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Good Faith in English Law

Howard HUNTER
Singapore Management University, howardhunter@smu.edu.sg

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Book review

Good Faith in English Law, J F O'Connor, Faculty of Law, University College Cork, Dartmouth Publishing Company Limited, Aldershot, 1990, 148 pages (including tables and index) ISBN 1 85521 017 7.

'Good faith' is a term often used but rarely defined or analysed with care. In this short volume O'Connor has undertaken a formidable task: the development of a general principle of good faith that is applicable throughout English law. He begins with a proposed definition and then proceeds through brief analyses of the good faith concept in six areas of the law (administrative law, contracts, company law, criminal law, torts, trusts and property). He makes a quick excursion across the Channel to consider the civil law approach to the principle of good faith and then concludes with a chapter devoted to the synthesis of the cases considered in the book and to a re-examination of his proposed definition.

The discussion of the development of equitable principles which underlie the doctrine of good faith (ch 1, pp 1–10) is interesting, but cursory. That story has been told at length elsewhere, but it does provide a necessary introduction to O'Connor's work. O'Connor addresses what appears to be his overall goal early in the book when he goes about defining a general principle of good faith. He makes two assumptions (ch 1, p 11). The first is that any definitions of good faith must include the rule of pacta sunt servanda from contract law and include elements of 'honesty, fairness, and reasonableness'. The second 'is that a large part of the "normal" rules of *any* legal system will reflect the substantive ethical content of good faith'. On the basis of these assumptions, he goes on to attempt a general definition of good faith (p 11):

> The principle of good faith in English law is a fundamental principle derived from the rule pacta sunt servanda and other legal rules distinctively and directly related to honesty, fairness and reasonableness, which supplements or supersedes normally applicable rules when this is necessary to ensure that the standards of honesty, fairness and reasonableness which prevail in the community also prevail in English law.

The six chapters which follow and which test the definition in various substantive areas are too brief to offer more than a telegraphic form of coverage. Moreover, they involve topics so disparate that a proper comparative analysis would require treatment in substantially greater detail. On p 64, for example, O'Connor concludes that the 'normal rules of criminal law, and the basic presumption of mens rea reflect the substance of good faith'. That is no doubt true, but is hardly more than a truism. The conclusion does not relate in any meaningful way to the complex interconnections in contract law among pacta sunt servanda, freedom of contract, the doctrine of efficient breach, and excuses for non-performance such as unconscionability and commercial

impracticability. (See, for example, Uniform Commercial Code ss 2-302 and 2-615). This leaves the reader with little that ties the chapters together other than vague references to concepts of honesty, reasonableness and fair dealing.

Space constraints on this review prevent a careful parsing of each chapter, and, in any event, this reviewer is far from being an expert on several of the substantive areas. However, a review of ch 3 on good faith in contract law does give pause. The author notes the importance of good faith in the Uniform Commercial Code of the United States, but provides virtually no discussion of the extensive common law development of the concept outside the code since the decision by Judge Cardozo in *Wood v Lucy, Lady Duff-Gordon*.[1] Similarly, the author's discussion of unconscionability in s 2-302 of the UCC overlooks the often confusing, but extensive use of the concept by American courts for generations.[2] The author is correct in noting that there has been increased interest in the concept of good faith in contract law among American judges and legislators,[3] but he fails to consider the parallel rise of interest in the concept of efficient breach,[4] the continuing vitality of the concept of freedom of contract,[5] and the importance of relationships, especially in long term agreements.[6]

In the concluding ch 9, p 99–102, the author tries to draw together the various strands of good faith from the authorities he has reviewed to test the validity of the definition he put forth at the outset. His conclusion is significantly different from his original proposal. The changes are italicised (ch 9, p 102);

> The principle of good faith in English law is a fundamental principle derived from the rule pacta sunt servanda, and other legal rules, distinctively and directly related to honesty, fairness, and reasonableness, *the application of which is determined at a particular time by the standards of honesty, fairness and reasonableness prevailing in the community which are considered appropriate for formulation in new or revised legal rules.*

This definition may be an accurate reflection of the cases reviewed by the author, but, if so, it is not a prescriptive rule but simply a statement that 'good faith' is whatever happens to be currently acceptable behaviour in the 'community'. Which 'community' is important. For example, Karl Llewellyn, the principal draftsman of the Uniform Commercial Code, wanted to have questions of reasonableness, trade practice, and so forth under Art 2 of the UCC decided by juries of

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1 222 NY 88, 118 NE 214 (1917). There is also the long development of reliance and promissory estoppel as alternative justifications for the enforcement of promises. See eg P S Atiyah, *The Rise and Fall of Freedom of Contract*, 1979.

2 See eg *Williams v Walker-Thomas Furniture Co* 350 F 2d 445 (DC Cir 1965).

3 For a commentator's argument in favor of the sanctity of promise as a moral duty see C Fried, *Contract as Promise*, 1981.

4 See eg C J Goetz and R E Scott, 'Enforcing Promises: An Examination of the Basis of Contract' (1980) 89 *Yale LJ* 1261; Symposium, 'Economics of Contract Law', (1989) 52 *Law & Contemp Probs* 1.

5 See eg R E Barnett, 'A Consent Theory of Contract', (1986) 86 *Colum L Rev* 269.

6 See eg C J Goetz and R E Scott, 'Principles of Relational Contracts' (1981) 67 *Va L Rev* 1089.

merchants, the business world peers of those most affected by the provisions on sales.[7] He was unsuccessful, and lay jurors or judges today decide such issues in American courts. This expands the 'community' to the larger society at the expense of predictability and stability among the smaller universe of merchants and makes merchants subject to more generalised standards of behaviour.

Whether one uses a larger universe of jurors or a smaller universe drawn from a particular economic group, the result remains similar: the 'oughts' suggested by terms such as 'fair dealing,' 'honesty', 'reasonableness' and 'good faith' are defined by reference to 'what is' rather than by reference to a norm.[8] The broader the community the more likely that 'what is' acceptable behaviour will have a generalised appeal. (One can imagine the problems created by a definition of good faith that is dependent on what is acceptable among a community of criminals.) At the same time a broader community is less likely to agree upon a specific standard of good faith that is applicable in a given case. (How many times must a prospective buyer apply for a loan when closing is conditioned on a successful loan application by the buyer?)

A rough approximation of what most people consider to be ethical behaviour might be derived from a careful consideration of socially acceptable behavior, but even under the most generous reading, O'Connor's conclusion can never be more than descriptive and fluid. That may be the best we can do from an analysis of current case law, but it is not a satisfactory result if the goal is to establish a normative definition of universal legal applicability.[9]

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7 Note, 'Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code', (1987) 97 *Yale LJ* 156.

8 Students of philosophy should be aware of the 'naturalistic fallacy' which is the attempt to define 'what ought to be by reference to what is'. See G E Moore, *Principia Ethica*, 1971 ed, pp 10–14, discussed in C J Goetz and R E Scott, *Sales Law and the Contracting Process*, 2nd ed, 1991, p 18.

9 See generally on a similar topic R Danzig, 'A Comment on the Jurisprudence of the Uniform Commercial Code', (1975) 27 *Stan L Rev* 621.