veal (n 1) 101.

²⁵ Veal and Tsimplis (n 4) 303.

²⁶ COLREGs 1972, Rule 2.

standard even if departure from the COLREGs is required to do so. It is this standard of good seamanship that presents the substantial issues to the introduction of unmanned ships.

The main issue that is caused by an unmanned ship here is that there is much case law that asserts where officers in charge must be situated on the deck, therefore implying that there must in fact be an officer present on the ship.²⁷ The younger of these two cases is 67 years old though, so there is a strong argument to be made about the context within which these judgments were given and the differences that today's developments in technology will make. Therefore currently, having no crew aboard would breach this established case law but its precedence is arguable. Veal and Tsimplis make an agreeable point that paragraph (b) calls for 'contemporaneous human sentience in continually making'²⁸ 'a judgement between compliance with the codified directions...[and] unspecified action'.²⁹ Having an unmanned ship would fall foul of this implied provision from Rule 2 of the Collision Regulations. However, a distinction between remotely controlled and autonomous handling of the ship here needs to be drawn. The former could arguably satisfy this provision if the 'communication method in the remote controlling is sufficiently instantaneous'³⁰ because, provided the controlling officer has the appropriate training, the ability to make these judgements would not be impaired and Rule 2 could therefore be satisfied. If the ship was completely autonomous though, this could not be satisfied under Veal's interpretation of the rule as there would be no human available to make these judgements. An argument can be made that paragraph (b) does not call for human judgement though, just that 'due regard shall be had to all dangers of navigation and collision and to any special circumstances'.³¹ 'Due regard' is not defined here and whilst Veal's assumption would be shared by most ordinary readers of this provision, it is arguable that an autonomous ship with appropriate capabilities could satisfy this provision. The improvements in technological ability bring a changing context to the interpretation of these rules, so it could be possible that an autonomous ship would satisfy this. It must be stated though that this argument will perhaps be more relevant in the future when more data will be available on autonomous ship's performance and capabilities in the high seas.

²⁷ *The Arthur Gordon*, *The Independence* (1861) Lush 270; *The British Confidence* [1951] 2 Lloyd's Rep 615, Willmer J 461.

²⁸ Veal and Tsimplis (n 4) 325.

²⁹ *ibid.*

³⁰ *ibid.*

³¹ COLREGs 1972, Rule 2.

3.2 A proper lookout

Rule 5 concerns the need for a proper lookout. The rule states that,

Every vessel shall at all times maintain a proper lookout by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision.³²

The rule makes ‘reference to ‘sight and hearing’ [which] clearly requires a human input in surveying and assessing the situation and collision risk, consistently with Rule 2’.³³ However, there is an argument that with the camera coverage and aural sensors present onboard, information can be passed to a human operating the vessel remotely, who could then satisfy the requirement of sight and hearing. Again, this would only apply if it was being controlled remotely and not fully autonomous. This view is arguable but inconsistent with established case law. Willmer J stated in *The British Confidence*, ‘If he is... at the fore end of the ship-his attention is not so diverted, and there is nothing to prevent him keeping the sharp look-out which is expected of the man on duty’.³⁴ In this case, the use of the terms ‘ship’ and ‘man on duty’ demonstrates that having a lookout positioned at an off-shore facility would fall foul of this precedent and the interpretation of Rule 5 in the case. Another, perhaps clearer contradiction to this argument comes from *The Maloja 2*,³⁵ where it was held that radar is not a substitute for a visual lookout. An agreeable view is that the ‘currently prescribed human element would provide an essential back-up to an autonomous network’.³⁶ This view has support from *Selat Arjuna and Contship Success*,³⁷ where the defendant was liable for acting on scanty information given by the radar, showing that there must be a human lookout to confirm the findings. This view is also supported by Luci Carey, who states that ‘the text of the COLREGs makes it plain that *all* available means ought to be used *as well as* keeping a lookout by sight and hearing’.³⁸ After analysis of the case law, it can therefore be seen that both autonomous and remote controlling of the client’s vessel would breach rule 5 of the regulations. Of course, the argument still remains that the approach of judges may

³² COLREGs 1972, Rule 5.

³³ Veal (n 1) 114.

³⁴ *The British Confidence* (n 21) (Willmer J) [621].

³⁵ [1993] 1 Lloyd’s Rep 48.

³⁶ Veal (n 1) 114.

³⁷ [2000] 1 Lloyd’s Rep 627.

³⁸ L Carey, ‘All Hands Off Deck? The Legal Barriers to Autonomous Ships’ (2017) 23 JIML 3, 11 (emphasis added).

be different if a case went before the court today. Carey states that ‘Law must keep pace with technology’³⁹ and proposes that autonomous ships be left out of rule 5 and separate rule for them is created. This approach does not seem beneficial because it adds greater complexity to the integration of manned and unmanned ships. Once the unmanned vessels do begin to set sail, they should be governed by the same laws as the manned ships, the complexity of issues that arise under the COLREGs should be kept to a minimum.

3.3 Safe speed

Rule 6 is argued to be a ‘corollary of Rules 2 and 5’,⁴⁰ so a logical approach would hold that because unmanned vessels breach both of those rules, they would fail to satisfy rule 6 also. The rule is concerned with ability of the ship to ‘at all times proceed at a safe speed so that she can take proper and effective action to avoid collision’.⁴¹ Paragraph 1 lists factors that are relevant in the assessment of what constitutes a ‘safe speed’, the outcome depends on the circumstances that the ship finds herself in. These factors do not seem to require a crew to be onboard because all can be assessed by technology. However, interpretation of this rule by Aleka Sheppard would suggest that an unmanned ship would again fall foul because ‘Safe speed is a matter of good seamanship and is a relative term, requiring various factors to be taken into account in any given case’.⁴² The use of good seamanship here, supports Veal’s statement that rule 6 is a corollary of rules 2 and 5, and therefore that an unmanned ship would breach this provision. Further evidence of a potential breach can be found in Paragraph 2 (d) of Rule 6, which states that Vessels shall take into account ‘the possibility that small vessels, ice and other floating objects may not be detected by radar at an adequate range’. The wording here implies that radar should not be relied on completely, which reflects the attitude taken in *The Maloja 2 1993*,⁴³ that a radar is not a substitute for a visual lookout. Therefore, crew should be on board to provide for this in order to satisfy the provisions in rule 6 and therefore, an unmanned ship will fall foul of rule 6 whether acting completely autonomously or remotely.

³⁹ *ibid.*

⁴⁰ Veal (n 1) 115.

⁴¹ COLREGS, Rule 6.

⁴² A Sheppard, *Modern Maritime Law Volume 2: Managing Risks and Liabilities* (3rd edn, Informa Law 2013) 1.6.2.2.

⁴³ [2000] 1 Lloyd’s Rep 627.

3.4 Vessels ‘not under command’

What happens if the signal to the remote-controlled ship is lost, or there is a malfunction with the autonomous ship? This paragraph will not discuss liability in the case of a crash, that will follow. This paragraph will discuss Rule 27, which sets out the requirements of vessels ‘not under command or restricted in their ability to manoeuvre’. Rule 27 requires a ship to exhibit ‘two all-round lights in a vertical line where they can best be seen, two balls or similar shapes in a vertical line where they can best be seen and, when making way through the water, in addition to the lights prescribed in this paragraph, sidelights and a stern light’. In order to satisfy this provision, the manufacturers of the unmanned ships would have to ensure that the ability to exhibit these requirements can be carried out in any circumstance, even when all signal or other functions may have gone wrong. This sounds simple enough but must be achieved because this is where the implementation of unmanned ships could become dangerous to other ships. Safety is one of the key driving factors for the COLREGs so failing to satisfy this rule could be detrimental to the chances of unmanned ships being able to satisfy them and sail. This rule is arguably different to the others discussed because this one cannot be changed to accommodate unmanned ships. A ship which is unmanned and in danger or dangerous to others must be able to demonstrate this to other nearby ships so that they may have a chance to avoid a collision. Whether a ship is manned or unmanned, this must be the case. But this rule is one that unmanned ships can satisfy if technology is capable.

4.0 Enforcing the COLREGs

Regulation 6 of the UK Merchant Shipping (Distress Signals and Prevention of Collisions) Regulations 1996 (hereinafter referred to as ‘the 1996 Regulations’), which give effect to the COLREGs, provides that ‘Where any of these Regulations is contravened, the owner of the vessel, the master and any person...shall each be guilty of an offence’. Carey argues that ‘determining who is responsible for the conduct of an autonomous ship “for the time being” is going to be complex’.⁴⁴ Under this current framework, this is indeed true, because there are questions of whether an officer controlling the vessel remotely can be considered a ‘master’ of that ship or in control ‘for the time being’. There are worse issues with autonomous ships because it is unclear whether the manufacturer should be held liable,

⁴⁴ L Carey (n 35) 12.

whether criminally or civilly for damages caused to or by the ship. If they are, the risks for commercial manufacturers would be extremely high and this may affect their chances of covering their loss through insurance, especially at an affordable price. Technology also does not seem to have a particularly long lifespan either; take mobile phones for instance, once 3 years has passed, many retailers will resort to advising the purchase of a new device, rather than repairing the old one because technology is advancing so quickly.⁴⁵ Will this be the case with autonomous ships? Will their technology need to be replaced every couple of years, what happens if a collision occurs involving a ship with technology that is older than this period? Rules for this may need to be implemented and this could be expensive for the owners/companies hiring them and will make the vessels less attractive on the commercial stage because of the reduced profit margins.

With these issues present, a change would not need to be too complex in order to rectify this issue. Let us move away from admiralty law for one moment and cast an eye to the autonomous vehicles that operate on roads. S2 of the Automated and Electric Vehicles Act 2018 provides a simple answer to the issues of liability on the road. S2(1) states that

Where an accident is caused by an automated vehicle when driving itself... the vehicle is insured at the time of the accident, and an insured person or any other person suffers damage as a result of the accident, the insurer is liable for that damage.

