# Of Rubbish Bins and Beauty Queens: Independent Obligations in Contract

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> It might be, but it never has been, the law that a person is only entitled to enforce his contractual rights in a reasonable way, and that a court will not support an attempt to enforce them in an unreasonable way. One reason why that is not the law is, no doubt, because it was thought that it would create too much uncertainty to require the court to decide whether it is reasonable or equitable to allow a party to enforce his full rights under a contract.[1]

This paper is concerned with the rule in *White and Carter (Councils) Ltd v McGregor,*[2] viz, that an innocent party, when faced with a repudiation, may elect not to accept the repudiation and, if her obligations are independent, may go on to perform the contract and claim the contract price. Using a recent scenario reported in the press, this paper compares the likely outcome of this scenario under an ordinary claim for damages in contract, under a Trade Practices Act section 52 action, and under the rule in *White and Carter.* The paper argues that the application of the rule in White and Carter not only leads to anomalous results but is out of keeping with the emerging trend to imply duties of good faith into contracts.

Earlier this year, a news item reported that the former Miss World Australia was suing pageant organisers for $350 000 in lost income and prize money. Ms Stratton won the Miss World Australia title in October 2003, after reading the contest website, which she claims promised the winner a 'million dollar lifestyle' and $250 000 in cash and prizes as well as training in health and fitness, communication, grace and deportment, business and wealth-creation, up until the Miss World final. Despite being told by the Australian organisers that they would not honour these promises (after the financial backer of Miss World Australia, property developer Henry Kaye, went bankrupt),[3] Ms Stratton decided to continue in the world contest and was chosen as the Miss World People's Choice in the pageant in Sanya, China in 2003. Ms Stratton honoured her year of charity service during which she paid her own way around the world and ran her own itinerary and office. She then sought to claim $250 000 in the promised prizes, as well as all out-of-pocket expenses incurred pursuing her year of charity service as required by her title and training for the Miss

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1. [1962] AC 413, Lord Reid 430 (*'White and Carter'*).
2. Ibid.
3. Sally Jackson 'On Top of the World' *The Australian* 4 June 2004.

World competition. The report stated that the alleged Australian licensee, Jim Davie, denied responsibility, claiming that another man was running the contest at the time. Davie had since sold the licence to John Waterhouse and businesswoman Pauline McFetridge.[4] International organisers Miss World Ltd claimed that they licensed the competition to individual countries and had no direct responsibility for contests run in those countries.

This factual scenario squarely raises the rule in *White and Carter*. Ordinarily, an innocent party faced with a breach of contract is under a duty to take all reasonable steps to mitigate her loss. *White and Carter*, however, imposes no such duty. The rule has always been controversial because of this discrepancy and a number of writers have criticised it. This paper seeks to use the reported factual scenario of Ms Stratton's case (hereafter referred to as 'The Beauty Queen case') as an illustration with which to support these criticisms. The paper will compare the potential outcomes of the Beauty Queen case under the rule in *White and Carter*, with, first, the outcome should the contestant have terminated the contract and sued for damages; and second, the alternative action which would appear available on the facts, an action under the Trade Practices Act 1974 (Cth) for misleading or deceptive conduct. The paper argues on the basis of this comparison that *White and Carter*, though a logical extension of contractual principles, leads to anomalous results and may well be out of keeping with the general trend in Australia towards the imposition of good faith obligations upon contracting parties.

The paper begins by outlining the rule in *White and Carter* and considers the status of the rule in Australian law. It then analyses the factual scenario of the Beauty Queen case using the ordinary rules applying to damages for breach of contract, the *White and Carter* rule and a Trade Practices Act section 52 action. The paper then presents an evaluation of the rule in light of these comparisons.

## THE RULE IN *WHITE AND CARTER*

The rule in *White and Carter* comes into play where there is a repudiation of contractual obligations. Repudiation is an express or implied refusal to be bound by a contract.[5] Generally, an innocent party who is faced with repudiation by the other party has an election as to whether to accept the repudiation, terminate and sue for damages or to affirm the contract, insisting on performance by the party in breach.[6]

4. 'Ex-Miss World Aussie Sues' in *World Briefs from Arond the World* 30 Jan 2005 <http://www.geocities.com/FashionAvenue/1744/missworld2002contestants.html>.
5. *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* (1938) 38 SR (NSW) 632, Jordan CJ 646.
6. As Hugh Collins, *The Law of Contract* 4th edn (London: LexisNexis, 2003) 370-371 points out, the rationale for this rule is twofold: 'this choice protects the innocent party from an attempt by the party who is repudiating from relying upon his or her own wrongful conduct to avoid the remaining contractual obligations; and the contract is preserved intact, thus encouraging the parties to find a compromise and reinforcing the duty of cooperation.'