S2(2) provides that ‘when an accident is caused by an automated vehicle when driving itself [and] the vehicle is not insured at the time of the accident...the owner of the vehicle is liable for that damage’. This very simply holds that if the vehicle is insured, the insurer is liable for losses, if it is not, then the owner will be liable. In light of this, it is arguable that liability for breach of the COLREGs should have a similar approach. It is appreciated that it will not be quite as simple because there are 3 named parties that could potentially be liable under the 1996 Regulations, but this approach can be built upon. For example, where the ship is being controlled remotely, the owner will be liable (if this rule is to be maintained), and the officer remotely controlling the ship will also be liable, thus taking the position of the master of the vessel and the one who is in control ‘for the time being’. This, of course leads to

⁴⁵ Apple’s warranty on iPhones is in fact only 1 year: <https://www.apple.com/support/iphone/ios/service.html#warranty1>.

the question of whether a master is capable of being so without onboard attendance. UNCLOS does not provide a definition of a master, and member state legislation does

not define the master by reference to the individual's onboard attendance but instead by reference to his hierarchical position in respect of the ship's navigation and, more particularly, his position at the top of it.⁴⁶

Therefore, it would appear that this would not pose an issue and the issue of whether the officer remotely controlling the ship is a master or in control 'for the time being'⁴⁷ would be resolved. If the ship is acting completely autonomously, then the owner would still be liable, but the issues discussed above may arise in regard to the party who is in control. Veal stated that 'it is anticipated that a human will monitor the autonomous ship';⁴⁸ this is agreeable, given its current incompatibility with Rule 5. If this is the case, then this issue could be rectified; the owner will be liable and the officer monitoring will also be liable for failing to intervene or call assistance to mitigate any issues that have arisen due to fault aboard the autonomous ship. This, of course, means that the remote-controlling equipment would need to be maintained on the ships for emergencies, but this is implied from Veal and Tsimplis' comment anyway. The issue of liability therefore warrants new legislation, as the autonomous vehicles on the road did, but the positive is that once completed, liability for collisions involving unmanned ships will not be overly complex. Although, it must be noted that issues regarding the lifespan of the technology may still be present.

5.0 Reform

It has been shown thus far that change is certainly needed if unmanned ships are to become incorporated into commercial operations. In February 2017, paper MSC 98/20/2 was jointly submitted by Denmark, Estonia, Finland, Japan, the Netherlands, Norway, the Republic of Korea, the United Kingdom and the United States.⁴⁹ It calls for the issue of unmanned ships to be put onto the IMO's

⁴⁶ Veal and Tsimplis (n 4) 318.

⁴⁷ *ibid.*

⁴⁸ Carey (n 38) 214.

⁴⁹ R Veal, 'Unmanned Ships on the IMO Work Agenda' (2017) 17 STL 5 1.

Maritime Safety Committee (MSC) agenda. The paper is titled ‘Maritime Autonomous Surface Ships: Proposal for a Regulatory Scoping Exercise’ (MASS) and

Proposes that the MSC undertakes a ‘regulatory scoping exercise’ identifying IMO regulations which (a) preclude unmanned operations; (b) have no application to unmanned operations (as they relate purely to a presence on board); and (c) do not preclude unmanned operations but may need to be amended in order ensure that the construction and operation of marine autonomous systems are carried out safely, securely and in an environmentally safe manner.⁵⁰

This would of course cover the COLREGs as many of the different rules would be covered by the categories listed. The paper also warns that ‘as the number, type and size of MASS increase, these arrangements may become unsustainable and potentially unsafe’.⁵¹

Responses were made to this paper, in particular by the International Transport Workers’ Federation (ITF).⁵² A comprehensive breakdown of all the issues noted is beyond the scope of this article and many are succinctly dealt with by Veal in his article.⁵³ Despite this, it is important for the context of this article to show that change is afoot and many of the issues discussed above are relevant in this change. The major concern in the response was the definition of an unmanned ship. The issue of whether it would be covered by the COLREGs has been discussed in this article and it was concluded that it would be covered. This view was also shared by the delegations of the MSC, none of which ‘suggested that an unmanned or autonomous ship was not a “ship” at all for the purposes of the IMO mandate and the applicability of the existing regulatory shipping framework’.⁵⁴ However, it is indeed important for the MSC to provide an answer with a greater deal of certainty.

Another issue raised in this article, albeit impliedly, was also noted by the responses. It was submitted that it was necessary to ensure that the appropriate umbrella term is ‘unmanned ships’ and not ‘autonomous ships’ because, as has been shown earlier in the article, the difference between the two becomes significant when being applied to the regulatory framework. This is, again, important but will

⁵⁰ *ibid.*

⁵¹ MSC 98/20/2, [10].

⁵² MSC 98/20/13.

⁵³ Veal (n 46).

⁵⁴ *ibid.*

not be a particularly difficult task for the MSC as a simple outline of what the umbrella term covers is necessary, and the content of that umbrella term is not a contentious topic.

It can therefore be seen that the first step towards amendments not just for the COLREGs but all regulatory framework has been taken. It must be stated that very little progress has been made thus far, but the issues have been put onto the MSC's agenda and this is key to start the momentum of reform that is necessary. It is difficult to see what trajectory the reforms will take as they will indeed 'evolve over time',⁵⁵ but the main point is that the process has begun and with the exponential rate at which unmanned ships are being developed, pressure on the MSC to adapt to such advances will increase as time goes on.

6.0 Conclusion

In conclusion, it is clear that unmanned vessels are considered ships for the purposes of the COLREGs. Unmanned ships will fail to satisfy the overarching duty of seamanship imposed by Rule 2 according to case law interpreting the provision. The same can be said for Rule 5. However, the argument that these cases may be outdated in today's context is agreeable and therefore these provisions may not have to be altered, but their interpretation might. Rule 6 is of course a 'corollary' of rules 2 and 5 so, by definition, unmanned ships will have difficulty complying with that. Rule 27 is essential in carrying out one of the central concerns of the COLREGs: safety, so will likely remain untouched. But unmanned vessels will be able to comply providing that they possess a fault-free ability to exhibit the required signals. The biggest change will need to come in assessing liability for collisions involving unmanned vessels. However, if the proposed approach is taken, the issue should not be overly complex once the alterations have been made (although this is easier said than done because it involves all states agreeing a framework under a constitution and, given the difficulties faced in defining what constitutes a ship, this may not be as simple as anticipated). The easiest way forward is to overrule existing case law and interpret the existing framework 'in a way that permits the inclusion of [unmanned] ships',⁵⁶ with the exception of course of the rules governing liability for breach of the COLREGs. Reform is

⁵⁵ *ibid.*

⁵⁶ Veal and Tsimplis (n 4) 304.

far from complete, but the first step has been taken by putting the issue onto the MSC's agenda, so it will not be long before we see an answer to many of the issues raised in this article.

Undergraduate Dissertation

The following is one of the high quality undergraduate dissertations from the 2017-2018 academic year.

This dissertation has not been edited.

The Journey of Good Faith: Where Does It belong in General Contract Law?

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Abstract

This piece considers the doctrine of good faith and its existence in contract law which began with Lord Mansfield's judgment in *Carter v Boehm*. Then, reconsiders the general contract law approach in reluctance to establishing an overriding duty of good faith. Parallels are drawn from the operation of the pre-contractual duty of good faith in insurance contracts to demonstrate that an overreaching principle is workable in contract law. The overarching theme of this thesis contends that the assumption that a good faith duty would bring disarray to certainty and will frustrate contractual parties' intentions, is inaccurate. The overall proposal for good faith is to establish a good faith regime, similar to the workings of insurance contract. A post-contractual duty has been rejected since it has been difficult to consolidate within the insurance contract realm. What we will see is the potential for harmonisation between insurance contract and general contract.

Introduction

The concept of good faith was first articulated by Lord Mansfield in his monumental judgment in *Carter v Boehm*.¹ Whilst this is an insurance case, Mansfield observed that good faith is the 'governing principle... applicable to all contracts and dealings'.² Here is where the journey began and the catalyst for much development and debate surrounding the role of good faith. Most notably, the importance of this judicial statement was recognised in the realm of insurance contracts. The foundation of Lord Mansfield's judgment was placed on statutory footing in the Marine Insurance Act 1906, which created a legal obligation on insurance contract parties to act in 'utmost good faith'.³ Furthermore, if this was not observed, 'the contract may be avoided by the other party'.⁴ Subsequently, this has been repealed in s14 of the Insurance Act 2015; the notion of good faith still

¹ (1766) 3 Burr 1905, 1910.

² *ibid* [1164] (Lord Mansfield).

³ Marine Insurance Act 1906, s17.

⁴ *ibid*.

applies, but the strict remedy of avoidance has been mitigated with more proportionate remedies.⁵ However, an equivalent duty was not established in the regulation of any other contract. Lord Hobhouse commented on the different route general contract law has taken:

Lord Mansfield's universal proposition did not survive. The commercial and mercantile law of England developed in a different direction, preferring the benefits of simplicity and certainty which flow from requiring those engaging in commerce to look after their own interests.⁶

For insurance contracts, the thread which underpins the reasoning for a pre-contractual duty is the asymmetry of knowledge between the contracting parties⁷, and the whole basis of the contract is what the insured presents to the underwriter, which allows them to evaluate the risk and choose whether to accept it, or not. Lord Mansfield expressed that the nature of such relationship between the underwriter and assured was one which necessitates a unique protection, in his judgment he stated:

Insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance ...⁸

Thus, illustrating the basis of an utmost good faith requirement in insurance was to protect the trust and confidence of the contract upon which performance is relying on. Therefore, the intention of the legislation favouring a good faith approach is to rebalance the dissimilarity of knowledge to remove the likelihood of fraud. On the face of it, insurance contracts appear to be a unique relationship with a discrete functioning to facilitate negotiations which are deemed unfairly imbalanced due to the inevitable inequality of knowledge.⁹ It is presumed that the same cannot be said for other contracts. Instead, they are perceived as the epitome of equal bargaining and full freedom to determine terms of the exchange and performance.¹⁰ It follows, the existence of inequality of knowledge is not

⁵ Rob Merkin and Özlem Gürses, "The Insurance Act 2015: Rebalancing the Interests of the Insurer and the Assured" (2015) 78 MLR 6 1004, 1015.

⁶ *Manifest Shipping v Uni-Polaris (The Star Sea)* [2001] UKHL 1 [45], [2003] 1 AC 492–493.

⁷ Francis D Rose, "Information asymmetry and the myth of good faith: back to basis" [2007] LMCLQ 181.

⁸ *Carter v Boehm* (1766) 3 Burr 1905, 1909.

⁹ Peter MacDonald Eggers Simon Picken and Patrick Foss, *Good faith and Insurance Contracts* (First published 1998, 4th edn Routledge 2017) 47.

¹⁰ Jim Mason, "Contracting in Good Faith- Giving the Parties What They Want" (2007) 23(6) CLJ 436, 439.

correspondingly detrimental compared to insurance contracts. However, all commercial contracts contain a level of risk.¹¹ The risk is portrayed as more prominent in insurance contracts, but that does not rule out the fact that any party to a contract can conceal information in order to pursue self-interest, even if it is to the detriment of the other party. Therefore, it is possible to appreciate the similarities of risk within both insurance and general contracts.

The focus of this thesis is to examine the justifications for and against the use of good faith as a requirement for all contracts. The purpose of which is to discover whether the general contract law should continue in its defiance to implement a good faith requirement/regime. What will aid the evaluation is to assess whether the distinctions between insurance contract and general contracts are sufficient to justify the difference in contract enforcement rules. The overall submission will be that there is lack of sufficient reasoning for the exclusion of an overriding good faith element in general contracts. It will be apparent that the insurance contract functioning is moving closer to general contract principles, and at the same time general contract is progressing towards insurance principals similar to the ‘fair presentation’¹² pre-contractual duty. There is not a perfect model that can be submitted, however the contract system overall would be improved by a development of an overriding good faith doctrine. The struggle to overcome is the supposed illegitimate restriction on freedom of contract.¹³

The evolution of good faith in insurance contracts

A crucial part of the journey of good faith is the important role it has played in the functioning of insurance contracts. Namely, good faith has been significant in establishing pre-contractual duties on the parties. The phrase ‘utmost good faith’ is usually defined in terms of a duty ‘not to act in bad faith’. Lord Hobhouse in *The Star Sea*¹⁴ held that good faith was defined as ‘the most extensive, rather than the greatest’¹⁵ good faith. Until the 2015 Act, good faith duties were achieved through ss18-20 of the Marine Insurance Act 1906, requiring full-disclosure and avoidance of misrepresentation by the

¹¹ *ibid.*

¹² Insurance Act 2015, ss3-8.

¹³ David Pliener and Sri Carmicheal, “Are English Courts Still Hostile to a Doctrine of Good Faith” (2017) 1 JIBFL 19, 19.

¹⁴ *Manifest Shipping v Uni-Polaris (The Star Sea)* [2001] UKHL 1, [2003] 1 AC 469.

¹⁵ *ibid* [44].

assured. Now repealed, ss 3-8 of the Insurance Act 2015 cover 'fair presentation of risk'. Neither of which, however, were alleged as being illegitimate restrictions on the freedom of contract. Instead, the criticisms before the recent reform, concerned the remedy for breach of the duty. Commentators recognised that the aim of these pre-contractual duties were to fix the inequality of knowledge, not to limit the parties' rights to choose which terms they decided to contract on. Thus, after analysis, it becomes apparent that the criticisms and concerns that are embedded in contract theory could be reduced; enabling a good faith theory to become a feature of general contract law. Peter MacDonald Eggers notes, development of the good faith duty in insurance contract is 'at odds with the disinclination of the courts to recognise a general obligation applicable in all contracts requiring the parties to exercise good faith',¹⁶ thus it is clear that there is a *lacuna* in the law. The gap is caused by either, lack of adequate justification for not drawing more similarities between the working of insurance contracts and general contracts; or, the rationalisation for two separate regimes is weak. John Lowry highlighted, whilst the preferred explanation for this exceptional feature is inequality of knowledge; this cannot be adequate because other contracts similarly lack equality of knowledge, thus there needs to be a more convincing rationale.¹⁷

Pre- Contractual duty of good faith

Much of the rationale of good faith in the negotiating process lies with the necessity to the functioning of insurance, since insurance contracts require the volunteering of information before conclusion¹⁸. The underwriter is heavily reliant on the assured to present the risk to him in a manner which will allow an accurate evaluation of risk. Without such a duty, there would be an incentive for the assured to act dishonestly in order to receive lower premium payments. Therefore, there is a strong policy objective behind the duty, as well as aiming to encourage faithful relationships between contracting parties.

Previous criticisms of the pre-contractual duty arose from the remedy of avoidance. Due to the prior strictness of the duty, much was done to limit the classification of 'material' resulting in the judicial

¹⁶ Peter MacDonald Eggers, Simon Picken (n9) 2.

¹⁷ John Lowry, "Whither the Duty of Good Faith in UK Insurance Contracts" 2009 16 Conn Ins LJ 97, 104.

¹⁸ Dr Özlem Gürses, "What does 'utmost good faith' mean" (2016) 27 ILJ 124, 129.

development of inducement.¹⁹ Similar to the general contract law provisions of misrepresentation,²⁰ which required inducement to establish whether the underwriter has been ‘influenced’. Drawing on the similarities, idea that insurance contract and general contract law should be two distinct regimes is unconvincing. Furthermore, John Lowry suggested that, ‘the economic consequences are severe and disproportionately harsh’²¹ towards the insured because their policy is rendered futile because they have lost the ‘inancial safeguard’.²² The extensiveness of the duty combined with the ‘all or nothing’ remedy raised valid concern. Therefore, one submission for the courts’ activism in refining the pre-contractual duty and development of the duty at different stages of the contract, can be that they were motivated to rebalance the burden of duties.²³ Majority of judicial anxiety was addressed in the reform: there is now the availability of a range of proportionate remedies to reflect the severity of non-disclosure; additionally, the underwriter is encouraged not to take a passive role.²⁴ The second reform reflects the modern approach that the underwriter should be willing to make enquires, however this was what was originally intended by Lord Mansfield in his initial assimilation of good faith.²⁵ The reform in consumer insurance contracts,²⁶ further reinforces a less invasive approach, imitating general contract attitude to interference with contracts.

This most recent development of the good faith role in insurance contract demonstrates a shift towards general contract principles. For instance, the equal role of the parties during the negotiating process. The underwriter is no longer deemed as entirely indefensible against an assured who may not provide the full details of relevant facts. Now, the underwriter is encouraged to participate in the discovering of facts to enhance a fair exchange. The new idea of the relationship between the underwriter and the assured, mirrors the more equal footing that general contract parties are perceived to be. Additionally, the adoption of more proportionate remedies reflects the general contract law approach in cases of

¹⁹ *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501.

²⁰ Misrepresentation Act 1967.

²¹ Lowry (n17) 98.

²² *ibid.*

²³ Laura Reeves, “The Duty of Pre- Contractual Disclosure in English Insurance Law: Past and Future- Does the Law Need to be Changed?” (2015) 5 SSLR 1, 9.

²⁴ Insurance Act 2015, s5.

²⁵ *Carter v Boehm* (1766) 97 Eng Rep 1162.

²⁶ Consumer Insurance (Disclosure and Representations) Act 2012.

misrepresentation, that only the most severe form of non-disclosure would attract the remedy of avoidance.²⁷

Post- Contractual Good Faith

The vagueness of the drafting of s17, Marine Insurance Act 1906 caused debate as to the scope of good faith. Whilst the definitive capacity of s17 was uncertain, there was an element of consensus among the judiciary that the requirement of good faith should not end once the contract had been formed, but should continue throughout.²⁸ A post-contractual duty was justified on similar grounds as the rationale for pre-contractual duties of utmost good faith. Lord Woolf MR in *Galloway*²⁹ observed, ‘just as the nature of the risk will usually be within the peculiar knowledge of the insured, so will circumstances of the casualty, it will rarely be within the knowledge of the insurance company’³⁰ highlighting that pre- and post- contractual circumstances carry the same risk and imbalance of information.

The struggle with consolidating utmost good faith as a post-contract duty was that s17 gave rise to the remedy of avoidance. Having such an extreme remedy would grant the insurer too much power. Broadening the grounds on which an insurer could avoid their liability to indemnify creates significant vulnerabilities for the insured.³¹ Discussion of this prejudicial balance of power took place in *Drake Insurance Plc*,³² which sought to prevent abuse of the function.³³ Lord Hobhouse further considered that appropriate remedy for post-contractual breaches of good faith had not been decisively resolved,³⁴ reducing the utility of a post-contractual duty. In a post-*Star Sea* case, *The Mercandian Continent*,³⁵ Longmore LJ maintained that the duty of utmost good faith, under s17 MIA 1906, continued beyond the making of an insurance contract. In doing so, conditions were set which had to be fulfilled before the contract could be avoided: the fraud must have been material in that it swayed the insurer’s ultimate liability; the gravity or consequence of the fraud must be such that would entitle the insurer to terminate

²⁷ James Davey, “Utmost Good Faith, Freedom of Contract and the Insurance Act 2015” (2016) 27 ILJ 247, 254.

²⁸ James Davey, “Unpicking the Fraudulent Claims Jurisdiction in Insurance Contract Law: Sympathy for the Devil?” [2006] LMLCQ 223, 233.

²⁹ *Galloway v Guardian Royal Exchange (UK) Ltd* [1999] Lloyd's Rep. I.R. 209 (CA).