If she chooses the former path and seeks damages she is under a duty to take all reasonable steps to mitigate her loss.[7] She will not be able to claim damages for losses that could have been avoided should such steps have been taken.[8] The rule in *White and Carter*, however, holds that an innocent party may elect to affirm the contract and where possible perform their obligations in the face of repudiation by the other party. In such a case there is no duty to reduce loss.

In the case of *White and Carter*, White and Carter (Councils) Ltd ('White'), agreed to advertise McGregor's business. The contract provided that White would affix advertising on metal plates to its litter bins in a specified area and, in return, McGregor would pay two shillings per week and five shillings per annum for each plate. This payment was to be made annually and in advance. Immediately after signing the contract, McGregor repudiated it and sought its 'cancellation', despite a warning notice at the beginning of the contract that it was not to be cancelled and a clause which provided the contract was not subject to 'countermand' by McGregor. In response, White refused to accept the repudiation, made the plates and displayed the advertisements for the full contract period of 156 weeks. It then claimed the full contract price.

A majority of the House of Lords held that White was entitled to elect to keep the contract on foot and, having fulfilled its contractual obligations, was entitled to the contract price. As repudiation does not automatically terminate the contract, an innocent party, faced with a repudiation, may elect to accept the repudiation and sue for damages (generally subject to mitigation), or keep the contract on foot. The innocent party is under no obligation (nor does it have to prove) that it acted reasonably in making the election. In a case where the innocent party does proceed to perform the contract, the contract price may be recoverable as a debt and the innocent party does not have to bring an action in damages. This being so, the law of mitigation is not relevant. In this case, White was enforcing its right to recover the debt and was entitled to do so.[9]

Of the majority,[10] Lord Reid acknowledged that the rule would result in a somewhat controversial outcome. But he was clear that there was no general obligation on a contracting party to act reasonably and no general equitable principle that required a limitation upon the contractual rights of the innocent party.[11] This being said, Lord

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7. Unless the amount owing is characterised as a debt.
8. The duty is confined, however, to reasonable steps: *British Westinghouse Electric Co Ltd v Underground Electric Railways Co Ltd* [1912] AC 673. See, for instance, *Wroth v Tyler* [1974] Ch 30, where the plaintiff's lack of resources was taken to justify its failure to make alternative purchases in the market in order to mitigate loss.
9. The minority (Lord Morton & Lord Keith) dissented on the basis that, firstly, White had not taken reasonable steps to mitigate its loss; and secondly, in the absence of a right to specific performance, White could only claim damages from McGregor.
10. Lord Reid, Lord Tucker and Lord Hodson were in the majority. Lord Morton of Henryton and Lord Keith of Avonholm were in dissent.
11. *White and Carter* above n 1, 430.

Reid imposed two limitations upon the rule in *White and Carter*: Firstly, it will not apply where the innocent party's performance relies upon the cooperation of the other party and specific performance is not available; secondly, the rule will not apply in cases where the innocent party has no legitimate interest in performing the contract:

> It may well be that, if it can be shown that a person has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages, he ought not to be allowed to saddle the other party with an additional burden with no benefit to himself. If a party has no interest to enforce a stipulation, he cannot in general enforce it: so it might be said that, if a party has no interest to insist on a particular remedy, he ought not to be allowed to insist on it. And, just as a party is not allowed to enforce a penalty, so he ought not to be allowed to penalise the other party by taking one course when another is equally advantageous to him.[12]

The burden of proving the absence of a legitimate interest would appear to be on the defendant.[13]

Lord Hodson, like Lord Reid, appeared to be conscious of the controversial nature of the decision. He said:

> It may be unfortunate that the appellants have saddled themselves with an unwanted contract causing an apparent waste of time and money. No doubt this aspect impressed the Court of Session but there is no equity which can assist the respondent. It is trite that equity will not rewrite an improvident contract where there is no disability on either side. There is no duty laid upon a party to a subsisting contract to vary it at the behest of the other party so as to deprive himself of the benefit given to him by the contract. To hold otherwise would be to introduce a novel equitable doctrine that a party was not to be held to his contract unless the court in a given instance thought it reasonable to do so. In this case it would make an action for debt a claim for a discretionary remedy. This would introduce an uncertainty into the field of contract which appears to be unsupported by authority either in English or Scottish law.[14]

The potential consequences of the decision led Lord Morton of Henryton to take a dissenting view:

> I think that this is a case of great importance, although the claim is for a comparatively small sum. If the appellants are right, strange consequences follow in any case in which, under a repudiated contract, services are to be performed by a party who has not repudiated it, so long as he is able to perform these services without the cooperation of the repudiating party.[15]

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12. Ibid, 431.
13. Ibid, Lord Reid.
14. Ibid, 445.
15. Ibid, 432. In their discussion of this decision, Carter, Phang and Phang refer to the contrast

## WHITE AND CARTER IN AUSTRALIA

The 'strange consequences' alluded to by Lord Morton have troubled a number of commentators over the years.[16] Nevertheless, the rule remains good law in the UK and has been applied in subsequent cases.[17]

Although the Australian High Court has not ruled directly on *White and Carter*, the principles it espouses are well established in Australian law. The earlier decision in *Automatic Fire Sprinklers Pty Ltd v Wat*son[18] affirmed the innocent party's right to election. In that case, the purported dismissal of an employee without the necessary permission as then required by Regulation 14(1) of the National Security (Man Power) Regulations, was ineffectual to terminate the contract of employment. Latham CJ held that a wrongful dismissal goes to the root of the employment contract and entitles the other party to elect to treat the contract as discharged. However, neither repudiation nor an actual breach in itself brings about a discharge of the contract independently of such acceptance, that is, the innocent party retains a right of election and the contract remains on foot should she choose not to accept the repudiation or breach and terminate.[19]

Similarly, in *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd,*[20] Jordan CJ observed that a plaintiff is not bound to accept a repudiation and may, if she chooses, elect to keep the contract on foot and claim the contract price:

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between the 'the impeccable logic of the majority and the intuitive sense of justice of the minority': JW Carter, A Phang & S Phang 'Performance following Repudiation: Legal and Economic Interests' (1999) 15 JCL 97.

16. See eg A Goodhart 'Measure of Damages when a Contract is Repudiated' (1962) 78 LQR 263; M Furmston 'The Case of the Insistent Performer' (1962) 25 MLR 364; S Stoljar 'Some Problems of Anticipatory Breach' (1974) 9 MULR 355; K Mason 'Commentary on Conduct after Breach' (1991) 3 JCL 232; LJ Priestly 'Conduct after Breach: The Position of the Party not in Breach' (1991) 3 JCL 218; Carter, Phang & Phang, ibid.
17. See eg *Gator Shipping Corp v Trans-Asiatic Oil Ltd SA* [1978] 2 Lloyd's Rep 357; *Clea Shipping Corp v Bulk Oil International Ltd ('The Alaskan Trader')* [1984] 1 All ER 129; *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233.
18. (1946) 72 CLR 435.
19. Ibid, 450-451. See also the comments by Dixon J 465. Nevertheless, in an employment contract, the relationship is ordinarily terminated by the dismissal and the plaintiff can choose whether to sue for damages for breach or on a quantum meruit: 'Any other view would in effect grant specific performance of a contract of personal service, a remedy which the courts have always refused in such a case' (ibid). Emphasising the distinction between independent and dependent obligations in contract, His Honour noted that it will only be in exceptional cases that the payment of money to the employee will not depend upon the employee doing work and thus allow him or her to claim wages or salary: 'it must be ascertained from the contract whether the consideration for the payment of wages is the actual performance of the work, or whether the mere readiness and willingness, if of ability to do so, is the consideration' (ibid, 452). See similar comments by Starke J 461, Dixon J 465.
20. Above n 5.