³⁰ *ibid* 212.

³¹ Davey (n28) 233.

³² [2003] EWCA Civ 1834, [2004] 2 WLR 530.

³³ *ibid* [87] (Rix LJ).

³⁴ *The Star Sea* (n14)[51]- [53].

³⁵ [2001] EWCA Civ 1275, [2001] 2 Lloyd's Rep 563.

the contract for breach of contract.³⁶ Longmore LJ's attempt to set a criterion for an imposition of post-contract utmost good faith still left open complex issues. Thus, his approach was short-lived.

The subsequent case of *The Aegeon*³⁷ resolved much of the debate regarding the good faith aspect and refined fraudulent claims.³⁸ It confined the use of good faith duty in post-contractual duties, instead the favoured approach was to separate utmost good faith and fraudulent claims. It has since been maintained that good faith plays no role in fraudulent claims and much of the reasoning was down to the fact that s17 only provided the remedy of *void ab initio* which was incompatible with the functioning of the rest of the insurance contract.³⁹ Mance LJ stated his chosen approach: 'to treat the common law rules governing the making of a fraudulent claim as falling outside the scope of s17 [the doctrine of utmost good faith] ... on this basis no question of avoidance ab initio would arise',⁴⁰ resolving the complications which would occur with the application of avoidance.⁴¹ Accordingly, the scope of utmost good faith has been moderated and is no longer used as a mechanism to regulate fraudulent claims.⁴² On the balance of legal principles and obtaining an appropriate remedy, this is a welcomed development because it upholds the contract which is otherwise valid.⁴³

The analogy of good faith from Richard Aikens, that good faith is like a Cheshire Cat, 'it never disappears entirely, but at certain times you can only see its smile'⁴⁴ summarises the concept. Good faith is always lingering in the reasoning of the judges, even if subtly. It is noticeable that the judiciary wish to invoke utmost good faith, but are concerned about the draconian remedy. It was appropriate to divorce good faith from fraudulent claims to enable better-suited remedies to apply.⁴⁵ Additionally, the Insurance Act 2015 put an end to much confusion and established proportionate remedies for cases of breach of the pre-contractual duties.⁴⁶ Schedule 1 reserves avoidance for knowingly or recklessly

³⁶ *ibid* [30], [39], [40].

³⁷ *Agapitos v Agnew* [2002] EWCA Civ 247, [2002] 3 WLR 616.

³⁸ Sir Andrew Longmore, "Good Faith and Breach of Warranty: Are We Moving Forwards or Backwards?" LMCLQ 158, 186.

³⁹ *Gottlieb v AXA General Insurance Co* [2005] Lloyd's Rep. I.R. 369.

⁴⁰ *Agapitos v Agnew* (n37) [45].

⁴¹ Roger Kay, "Insurance Law: Good Faith and Fraudulent Claims- Another Fine Mess" (2002) 7(1) Cov. LJ 16, 20.

⁴² Davey (n27) 234.

⁴³ Kay (n41) 20.

⁴⁴ Richard Aikens, "The post-contract Duty of Good Faith in Insurance Contracts: is there a problem that needs a solution?" (2010) 5 JBL 379, 382.

⁴⁵ Insurance Act 2015, s12.

⁴⁶ Insurance Act 2015, Sch 1.

untrue statements and this is the clearest shift from the previous approach.⁴⁷ It is evident that good faith has embarked on its own distinct journey within insurance contracts. But, what is useful for the overall analysis of where good faith belongs in the general contract law, is that the courts and the legislators have managed to develop methods and structures to enable good faith to survive. The sphere in which good faith has taken to operate in insurance contracts provides a useful structure for how a model could be created in general contracts. Thus, this could be drive for more harmonisation between insurance contracts and general contracts.

How Does General Contract Law Recognise Good Faith?

One of the pivotal differences between insurance contracts and general contracts is the requirement of (utmost) good faith.⁴⁸ Therefore, it is necessary to discuss the basis of which general contract law has been developed and why it has not followed the same route as insurance contracts. The English courts and legislators have been reluctant to form a general or overarching concept of good faith.⁴⁹ There are several contract theorists that would give good reason as to why a general duty of good faith is non-existent in the formation and performance in general contract law; the aim is to dismantle these.

A History of Contract Theory

The traditional view of the courts is that they should have limited interference with how the terms of a contract are enforced. The foundation of this view is based on the notion that interference would be inconsistent with the parties' intentions; there is a likelihood that judges would substitute their opinion of what would make the contract fairer, rather than what the parties intended.⁵⁰ The importance of party intentions is a key concept of contract theories. The underlying theory which governs how the

⁴⁷ Davey (n27) 255.

⁴⁸ Howard N. Bennett, "Mapping the Doctrine of Utmost Good Faith in Insurance Contract Law" (1999) 2 LMCLQ 165, 165.

⁴⁹ Mary Arden, "Common Law and Modern Society: Keeping Pace with Change, Coming to Terms with Good Faith"(2013) 30 JCL 199

<<http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198755845.001.0001/acprof-9780198755845-chapter-4#acprof-9780198755845-chapter-4-note-157>> accessed November 2017.

⁵⁰ *Arnold v Britton* [2015] UKSC 36, [15], [18] (Lord Neuberger).

UK law has developed general contract regulations is Freedom of Contract.⁵¹ Sir George Jessel MR highlighted the importance of the freedom of contract rationale:

If there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that contracts when entered into freely and voluntarily, shall be held good and shall be enforced by the courts... paramount public policy to consider... that you are not lightly to interfere with this freedom of contract.⁵²

Due to this view, the courts and legislators are reluctant to find justification for intruding on this freedom and to change, or alter the bargain in a way which never may have been in contemplation of the parties. Therefore, if judges readily impede on contracts which have been freely agreed, there is a risk of limiting freedom of contract, which will have adverse consequences on enforcement, as there is the potential growth of uncertainty. Subsequently, this has provided a strong rationale for there not to be an inclusion of an overriding good faith doctrine. The freedom of contract theory supports the perception that, mirroring the pre-contractual duty of 'fair presentation of risk' in insurance contracts, an utmost good faith requirement in general contract would be placing expansive obligations on the parties, which had they wanted them to be included in their contract; they had the freedom to do so if they wished.

Another contract theory which provides rationale against an implication of a good faith requirement is the 'Will Theory'.⁵³ The Will Theory also follows a similar line of argument as the Freedom of Contract Theory, that the obligations placed on parties are fair because they have been decided by the parties themselves. Charles Fried observed that 'the will theory, which sees contractual obligations as essentially self-imposed, is a fair implication of liberal individualism',⁵⁴ therefore to deviate from that would be putting onerous obligations on the parties with little to justify the extra duties. Collins opined that, 'by permitting liabilities to arise before agreement is reached, the courts sense a danger that this

⁵¹ Jack Beatson and Daniel Friedmann, "Introduction: From 'Classical' to Modern Contract Law", in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (2nd edn OUP 1995) 7; Morris Cohen, "The Basis of Contract" (1993) 46 Harv L Rev 553, 558.

⁵² *ibid.*

⁵³ Stephen A. Smith, *Contract Theory* (2nd edn, OUP 2004) 56.

⁵⁴ Charles Fried, *Contract As Promise: A Theory of Contractual Obligation* (Harvard University Press, 1981).

would amount to the imposition of liability without consent⁵⁵ and that general contracts are based on the requirement of consideration as a way of ensuring performance, rather than good faith. Inferring the idea that general contract law has its own mechanisms to protect parties without using the nebulous theory of good faith. Furthermore, Cohen contends that allowing parties to contract with ultimate freedom as to terms and obligations, they willingly accept their own risk, but they are also able to benefit from the game.⁵⁶ The general consensus regarding general contract theory is that the parties should be free to pursue their own self-interest within limited legal boundaries.⁵⁷ Therefore, if the courts and legislators echo the approach in insurance contracts, there is a superseding fear of unwarranted constraint on the freedom of parties to negotiate terms. Additional to this imbedded fear, and more specifically to the proposition to have an overriding good faith requirement, there is an anxiety of creating uncertainty as such a duty is viewed as too vague.⁵⁸

The combination of these concerns and apprehension of the potential consequences of a good faith theory, the courts prefer to prioritise maintaining individual party self-interest. Furthermore, in absence of such a requirement, the courts have opted for piecemeal solutions to try and cure the balance between freedom and fairness.⁵⁹ However, this is also likely to have adverse implications on certainty as it will call for the judges to try and strike that balance. No doubt that such an attempt will call to the subjective opinions of judges as to what is the correct balance.⁶⁰ Moreover, the use of piecemeal solutions has become a scapegoat for denying a duty, but reflects the reality for the need for a good faith doctrine. Additionally, the counter-arguments carry considerable weight to impugn some of the critics of good faith. Samuel Williston highlights, that unlimited freedom may not actually be beneficial, and like unlimited freedom in other spheres, will not guarantee public or individual welfare.⁶¹ Williston's point stresses that having a good faith requirement may contribute to achieving more advantageous results for the parties and society. Another noteworthy opinion is that of David Campbell, who contends that the infrastructure which already exists would enable a good faith

⁵⁵ Hugh Collins, *The Law of Contract* (2nd ed CUP 1993) 169.

⁵⁶ Nili Cohen, "Pre-Contractual Duties: Two Freedoms and the Contract to Negotiate" in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (2nd edn OUP 1995) 27.

⁵⁷ *Walford v Miles* [1992] 2 AC 128 (Lord Ackner).

⁵⁸ David Pliener and Sri Carmicheal, "Are the English Courts Still Hostile to a Doctrine of Good Faith" (2017) 1 JIBFL 19, 19.

⁵⁹ Cohen (n57) 27.

⁶⁰ *ibid* [32].