> A party by committing a breach of an essential promise cannot thereby compel the innocent party to put an end to the contract: the latter may go on with the performance of the contract if he chooses.[21]... If, however, the terms or nature of the contract are such that the participation of the defaulting party is necessary to enable the innocent party to perform the contract on his part, and this participation is withheld, the innocent party is necessarily prevented and absolved from performance as long as the participation is withheld. And, if the innocent party insists on upholding the contract, he must in any action brought by him on the contract as a subsisting contract prove performance on his part or readiness and willingness to perform as the case may be.[22]

Where cooperation is required by the other party, however, the innocent party is ordinarily confined to an action in damages for breach.[23]

Since these early cases, a number of decisions of Australian courts and tribunals have referred to the *White and Carter* decision with approval.[24]

## THE STATUS OF THE EXCEPTIONS TO THE RULE IN WHITE AND CARTER

Of the two potential exceptions to the rule in White and Carter identified by Lord Reid, the first, the necessity to show that the innocent party's performance does not rely upon the cooperation of the other party and specific performance is not available, has been upheld in a number of cases. For instance, in *Hounslow London Borough Council v Twickenham Garden Developments Ltd,*[25] work was to be done on property owned by the other party. The need for 'passive cooperation' was sufficient to exclude the principle in *White and Carter*.[26] On the other hand, in *Richmond v Morse*,[27] the doctrine of *White and Carter* was applied to a lease, and the tribunal stated that, because the cooperation of the lessee is not required:

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21. In support of this proposition, His Honour cited *Fullers' Theatres Ltd v Musgrove* [1923] 31 CLR 524, 543-544 and *Ahmed v Estate & Trust Agencies* [1938] AC 624, 639.
22. *Tramways Advertising v Luna Park* above n 5, 645.
23. Ibid, 655.
24. See eg *Richmond v Morse* [2003] VCAT 505; *Dellys v Elderslie Finance Corporation Ltd* [2002] WASCA 161; *Hotcopper Aus Ltd v Saab* [2002] WASCA 190; *Francis v South Sydney District Rugby League Football Club Ltd* [2002] FLA 1306; *Westfield Holdings v Adams* [2001] NSWR Comm 293; *17883 626 Pty Ltd v CSR Ltd* [1988] 841 FLA; *J & S Chan Pty Ltd v McKenzie and McKenzie* [1994] ACTSC 1; *Prus-Grzybowksi v Everingham* (1986) 87 FLR 182; *Vickers and Vickers v Stichtenoth Investments Pty Ltd* (1989) 52 SASR 90; *Keen Mar Corp Pty Ltd v Labrador Park Shopping Centre Pty Ltd* (1989) ATPR 46-048; *Tall-Bennett & Co Pty Ltd v Sadot Holdings* Pty Ltd (1988) NSW Conv R 57,881; *Bolwell Fibreglass Pty Ltd v Foley* [1984] VR 97; *Maridakis v Kouvaris* (1975) 5 ALR 1971.
25. [1971] Ch 233.
26. Carter observes that contracts for the sale of land or for goods are common examples of contracts that require cooperation: JW Carter *Breach of Contract* 2nd edn (Sydney: Law Book Co, 1991) 412.

> A landlord has a practical ability to refuse to accept repudiation by a tenant who has taken possession of demised premises by simply refusing to retake possession of the premises and informing the tenant that the premises remain at his or her disposal.[28]

In *Dellys v Elderslie Finance Corporation Ltd*,[29] the court found that a wrongful dismissal terminates a contract (and thus the rule in *White v Carter* does not apply), because specific performance is not a remedy that is available to an employee. Thus, the employee is left with a claim for damages for breach of contract.

The second limitation, that the rule will not apply in cases where the innocent party has no legitimate interest in performing the contract, and thus is behaving unreasonably, is not so clearly supported by authority. The first reason for this is that the exception is somewhat ambiguous. Just what is considered to be a legitimate, as opposed to an illegitimate, interest, is not clear. A financial interest would be considered legitimate, but non-financial interests may also qualify: in *White and Carter*, it was suggested that enhancement of reputation might be a legitimate interest.[30]

Despite its ambiguity, the exception was applied in *Attica Sea Carriers Corporation v Ferrostaal Poseidon Bulk Reederei GmbH* (*'The Puerto Buitrago'*)[31] where, six months into a 17 month charterparty, the ship in question developed engine trouble. The vessel was in need of repairs which would have cost $2 million, although the vessel was only worth $1 million. The charterers admitted liability for only $400 000 in repairs under the contract and returned the ship to the owners at the end of the hire period. The owners declined to accept, and claimed that the charterers were obliged to repair the ship (whatever the cost may be), and to continue to pay the hire charge until the vessel was repaired.

The court found the owners should have accepted the redelivery of the ship. Specific performance was not available because an award of damages was an adequate remedy and therefore the rule in *White and Carter* did not apply. Lord Denning said *White and Carter* has:

> [N]o application whatever in a case where the plaintiff ought, in all reason, to accept the repudiation and sue for damages – provided that damages would provide an adequate remedy for any loss suffered by him. The reason is because, by suing for the money, the plaintiff is seeking to enforce specific performance of the contract – and he should not be allowed to do so when damages would be an adequate remedy.[32]

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27. [2003] VCAT 505.
28. Ibid, para 42.
29. [2002] WASCA 161.
30. *White and Carter* above n 1, 429.
31. [1976] 1 Lloyd's Rep 250.
32. Ibid, 255.

Two years later, in *Gator Shipping Corporation v Trans-Asiatic Oil Ltd SA* (*'The Odenfeld'*)[33] Kerr J took a similar view, stating that any restriction on an innocent party's right of election 'will only be applied in extreme cases, viz, where damages would be an adequate remedy and where an election to keep the contract alive would be wholly unreasonable'.[34] His Honour observed, however, that '...the passage of time might itself alter the legal position of the parties, because an insistence to treat the contract as still in being might in time become quite unrealistic, unreasonable and untenable'.[35] In this case, Kerr J found that the plaintiffs' conduct was not 'wholly unreasonable'. The plaintiffs were justified in holding the charterers to the contract as the charterers could have sub-let or laid up the vessel. In this case, damages would have been inadequate because they were so difficult to assess.

Both decisions were then considered in *Clea Shipping Corporation v Bulk Oil International Ltd* (*'The Alaskan Trader'*).[36] This case involved a 24-month charterparty. After the first year, the ship broke down and it was clear that it would take some months to repair. The charterers purported to terminate the contract but the owners repaired the ship at significant cost and told the charterers that the ship was once again available. Although the charterers maintained that the contract had been terminated, the owners kept the ship available for them until the expiry of the charterparty in December 1981 and then claimed the contract price. On appeal, the decision of the arbitrator that the owners had no legitimate interest in the performance of the contract, and therefore could not rely upon the decision in *White and Carter*, was upheld. Although the court recognised that the cooperation and legitimate interest exceptions were, strictly speaking, obiter dicta by Lord Reid in *White and Carter*, it recognised that these exceptions had been upheld and applied in subsequent cases.[37] Jordan CJ concluded that 'there comes a point at which the court will cease, on general equitable principles, to allow the innocent party to enforce his contract according to its strict legal terms'.[38] However, His Honour noted that this point required the court to determine where a line should be drawn between what is *merely* unreasonable and what is *wholly* unreasonable in the circumstances and that this was no easy task.

Carter observes that the 'legitimate interest' exception has no supporting Australian authority.[39] In Australia, however, insistence on strict legal rights in a *White and*

33. [1978] 2 Lloyd's Rep 357.
34. Ibid, 374.
35. Ibid, 375.
36. *The Alaskan Trader* above n 17.
37. The court referred to *Hounslow London Borough Council v Twickenham Garden Developments Ltd* above n 25; *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361; *Attica Sea Carriers Corporation v Ferrostaal Poseidon Bulk Reederei GmbH, The Puerto Buitrago* [1976] 1 Lloyd's Rep 250. As the court applied the legitimate interest exception in this case, it did not deem it necessary to consider the cooperation exception.
38. *The Alaskan Trader* above n 17, 136.
39. Carter above n 26, 416. He argues elsewhere that the exception is analogous to mitigation: see Carter, ibid, n 13.