⁶¹ Samuel Williston, "Freedom of Contract" (1920-21) 6 Cornell LQ 365, 374.

requirement to function, such as notions of construction and interpretation.⁶² Thus, following Leggatt J's opinion in *Yam Seng*,⁶³ much of the judicial and legislative concern is 'misplaced'.⁶⁴ Therefore, majority of discussion will be concerned with the 'traditional hostility'⁶⁵ towards an overriding good faith requirement and whether such a view is actually reasonable. And succinctly following, whether the current denial of such a duty is satisfactory.

English Court Hostility

Lord Ackner in his judgment in *Walford v Miles*,⁶⁶ is the exemplification of the reluctance to develop a good faith requirement which has been enshrined in contract theory. In Lord Ackner's judgment he clearly rejects the idea of an implied duty of good faith, namely the role it plays in negotiations, suggesting that:

...the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled... to threaten to withdraw from further negotiations or to withdraw in fact, in the hope that the opposite party may seek to reopen the negotiations by offering him to improve terms. A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of negotiating party. It is here that the uncertainty lies.⁶⁷

The reasoning in the judgment links back to the earlier point that judges feel compelled to preserve the freedom of contract. Professor Cohen notes that *Walford* restricts the positive freedom to contract, ensuring that parties are free to form a contract which reflects their intentions; additionally, the case strengthens the negative freedom of contract, which allows parties to be free from obligations until a

⁶² David Campbell, "Adam Smith and the Social Foundation of Agreement: *Walford v Miles* as a Relational Contract" (2017) 21(3) Edin LR 376, 378.

⁶³ [2013] EWHC 111 (QB), [2013] All ER (D) 227.

⁶⁴ *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 [153].

⁶⁵ Ewan McKendrick, *Contract Law* (9th edn Palgrave Law Masters 2011) 221-222, cited in Lord Leggatt J's judgment (n64) [123].

⁶⁶ [1992] 2 AC 128.

⁶⁷ *Walford v Miles* (n67) 138.

valid contract has been concluded.⁶⁸ In interpreting Lord Ackner's judgment it appears to suggest that there should be no kind of implied duty of good faith because there is insufficient support for the extra responsibilities and adds little substance to future justice. But, highlights the contradiction to have one and not the other, and blurs the lines between not allowing bad faith, yet maintaining there is not an overriding requirement of good faith. In support of good faith, Mills and Loveridge have persuasively reasoned that good faith generates a co-operative regime which is valuable for parties seeking to maintain good-will, thus is crucial to obtain their long-term interests.⁶⁹ Bruno Zeller points out that resisting a doctrine of good faith is only plausible for the short-term, because in the long-term it will become unavoidable.⁷⁰

Furthermore, such is not the case in insurance contracts. In fact, the principle reason for Lord Mansfield's vision of a pre-contractual duty of good faith was to secure justice for both parties. Nonetheless, Lord Ackner's concern for public policy lacks legitimacy. There is an absence of consideration for the fact that, serious intentions of parties to enter into an arrangement requiring that they take certain steps and if these can be outlined with sufficient certainty, and there is adherence to contractual principles of formation; such as consideration, then why should they not be able to bind themselves,⁷¹ taking a counter-position flies in the face of freedom of contract; rather than preserve it. The same standpoint was followed in, *Emirates Trading Agency LLC*⁷² holding that refusing to enforce such terms 'frustrates' their expectations,⁷³ providing little support for the resilient stance taken by Lord Ackner. If the courts utilise textual interpretation, the court can render the agreement to negotiate in good faith binding based on the parties having unequivocally agreed, or when the court determines that a duty to negotiate in good faith is reasonably inferred from their agreements.⁷⁴ Enforcing agreements to negotiate in good faith could open the door to litigation from disappointed negotiating parties,⁷⁵ making the concept broader than manageable. This may be the standpoint that Lord Ackner was pursuing, masking it as protecting the self-interest of individuals. On the other hand, it may

⁶⁸ Cohen (n57) 25-28.

⁶⁹ Alistair Mills and Rebecca Loveridge, "The Uncertain Future of *Walford v Miles*" (2011) LMCLQ 528, 530–533.

⁷⁰ Bruno Zeller, "Good Faith- is it a Contractual Obligation?" (2003) 15 BLR 215, 238.

⁷¹ Leon E Trakman and Kunal Sharma, "The Binding Force of Agreements to Negotiate in Good Faith" (2014). 73 CLJ 598, 621.

⁷² *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104, [2015]1 WLR 1145.

⁷³ *ibid* [40].

⁷⁴ Leon E Trakman and Kunal Sharma (n68), 622.

⁷⁵ *ibid* 628.

‘encourage good faith dealings and discourage frivolous lawsuits’.⁷⁶ It has always been a priority for judges to avoid decisions which may open the floodgates to litigation, but good faith can be confined in an adequate manner to prevent such bedlam.

Moreover, *Interfoto Picture Library Ltd v Stiletto Programmes Ltd*⁷⁷ reflects the preferred piecemeal solution option, meaning that the courts will proceed ‘incrementally’.⁷⁸ Judges wish to decide issues on a case-by-case basis, providing the catalyst for judicial response, if they see it as required. *Interfoto Picture Library* resonates that there is not a paramount rule, but there have been moves to encourage good faith, Lord Bingham observes: ‘It is in essence a principle of fair and open dealing... English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness’,⁷⁹ while this may be good for parties who may have suffered a loss due to dealing in bad faith, it does no justice to the certainty and application of principles to enforcement of contracts beyond this case. Demonstrating the adverse consequence of uncertainty, the judges wished to avoid, is exactly the result which their approach has. Lord Hobhouse in *The Star Sea*⁸⁰ also preferred an approach which required ‘principle of fair dealing’ regarding insurance contracts and Lord Clyde, put the matter succinctly stating:

The idea of good faith in the context of insurance contracts reflects the degree of openness required of the parties in the various stages of their relationship. It is not absolute. The substance of the obligation which is entailed can vary according to the context of the matter comes to be judged.⁸¹

If this approach can be taken in the enforcement of insurance contracts, it could be used as guidance for the development of good faith in general contracts.

An Attempt to Accommodate Good Faith

Despite the rigorous denial of an overriding concept of good faith. The approach taken by Leggatt J in *Yam Seng Pte Ltd v International Trade Corporation Ltd*⁸² showed a brave attempt to find a place for

⁷⁶ *ibid.*

⁷⁷ [1989] QB 433.

⁷⁸ Hugh Collins, “Implied Terms: The Foundation in Good Faith and Fair Dealing” (2014) 67 CLP 297, 302

⁷⁹ *Interfoto Picture Library Ltd v Stiletto Programmes Ltd* [1989] QB 433, 439.

⁸⁰ *Manifest Shipping Co Ltd v Uni- Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1, [2003] 1 A.C. 469 [50].

⁸¹ *ibid* [7].

⁸² *Yam Seng* (n64).

good faith in general contract law. Thus, Leggatt J's position demonstrates a turning point in willingness to apply features of good faith in the enforcement of a commercial contract. What is also notable about the judgment is the acknowledgment that the UK is 'swimming against the tide'⁸³ in not establishing a general and overarching principle of good faith in general contracts; compared to other jurisdictions. Stressing the point that a good faith doctrine would work to promote the commercial effectiveness of contracts.

Leggatt J held there were three principal characteristics justifying an implied term approach to recognise a duty of good faith. Firstly, the contract was very brief, so not all of the contractual obligations were expressly stated; secondly, Yam Seng was under an obligation not to sell the products lower than the agreed duty-free price. Therefore, equally, ITC should be under a reciprocal duty. Otherwise, it did not make commercial sense for Yam Seng to enter into the contract in the first place; finally, there was common ground of the parties that there was an industry assumption that the domestic retail price is lower than the corresponding duty-free price.⁸⁴ Leggatt J used the relationship between the parties and viewed the contract holistically, to support the opinion that there should be an implied duty of good faith. Whilst this would be a significant step towards establishing an overriding duty of good faith; the adopted approach still follows the 'piecemeal' position which has been adhered to previously, however it narrows the gap towards a good faith doctrine.⁸⁵ Meanwhile, Leggatt J was still conscious to obey the limits the judiciary are confined to. Namely, the well-established rules of construction and interpretation which create guidelines to reduce subjectivity in order to promote certainty. The main points surrounding implied terms is that there should not be an implication unless: the term implied is so obvious and unambiguous that it goes without saying; and that the term is necessary to give the contract business efficacy.⁸⁶ It needs to be stressed that the role of the courts, when implying a term, is not to make the contract fairer and the main focus is the workability of the contract. Nevertheless, while the restraints of contractual construction and interpretation are respected, it does not reflect the reality and it is not always useful to reject subjective reasoning.⁸⁷ Additionally,

⁸³ *ibid* [124].

⁸⁴ Qi Zhou, "The Yam Seng Case: A New Development of Good Faith in English Contract Law" (2014) 17 *ITBLJ* 358, 362.

⁸⁵ *ibid* 363.

⁸⁶ *AG for Belize v Belize Telecom Ltd* [2009] 1 *WLR* 1988, 1993-1995.

⁸⁷ Anthony F Mason, "Contract, Good Faith and Equitable Standards in Fair Dealings" (2000) 116 *LQR* 66, 70.

rigid observance of such does not always best serve the intentions of the parties. Party intentions are the cornerstone to developments of contractual guidelines, and as long as the judges find the most suitable method to achieve as such then the desired goal is accomplished. Leggatt J, thus, correctly highlights that, “there is nothing unduly vague or unworkable about the concept of [good faith]. Its application involves no more uncertainty than is inherent in the process of contractual interpretation”.⁸⁸ Much can be drawn from this, since denial of a good faith requirement lies on the belief that it will damage the certainty which English Contract Law has been renowned for up-holding, but having a good faith doctrine would do little to fracture the already existing regime.

The dominant understanding of agreements remains founded on conceptions of self-interest, seen in the orthodox position taken by Lord Ackner. Leggatt J attacks the angle taken and emphasises that, ‘there is nothing novel or foreign to English law in recognising an implied duty of good faith’,⁸⁹ by this he is inferring that our current framework of interpretation and construction is satisfactory. Furthermore, what is underlined is that, ‘the basis of the general duty of good faith is the presumed intention of the parties and the meaning of their contract’ then such insertion ‘does not involve the court imposing its view of what is substantively fair on the parties’;⁹⁰ clarifying that there is no interpretation dispute. What is illustrated is that a good faith doctrine will be able to work without disrupting the status quo. It can be integrated with how contract law already functions on regular application and enforcement of terms. Hence, there would be no abandoning of traditional methods used by the courts when there are issues of implications of terms, or interpretation of contracts⁹¹. Further dismantling the position that accepting a good faith doctrine would be undesirable and unworkable. If critics were still dissatisfied, and more guidance were to be desired, it could be drawn from the workings of insurance contract. Much of the analysis is based on good faith operating as an implied term. But, this is not the only option for it to be encompassed in general contract law. A general observation at this point, consists of the fact that there appears to be a staggering amount of evidence to provide remedy to the critics who view good faith as a danger.

⁸⁸ *Yam Seng* (n64) [152].

⁸⁹ *ibid* [145].

⁹⁰ *ibid* [150].

⁹¹ *ibid* [147].

Furthermore, *Yam Seng* reinforces the unsatisfactory justification for the distinction between insurance and general contract; since a good faith doctrine protects contracting relationships. It is also important to consider the potential consequence if Leggatt J had not implied a duty of good faith. Since such an obligation enhances trust and deters unethical behaviour,⁹² if such a duty was not upheld in *Yam Seng* then it would provide a loop hole that parties would use in order to conceal or withhold information from the other party.⁹³ Leaving the party with the weaker bargaining power in a vulnerable position. Thus, if the courts failed to recognise this as a likely adverse consequence, then it would mean that misleading behaviour would have an increasing place in commercial dealings. Having a good faith doctrine at least ensures the equal footing of parties to set the basis for negotiating. From that, if parties require more protection, they are free to add additional terms to that effect, or conversely, include exclusion clauses to limit contractual liability.

Post- Yam Seng and the anticipation for good faith

Thus far, good faith has been on an up and down rollercoaster. The approaches taken by the judiciary have lacked consistency and the reasoning behind their approaches are in want of cogency. Some of the judiciary prioritise contract theory, though closing their eyes to the fact that freedom of contract can be maintained while endorsing a good faith doctrine. On the other hand, some favour the ‘reasonable expectation’ approach. It can be submitted that the two can cohabit. But, the path towards this goal is complex when judgments need to be reconciled with previous case law.

The hope that was ignited after Leggatt J’s authoritative evaluation of the law in *Yam Seng* was transient. For example, *Compass Group UK and Ireland v Mid-Essex Hospital Services NHS Trust*⁹⁴ which was concerned with the interpretation of a good faith clause. The courts declined to give effect to an obligation of good faith⁹⁵, which flies in the face of Leggatt J’s vision for future development. The reason being, implying a duty of good faith would not be necessary to give the contract effectiveness; it would have been a breach of express term regardless of any implication. There were compelling policy reasons to limit the express term of good faith to be an obligation to co-operate in

⁹² Zhou (n85) 368.

⁹³ *ibid.*

⁹⁴ [2013] EWCA Civ 200, [2013] BLR 265.

⁹⁵ *ibid* [84]- [95].

giving and receiving information enabling the trust to benefit from the contract.⁹⁶ In fact, the case actually ‘goes against the grain of *Yam Seng*’⁹⁷ because the court held that ‘if parties wish to impose such a duty they must do so expressly’⁹⁸, rather than allowing an implication on presumed intentions.

The case also highlighted the limitations of an indirect approach to good faith; the parties must first show there is a valid contract to enable them to enforce the express term. The second limitation being, the parties can only agree to a duty of good faith in performance, they cannot agree on a duty to negotiate in good faith. Jackson LJ quashed the trial judge’s position that the obligation for the parties to ‘co-operate with each other in good faith’ applied to the contract, as a whole. Instead, the obligation was limited to the two purposes for which the parties intended the term. Importantly, Jackson LJ emphasised the need to be cautious

Not to construe a general open-ended obligation such as good faith to ‘co-operate’ or ‘to act in good faith’ as covering the same ground as other more specific provisions lest it cuts across those more specific provisions’⁹⁹

There was unease with using an implied term to create a good faith requirement because it “invites the court to go well beyond the proper function of judicial law-making”.¹⁰⁰ Thus, instead of enhancing the position from *Yam Seng* the court recognised and reiterated that English law does not recognise any general duty of good faith.¹⁰¹

The case of *Greenclose Ltd v National Westminster Bank Plc*¹⁰² shows a narrower approach to that adopted in *Yam Seng*, it further reinforced the views which were expressed in *Mid- Essex Group*. Both cases stress the point that ‘there is no general doctrine of good faith in English contract law’ and that ‘such a term is unlikely to arise by way of necessary implication in contract between two sophisticated

⁹⁶ Zhong Xing Tan, “Keeping Faith with Good Faith? The Evolving Trajectory Post- *Yam Seng* and *Bhasin*” (2016) 5 JBL 420, 429.

⁹⁷ *ibid* 430.

⁹⁸ *Compass Group UK and Ireland v Mid-Essex Hospital Services NHS Trust* [2013] EWCA Civ 200, [2013] BLR 265 [105].

⁹⁹ *ibid* [145].

¹⁰⁰ Simon Whittaker, “Good faith, Implied Terms and Commercial Contracts” (2013) 129 LQR 463, 469.

¹⁰¹ Severine Saintier, “The Elusive Notion of Good Faith in the Performance of a Contract; Why still a Bete noir for the Civil and Common Law?” (2017) 6 JBL 441, 452.

¹⁰² [2014] EWHC 1156 (Ch), [2014] 2 Lloyd’s Rep 169.

commercial parties negotiating at arms' length'¹⁰³. There is a hesitancy to use *Yam Seng* as creating a general principle for good faith,¹⁰⁴ but at the expense of certainty by using interpretation of the judgment rather than finding principles to distinguish between cases. Which brings to our attention the question of whether good faith is necessary in such commercial contracts since they should have the resources and materials to formulate their own contracts, without the law intervening to offer more protection.

The true test of Leggatt J's suggestion of a duty of good faith was in *MSC Mediterranean Shipping Company SA v Cottonex Anstalt*,¹⁰⁵ initially the High Court were eager to endorse a good faith approach. The proposal by Leggatt J in *MSC Mediterranean* to use good faith as a legal basis to formally entrench that control was however rejected by the Court of Appeal. In this case the difficult question was presented by Leggatt J who queried whether self-interest alone was enough and stated the need 'to imply some constraint on the decision-maker's freedom to act purely in self-interest'.¹⁰⁶ However, this was not accepted. Moore-Bick LJ held in his strict rejection of good faith that,

Recognition of a general duty of good faith would be a significant step in the development of our law of contract with potentially far-reaching consequences and I do not think it is necessary or desirable to resort to it in order to decide the outcome of the present case.¹⁰⁷

The underlying rationale behind this was the focus on the traditional approach which had been sustained up until *Yam Seng*. Such as, Lord Bingham's, preferred method of 'piecemeal solutions in response to demonstrated problems of unfairness'.¹⁰⁸ It is well-recognised that broad concepts of fair dealing may be reflected in the court's response to questions of construction and the implication of terms. In Moore-Bick LJ's view, the better course is for the law to develop on established lines, rather than encourage judges to look to some 'general organising principle'.¹⁰⁹ Illustrating stark disagreement with Leggatt J; what can be inferred by Moore-Bick's approach is the entrenched fear of the judiciary

¹⁰³ *ibid* [150].

¹⁰⁴ Emmanuel Sheppard, "Good Faith in the Aftermath of *Yam Seng*" (2015) 7 JIBFL 407, 407.

¹⁰⁵ [2015] EWHC 283, (Comm), [2015] 1 CLC 143.

¹⁰⁶ *ibid* [97].

¹⁰⁷ *ibid* [45].

¹⁰⁸ *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433, 439.

¹⁰⁹ *MSC Mediterranean Shipping v Cottonex Anstalt* [2016] EWCA Civ 789, [2016] 2 CLC 272 [45] (Moore-Bick LJ).

to embark on a path where there is an unpredictable destination. Additionally, it is possible to see that the judgment was tainted with the unwelcoming position that freedom of contract is based on, he opines: ‘There is a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached an agreement’, resembling the innate fear of contradicting party intentions.

Emerging jurisprudence shows that the courts appear to have retreated behind a traditional hostility against good faith, that the concept is incompatible with commercial nature of contracts¹¹⁰. In *Acer Investment Management v Mansion Group*,¹¹¹ Laing J stated that the claim that this was a relational contract was ‘not grounded in the commercial reality of the relationship’¹¹² since it was not a long-term contract, there was no exclusivity and the contract could be terminated with a short period of notice.¹¹³ This allures considerations for how good faith could exist in general contract law, which will be discussed in the following chapter. But, what is already prevalent is that, it is easy to outline existing concepts. Though, it is not with such ease you can apply the same concepts. Taking “relational contracts” for example, there is existence normative notions surrounding the theory, and there may be a general comfort in the fact it can provide some certainty. In reality, it is the contrary, when does a relational contract come into existence? Most long-term relationships begin with multiple short-term contracts which had successful, or lucrative, outcomes. In such a situation, when does the ‘long-term’ relationship start for good faith to play a role? It is these unanswered questions, which lead to the option of relational contract theory being rejected as the road to take for a good faith doctrine.

The most recent rejection of a good faith doctrine was in the case, *Monde Petroleum SA v Westernzagros Ltd*,¹¹⁴ or more specifically, declined to imply a term which would hold the parties to a standard of good faith. The key aspect to implying terms was outlined in *Attorney General of Belize v Belize Telecom Ltd*,¹¹⁵ where Lord Hoffmann held:

¹¹⁰ Saintier (n102) 446.