*Carter* scenario may be unconscionable in some circumstances. Unconscionability has played a role in Australian contract law in a variety of contexts. Ellinghaus subsumes these[40] under the general principle that 'a party may not assert a contractual right, or deny a contractual obligation, if it would be unconscionable to do so'.[41] Thus, it will be unconscionable to use contractual rights and discretions in a way that conflicts with the purpose of the contract and it may be unconscionable to act in a way that is arbitrary or capricious.[42] For instance, in *Alcatel Australia Ltd v Scarcella* Sheller J observed that:

> If a contract confers power on a contracting party in terms wider than necessary for the protection of the legitimate interests of that party, the courts may interpret the power as not extending to the action proposed by the party in whom the power is vested or, alternatively, that the powers are being exercised in a capricious or arbitrary manner for an extraneous purpose, which is another was [sic] of saying the same thing. Thus a vendor may not be allowed to exercise a contractual power where it would be unconscionable in the circumstances to do so.[43]

Thus, it may be suggested that a plaintiff may be prevented from insisting on their strict legal rights, because given the facts and context it would be unconscionable for the plaintiff not to terminate the contract and sue for damages in the face of the breach.[44]

The rule in *White and Carter* may also be out of keeping with the general trend towards the imposition of good faith obligations upon contracting parties.[45] Such

40. Such as estoppel, unconscionable dealing and the unconscionable exercise of rights, as well as statutory unconscionability. Duress, undue influence and mistake could also be added to Ellinghaus's list.
41. MP Ellinghaus 'Overview of Contract Law' in *Cheshire and Fifoot's Law of Contract* 8th edn (Sydney: LexisNexis Butterworths, 2002) 3, 7.
42. See the decision of Einstein J in *Mobile Innovations v Vodafone Pacific Ltd* [2003] NSWSC 166, para 686, which observed that implied obligations of good faith would be breached if discretions were exercised arbitrarily or capriciously. Similarly, in *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* (1999) ATPR 41-703, 43-014, Finkelstein J observed that 'a term of a contract that requires a party to act in good faith and fairly, imposes an obligation upon that party not to act capriciously'. It has also been held that the exercise of the right of rescission may be restrained if the exercise would be 'unconscionable in the circumstances': *Pierce Bell Sales Pty Ltd v Frazer* (1973) 130 CLR 575, 578; see also *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 201 ALR 359.
43. *Alcatel Australia Ltd v Scarcella* (1988) 44 NSWLR 349, 368. Contrast this statement with that of Wills J in *Allen v Flood* [1898] AC 1, 46: '[A]ny right given by contract may be exercised against the giver by the person to whom it is granted, no matter how wicked, cruel or mean the motive may be which determines the enforcement of that right.'
44. However, see *Tanwar Enterprises Pty Ltd v Cauchi* above n 42, where the High Court found in favour of two property vendors who terminated contracts of sale after the purchasers failed to comply with stipulations as to time for performance. The vendors were at liberty to exercise their contractual rights, as they had not acted unconscionably.
45. Assuming that good faith obligations and those imposed by unconscionability are different. Some commentators maintain that the obligations of unconscionability and good faith are, in fact, the same. See J Stapleton 'Good Faith in Private Law' [1999] Current Legal Problems 1.

a duty was acknowledged by Priestly JA in *Renard Constructions (ME) Pty Ltd v Minister for Public Works*,[46] where his Honour suggested that it was appropriate in order to give business efficacy to a transaction, to imply a term that a contracting party act reasonably in exercising a discretion under the contract. His Honour was of the opinion that there was no reason why such a term should not be implied into all construction contracts of this type and even if this was not the case, an obligation of reasonableness could be implied as a matter of law. His Honour suggested that the time was ripe for the imposition 'in all contracts of a duty upon the parties of good faith and fair dealing in it performance'.[47] Such a duty would reflect community expectations of contractual behaviour.[48] The implication of a contractual term of good faith has been acknowledged in a number of cases since that time,[49] although the High Court has not decided the issue.[50]

Although the doctrine of good faith in Australia is still evolving, and some distinctions have been drawn between the terms 'good faith', fair dealing' and 'reasonableness', Priestly JA suggested in *Renard* that on many occasions these terms are used so as to indicate the same standard of conduct.[51] It could thus be suggested that the right of an innocent party to complete performance under the doctrine of *White and Carter* should be subject to an implied duty of reasonableness. The writers suggest that this would circumscribe the *White and Carter* doctrine considerably.