¹¹¹ [2014] EWHC 3011 (QB).

¹¹² *ibid* [107].

¹¹³ *ibid* [108]-[109].

¹¹⁴ [2016] EWHC 1472 (Comm), [2017] 1 All ER 1009.

¹¹⁵ [2009] UKPC 10, [2009] 2 All ER 1127.

The court has no power to improve upon the instrument ... It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors intended it is the meaning which the instrument would convey to the reasonable person having all the background knowledge which would be reasonably available to the audience... it is this objective meaning which is conventionally called the intention of the parties.¹¹⁶

This was endorsed in Leggatt J's position which implied a duty of good faith in fact to, 'any ordinary commercial contract' because it is necessary for 'business efficacy to commercial transactions'.¹¹⁷ Thus, in this case they could not imply a term because the contract already had commercial coherence without such a term. Consequently, representing a continuing reluctance to find a place for good faith to function. Such a result shows a lack of progress which could have been made since *Yam Seng*. Implied terms method is narrow for many reasons;¹¹⁸ one, it will always have to give-way to express terms in the event of inconsistency.¹¹⁹ Plus, good faith was only addressed as 'a component of the implied term' which is far from 'an overarching principle which determines the content of the term';¹²⁰ which denies it the potential to have a significant role.

Unfortunately, as a result of post- *Yam Seng* cases, the positive influence of Leggatt J's proposals for the role of good faith have been very much limited. An explanation could be that the judges fear that they will be treading on territory which is designed for the legislatures. Thus, Leggatt J's judgment was a mark of bravery to go against the longstanding hostility. Good faith has been recognised on many occasions, but judges have been too timid to provide the platform for which it needs to have a long-term influence on contractual functioning. Leggatt J resorted to the reasoning which he did as he was constrained by the existing requirements, but he still managed to legitimately find a way to give good faith some recognition which it has been yearning for.

¹¹⁶ *ibid* [16] see also, *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 986, 912-913.

¹¹⁷ *Yam Seng Pte (n64)* [131].

¹¹⁸ *Saintier (n102)* 450.

¹¹⁹ *Duke of Westminster v Guild* [1985] QB 688.

¹²⁰ Ewan McKendrick, "Good Faith in the Performance of a Contract in English Law" in Larry DiMatteo and Martin Hogg (eds) *Comparative Contract Law: British and American Perspectives* (OUP 2015) 224.

The Future for Good faith in General Contracts

As we have seen in the development of general contract law, there is still not a full agreement within the judiciary and the legislators to the precise role of good faith and what scope they are willing to apply it. The thread linking arguments surrounding whether an overriding duty of good faith is the motivation to seek a method which best serves the intentions of the contracting parties¹²¹. The view of this thesis is that it would be beneficial to adopt a duty of good faith, as it is a more effective way to achieve the interests of the parties. The potential of an overriding good faith doctrine will be explored and the advantages and disadvantages of each method.

Relational Contract

There have been a wide range of suggested routes that good faith can go down. One of the popular options is to have a good faith doctrine, but confine its application to ‘relational contracts’. Some commentators submit there is room for a duty of good faith, but it is more appropriately defined to long-term relationships. Since the relationship is long-term, there is more of an assumption that they will conduct their behaviour in a manner of honesty and trust. There has, however, been many misconceptions of relational contract theory, such as it being a tool biased in favour of state-intervention.¹²² rather than being a system which attempts to preserve continuance of relations. Many critics of relational contract theory have failed to conceive it as a neutral tool of social, economic, political and legal analysis which has resulted in discredit rather than recognising its value. *Yam Seng* involved relational contracts, but it doesn’t automatically mean that paternalistic standards should be imposed, it means that good faith obligations are essential even to commercial contracts of this sort, thus, must be implied in order to give it efficacy.¹²³ A level of good faith operating in relational contracts makes sense because it attempts to assist the parties to maintain a trustworthy relationship; which works in favour of both parties. If there was a good faith doctrine which operated in relational contracts the issue that may arise is when does such circumstances exist to satisfy the courts that it should be a relational contract, rather than any other form of contract. Since, the contract may only become long-term when the parties have initially contract and subsequently entered into additional

¹²¹ Mason (n10) 437.

¹²² Ian R Macneil, “Reflections on Relational Contract Theory after a Neo- Classical Seminar” in David Campbell, Hugh Collins and John Wightman, “Implicit Dimensions of Contract” (Hart Publishing 2003) 207.

¹²³ David Campbell, “Good Faith and the ubiquity of the “relational contract” (2014) 77 MLR 475, 477.

contracts as a result of the first gainful short-term contract. The difficulty lies in ascertaining when the obligations that come with a ‘relational contract’ begin. Additionally, in the case of *Yam Seng* it was suggested that ‘relational contracts’ should be part of the basic understanding of good faith.¹²⁴ Leggatt J described the parties’ agreement as a ‘distributorship agreement which required the parties to communicate effectively and co-operate with each other in its performance’.¹²⁵ This was mainly influenced by Lord Steyn’s judgment in *First Energy (UK) Ltd v Hungarian International Bank Ltd*¹²⁶ which exemplifies that a continuing theme which runs through contract law, as a whole is, that “reasonable expectations of honest” people should be given effect.¹²⁷

English law has conventionally made distinctions between particular relationships, for instance as we have explored earlier, in insurance contracts there is an onerous obligation of disclosure operates because of the nature of dealings. The main purpose behind this is to enable the parties to enter the contract on an equal standing, inhibiting the insured taking advantage of the lack of knowledge of the insurer. But drawing such a distinction of when there is the existence of such relationships is much easier said than done. The only obvious cases would be when there is a simple exchange, which does not involve an expectation on the parties to perform their duties in a particular manner. But then this would unlikely result in complex litigation in the first place. The recognition of relational contracts is at inconsistency with *Baird Textile Holdings plc v Marks and Spencer plc*,¹²⁸ which expressed the position authoritatively set out by Professor McKendrick that ‘English Law would not be justified in taking the steps of recognising the existence of a formal category of relational contracts’.¹²⁹ Therefore, categorisation of contracts may not be the most effective way to establish a good faith doctrine.

However, there is a concern that judges are knitting together construction and implication; creating an anxiety that when judges are implying a duty of good faith they may be submitting their ideas for what the commercial outcome should be for what the parties actually intended, clearly issues remain

¹²⁴ *ibid.*

¹²⁵ *Yam Seng* (n64) [142].

¹²⁶ [1993] 2 Lloyd’s Rep 194, 196.

¹²⁷ J. W Carter and Wayne Courtney, “Good Faith in Contracts: is there an implied promise to Act Honestly” 2016 75 CLJ 608, 611.

¹²⁸ [2001] EWCA Civ 274, [2001] 1 All ER (Comm) 737.

¹²⁹ Ewan McKendrick, ‘Long-term Contracts in English Law’ in J. Beatson and D. Friedmann (eds), *Good Faith and Fault in English Law* (2nd edn OUP 1995) 323.

unsolved. Using the ‘relational contract’ theory still does not satisfy Freedom of Contract, as it is viewed as being paternalistic which means prevents effective competition, therefore would have limited application.¹³⁰ The importance of freedom of contract is respected, but for the effective functioning of commercial market and economic exchanges, freedom of contract cannot be the sole value. There needs to a balance between the encouragement of business efficacy and paternal role. Whilst, it is appropriate to ensure that parties are not acting in bad faith, placing too many restrictions and obligations on the parties creates uncertainty for them and whether their true intentions will be enforced, or whether the judges will favour an approach to make the contract appear fairer based on their subjective view.

Specific Duty of Good Faith

Another option is, creating specific duties of ‘good faith’. Campbell suggests this form is already in existence, and that general contract law articulates good faith through multiple specific duties, allowing better scope for the rules of interpretation.¹³¹ In *Interfoto* Lord Bingham suggested that a requirement of good faith is essentially one of ‘fair and open dealings’ which reaches to further protection than prohibiting deception, such that it ‘is perhaps most aptly conveyed by such metaphorical colloquialisms as “playing fair”, “coming clean” or “putting one’s cards face upwards on the table”’.¹³² Therefore, in the context of *Interfoto* there would be nothing too startling about requiring a more explicit disclosure of information (mirroring that duty of disclosure in insurance contracts- or ‘fair presentation of risk’ s11 Insurance Act 2015). Roger Brownsword contends that, Powell was accurate to submit that English law would do well to adopt an explicit doctrine of good faith in contracts. However, in advancing this contention, a distinction will be drawn between the adoption of ‘a good faith requirement’ and the adoption of ‘a good faith regime’.¹³³ A good faith requirement would import accepted standards of honest and fair dealing. According to Brownsword, adopting a good faith requirement represents a more sophisticated attempt to locate contractual disputes in their actual normative setting and to resolve those disputes in a way that is faithful to the

¹³⁰ Gunther Teubner, ‘Contracting Worlds: The Many Autonomies of Private Law’ (2000) 9 S & LS 399, 404–405.

¹³¹ Campbell (n121) 475.

¹³² *Interfoto* (n78) 439.

¹³³ Roger Brownsword, ‘Good faith in Contracts’ Revisited” (1996) 49(1) CLP 111, 113.

contractual intentions of the parties.¹³⁴ Originally, Powell argued that adopting a good faith requirement seem to be more effective where they are based on custom and common opinion rather than on abstract moral theory.¹³⁵ Additionally, Powell opines that a good faith requirement would better serve the pursuit of justice.