In summary, then, the rule in *White and Carter* is that an innocent party, faced with a repudiation by the other party to the contract, may elect to affirm the contract, perform their obligations under the contract and claim the full contract price, subject only to the two exceptions identified by Lord Reid: that that performance should not

46. (1992) 26 NSWLR 234.
47. Ibid, 268.
48. Ibid, 266.
49. See eg *Presmist Pty Ltd v Turner Corporation Pty Ltd* (1992) 30 NSWLR 478; *Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (1993) 31 NSWLR 91; *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349; *Australian Co-operative Foods Ltd v Norco Co-operative Ltd* (1999) 46 NSWLR 267; *Aiton Australia Ltd v Transfield Pty Ltd* (1999) 153 FLR 237; *Far Horizons Pty Ltd v McDonald's Australia Ltd* [2000] VSC 310; *Burger King Corp v Hungry Jack's Pty Ltd* [2001] NSWCA 187; *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15; *ACI Operations Ltd v Berri Ltd* [2005] VSSC 201; *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* [2005] FCA 288.
50. The High Court discussed, but did not finally decide, the issue in *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] 186 ALR 289.
51. Much academic criticism focuses upon what is seen as a judicial failure to differentiate sufficiently between good faith and associated terms. For instance, T Carlin 'The Rise (and Fall?) of Implied Duties of Good Faith in Contractual Performance in Australia' (2002) 25 UNSWLJ 99, 121 is critical of judicial decision-making for the tendency to merge the terms 'reasonable', 'good faith' and 'fair dealing' 'as if they were homogenous in meaning and content'. See further, P Baron 'Resistance: A Consideration of the Opposition to a Duty of Good Faith in Australian Commercial Contracts' (2005) 11 NZBLQ 409.

depend on the cooperation of the other party, and the innocent party have a legitimate interest in performing. The general rule is supported by existing Australian authority, though this statement is qualified by the fact that there is no clear authority on the second exception and the rule may be subject to the principles of unconscionability and good faith.

This being the case, it falls now to compare the potential outcomes of the Beauty Queen case under a claim for contract damages, a section 52 claim and a *White and Carter* claim.

## THE BEAUTY QUEEN SCENARIO

### Breach of Contract

On the reported facts of the Beauty Queen case, in order to succeed in an action for breach of contract, a plaintiff would have to show that: she was a party to a contract recognised by law to be in existence (that is, she must show the elements of agreement, consideration and intention to create legal relations); that the other party to that contract repudiated the obligations imposed by the contract; that a remedy is available; and that she is not disentitled from insisting upon that remedy.

In relation to the formation of the contract, there appears to be little disagreement on the available facts that the contestant and the competition organisers agreed that, should she enter the competition and abide by its rules, she should be entitled to the opportunity to compete for the promised prizes. Although the requisite agreement is often found by the courts in an offer and acceptance analysis,[52] participation in the competition and agreeing to abide by its rules would be sufficient to establish consensus ad idem.[53] The contestant's participation in the competition according to its rules would constitute good consideration for the organiser's promise to provide certain prizes should she win the competition.[54] There would seem little doubt that the parties intended to be legally bound, the contract being primarily commercial in nature.[55]

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52. *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256; *Harvey v Facey* [1893] AC 552
53. See *Clarke v Dunraven* [1897] AC 59, 63 where a question was raised as to whether a contract existed between competitors to a yacht race. Lord Herschell said: 'The effect of their entering for the race, and undertaking to be bound by [the] rules to the knowledge of each other, is sufficient ... where these rules indicate a liability on the part of one to the other, to create a contractual obligation to discharge that liability.'
54. Consideration being classically defined by Sir Frederick Pollock: 'An act or forbearance of one party or the promise thereof, is the price for which the promise of the other is bought and the promise thus given for value is enforceable'. This definition was approved by Lord Dunedin in the decision of *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847.
55. See *Esso Petroleum Ltd v Commissioners of Customs & Excise* [1976] 1 All ER117; *Edwards v Skyways Ltd* [1964] 1 WLR 349.

In relation to establishing the repudiation, this seems unambiguous. A repudiation will entitle an innocent party to treat the contract as discharged. In order to establish repudiation, there must be a clear indication that the other party has refused to perform his or her contractual obligations.[56] Where the breach is anticipatory, that is, occurs where a party evinces an intention to no longer be bound by the contract before the time for performance falls due, the innocent party may terminate immediately or affirm the contract and elect to wait for the time for performance before terminating.[57] In the reported facts of the Beauty Queen case, the repudiation appears to be partially anticipatory, the organisers refusing to provide support for the next phase of the competition. They also appear to have refused to pay the prize money.