We can concede that there is a moral judgment whenever a question of individual good faith arises; but we must still get down to the brass tacks of finding the standards by which that judgment is to be reached. And if we are concerned with objective contractual good faith the element of moral judgment is in any case less material, if it is material at all, than the common practice in similar circumstances.¹³⁶

But scepticism remains over how the specific duties will be put to effect. There is the pre-contractual route which could be applied to performance. The likely functioning of this proposal is through implied terms. It has been generally accepted that not all of the parties' intentions will be wholly presented in the express terms of the contract.¹³⁷ If the implied terms are kept within the remit of observing party intentions, then there would logically be no disapproval of giving effect to good faith in this manner. The problems begin where there is the potential for the specific good faith duties where they are implied extra-contractually. Then there is the ambit for vagueness; would the reasonable, objective approach apply? Consequently, there is the sceptic view that there is a chance that the specific duties may go against the grain of what the parties contend to be the standard of fairness and decency, in reality the ambit in which the judges act highlights their respect for freedom of contract, it is impossible for parties to contract for every eventuality, so they are merely gap-filling.¹³⁸

But, if you are specifically outlining explicit duties that complement the functioning of commercial parties it will always be in line with their reasonable expectations; which are found in express terms and business context.¹³⁹ This could be the mutual obligation to be loyal to contractual promises, and Hugh Collins outlines:

¹³⁴ *ibid* 114.

¹³⁵ Raphael Powell, 'Good Faith in Contracts' (1956) 9 CLP 16.

¹³⁶ *ibid* 31.

¹³⁷ Brownsword (n134) 119.

¹³⁸ Scott Salisbury, "The Principle of Freedom of Contract: Are the Courts Too Interventionist" (2016) 5 MRLCE 58, 60.

¹³⁹ Catherine Mitchell, "Leading a Life of its Own? The Roles of Reasonable Expectation in Contract Law" (2003) 23 OJLS 639, 647.

A party may still look primarily to his or her own interests, but in the performance of the contract and in the exercise of rights and powers conferred by the contract, that party must not defeat or undermine the reasonable expectations of the other.¹⁴⁰

This also based on the principle of freedom of contract, and when the courts comply with this they are doing no more than enhancing what the parties initially intended. Thus, what reasonably would have been done themselves had they complemented it anyway. Compiling particular duties such as ‘loyalty to contract promises’ makes it easy for parties to predict what obligations they will be under, additional to the explicit ones they agreed themselves.

Overall, the central fear of vagueness which would result in an unwarranted degree of uncertainty in the law remains in part. Moreover, a good faith requirement may induce a tension between standards of fair dealing and the parties’ own standard which they wish to include in their contracts.¹⁴¹ However, the adoption of good faith is not intended to operate contrary to the intentions of the parties; the endeavour is to ensure that act within the justified expectations and “promoting the spirit of their agreement instead of insisting upon observance of literal wording of the contract”¹⁴². But, creating a good faith requirement to serve the need of a form of the good faith doctrine, still generates the same questions as to whether such would be used for the performance of contracts, or merely so they agree their contracts in good faith. It seems that implying specific good faith duties, while a significant step in the right direction, still relies on piecemeal solutions. Thus, only serving to provide short-term, case-by-case results. It will be an improvement to the functioning of the general contract law system, but will only have transient effect which may have as much impact as *Yam Seng*.

Good Faith Regime

So far, the pattern that emerges is that there is an underlying difficulty in finding an appropriate balance between allowing parties to be free in what they contract, and how much the law should protect individual parties. Thus, what should be remembered, and accentuated by Barry Reiter, is that the essential purpose of contract law is to facilitate exchanges between parties ‘by adding its authority and

¹⁴⁰ Hugh Collins, “Implied Terms: The Foundation in Good Faith and Fair Dealing” (2014) 67 CLP 297, 315.

¹⁴¹ Brownsword (n134) 119.

¹⁴² Mason (n10) 439.

force as security for due performance of what can reasonably be expected'.¹⁴³ This crucial dimension puts into perspective the real goal which is the motivation when searching for some form of good faith doctrine in general contract law. There is never full equality of knowledge; meaning that there is always a risk of the gates of fraud opening and one-party taking advantage of another. The judges have attempted to find justifications for when in such situations this acceptable. However, orthodox views, such as Lord Ackner's, regarding the pursuit of self-interest may be outdated as they neglect long-term goals¹⁴⁴. Prioritising self-interest does nothing to maximise the advantages of the contract, as a whole. It is logical to infer, that having a good faith doctrine, which seeks to enhance the benefit for both parties, is more valuable for the markets and trade relationships in general. Moreover, what is necessary is that the institutionalised view of good faith as being freedom limited needs to be surpassed.

A good faith regime could function in a similar light to insurance contract. Where it is codified in statute and is automatically binds parties to pre-contractual duties and set the bar for how the contract should be performed. The motivation behind disclosing information is to ensure the anticipated benefit and maximise autonomy so that entering the contract is fully voluntary and informed.¹⁴⁵ A suggested good faith regime by Roger Brownsword is that the doctrine could be measured against two criteria: facilitation of mutually beneficial dealing; and, securing a climate of trust¹⁴⁶. This does not seem to fly in the face of the party intentions and may be of assistance when relationships breakdown.¹⁴⁷ The idea of a good faith regime is to protect both parties. Whereas previous emphasis had been on protecting self-interest, who is to say which parties' self-interest is more valuable than the other's? Suggesting, that if you protect one over the other, it would be contradictory to at least one of the parties' initial contractual intentions. In addition, a good faith regime would be more viable than a good faith requirement, because it is less open to discretion and variations on what certain standards are.

The main objection arises from the apprehension that good faith will be interpreted on a moral basis. The recurring criticism of vagueness and vulnerability is present once again. Hence, the preferred

¹⁴³ Barry J. Reiter, "Good Faith in Contracts" (1983) 17 Valparasio ULR 705, 714.

¹⁴⁴ Roger Brownsword, *Contract Law: Themes for the Twenty-first Century* (2nd edn, OUP 2006).

¹⁴⁵ Brownsword (n134) 140-142.

¹⁴⁶ *ibid* 140.

¹⁴⁷ Mason (n10) 441.

suggestion is that it will be based on a set criterion; and it is also strengthened by the fact that it draws parallels with insurance contract formation. Meaning, it would not be a giant leap into the unknown; rather it will be a harmonisation of already existing systems. It is not entirely implausible to base the good faith regime on a moral examination. For instance, it could function similarly to Equity which focuses on agency relationships and respecting the freedom and well-being of agents.¹⁴⁸ But, whilst this is workable, its foundations do not lie with the underlying theme of encouraging and maximising the mutual interests of parties and their reasonable expectations.

After evaluation, the most plausible way for good faith to operate in the general contract law sphere is through a good faith regime. Whilst Leggatt J may have considered in detail how it would function in relational contracts through an implied term, he also envisaged that UK law ought to evolve in the direction of a more overriding concept which would best serve the interests of the parties.

Conclusion

To summarise, thus far, we have seen good faith operate in a number of ways. There is a vast potential for the usage of good faith. There are several branches of good faith: pre-contractual good faith, the most prevalent example being the pre-contractual duty of ‘fair presentation’ in insurance contracts; this also falls into a similar category of negotiating in good faith; then, there is the proposition of performing the contract in good faith where *Yam Seng* was the key case adding to debate; finally there is a consideration for post-contractual good faith, where it has been suggested that the person wishing to avoid the contract may be restricted from doing so if done in bad faith.¹⁴⁹ A pre-contractual duty such as, negotiating in good faith is where general contract law has struggled most with; since it is perceived as most restrictive on the freedom of contract. Now that the case law and theories have been examined, it illustrates that a good faith doctrine and freedom of contract can coexist. A good faith doctrine sets the minimum bar for parties beginning a contractual relationship, they are still wholly free to determine which terms will be included in their contract and how the contract will be performed. Thus, at the pre-contractual stage it is acceptable to submit that the adverse consequences which were feared would not occur, in reality.

¹⁴⁸ Alan Gewirth, “Reason and Morality” (University of Chicago Press, 1978) 119-25.

¹⁴⁹ *Drake Insurance Plc v Provident Insurance Plc* [2003] EWCA Civ 1834, [2004] 2 WLR 530.

The first limb of performing a contract in good faith can be solved with reference to freedom of contract theories. Ironically, the same reasons which a good faith doctrine had been previously denied are used conversely to deny expressed terms. Freedom of contract upholds express terms, therefore denying clear party intention to regulate behaviour during negotiation and performance is hypocritical.¹⁵⁰ The issue was prevalent in *Walford v Miles*, the fact that a term to negotiate in good faith was treated as an “agreement to agree”¹⁵¹ which meant it was void for want of certainty. Conversely, voiding the term frustrates the party intention and freedom of contract, rather than protect it. Here exemplifies where a good faith doctrine would provide clarity in the law and encourage developments in law to go along the same route, rather than each case being unpredictable and no substantial progress being made. The second limb, regards that there should be a certain standard that parties should maintain whilst performing their contractual duties. The central issue was that to perform a contract in good faith it would be placing extra obligations on parties which, had they wanted them to be included in their exchange, they would have included it themselves. But, we have seen many examples where the intentions of parties are not always exclusively contained in the express terms. Furthermore, this does not inevitably lead to ambiguous enforcement of contracts. For even the traditional implementation of contractual terms has not been absent of judicial intervention involving interpretation and incorporation. Thus, when a case is litigated and the judges decide that, for necessity and business efficacy, a good faith term should be implied, much litigation would be saved if there was an overriding good faith doctrine. Certainty would be enriched as parties would be aware, from the beginning, what standard their performance would be compared to.

Overall, if a good faith regime exists and utilised on similar lines as insurance contracts, the two regimes will be harmonised and Lord Mansfield’s original depiction of contract law and good faith, will finally come into existence. Good faith surely cannot be divorced from any contractual relationship and in the future, it will be a positive development.

¹⁵⁰Henry Hoskins, “Contractual Obligations to Negotiate in Good faith: Faithfulness to the Agreed Common Purpose” (2014) 131 LQR 131, 133-134.

¹⁵¹Leon E. Trakman and Kunal Sharma, “The Binding Force of Agreements to Negotiate in Good Faith” (2014) 73(3) CLJ 598.