Once the repudiation is established, and provided that there is no liquidated damages clause in the contract, the contestant would have to establish her claim to damages or to specific performance of the contract. The object of contract damages is to put the innocent party in the position they would have been had the contract been performed.[58] In order to bring a claim for damages, the plaintiff would have to show the elements of causation and remoteness, that is, that the loss was caused by the breach,[59] and that the loss was not too remote, that is, that it arose as an ordinary consequence of the breach, or, if the loss was unusual and would not be anticipated as an ordinary consequence of the breach, that the defendant had actual knowledge of the potential loss.[60]

Once the court has resolved the issues of causation and remoteness, it would then determine how much should be awarded to the injured party. Damages would not be available in this case for discomfort, inconvenience, anxiety or injured feelings.[61] Damages would be available for pecuniary losses, both expectation and reliance, and the plaintiff contestant would potentially be able to claim for a loss of a chance to win the international competition.[62]

However, the plaintiff would be under a duty to mitigate her loss. A party cannot claim for any loss that is incurred as a result of her failure to take reasonable steps to mitigate.[63] On the facts of the Beauty Queen case, a contestant's decision to continue with the competition and incur losses would be likely to disentitle her from claiming damages for the value of the ongoing support for the later stages of the

56. *Shevill v Builders Licensing Board* (1982) 149 CLR 620.
57. *Avery v Bowden* (1855) 119 ER 647; *Foran v Wight* (1989) 168 CLR 385.
58. *Robinson v Harman* (1848)1 Ex 850.
59. *Reg Glass Pty Ltd v Rivers Locking Systems Pty Ltd* (1968) 120 CLR 516.
60. *Hadley v Baxendale* (1854) 156 ER 145.
61. Contract law assumes the contracting parties to be rather robust. Such damages are only available in very limited circumstances, ie, where the purpose of the contract is to provide enjoyment, relaxation or freedom from molestation: *Baltic Shipping v Dillon* (1993) 176 CLR 344, Mason CJ 365.
62. *Howe v Teefy* (1927) 27 SR (NSW) 301; *Chaplin v Hicks* [1911] 2 KB 786.
63. *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* above n 8, 689.

competition, although she could still claim for the prize money for winning the Australian competition.

## Trade Practices Act 1974, section 52

Section 52 provides that: 'A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive'. In order for a breach of section 52 to be established, it must be shown that a corporation's conduct occurred in trade or commerce; that the defendant engaged in conduct; and that that conduct was misleading or deceptive or was likely to mislead or deceive.[64]

For the purposes of the section, the phrase 'in trade or commerce' means trade or commerce within Australia or between Australia and places outside Australia.[65] The courts have construed in 'trade or commerce' widely,[66] though it is clear that internal matters of business[67] and private transactions[68] are not considered to be 'in trade or commerce'. In this case, there would appear to be little difficulty in establishing that the defendants were acting in trade or commerce.

To establish a breach of section 52, a plaintiff is not required to establish any intention to mislead or deceive on the part of the wrongdoer.[69] The phrase 'misleading or deceptive' is not defined in the Act itself, but judicial interpretation has been that the phrase means 'to lead into error'.[70] Thus, conduct will be misleading or deceptive if it causes the person to whom it is directed to believe things that are not true or correct. Clearly, in the Beauty Queen case, a contestant would have entered the competition believing that the promises of prize money and ongoing support would be honoured.

Should a contravention of section 52 be made out, the innocent party will have available to her a number of remedies, including damages under section 82 of the Trade Practices Act. The High Court has accepted that in general the measure of

64. State fair trading legislation contains provisions equivalent to s 52 but with a constitutionally unrestricted focus on individuals engaging in misleading or deceptive conduct
65. Trade Practices Act 1974 (Cth) s 4.
66. See *Re Ku-ring-gai Corporative Building Society (No 12) Ltd* (1978) 36 FLR 134, Bowen J 139, citing *A McArthur Ltd v State of Queensland* (1920) 28 CLR 530, 547: 'The terms 'trade' and 'commerce' are ordinary words which describe all mutual communings, the negotiations verbal and by correspondence, the bargain, the transport and the delivery which comprised commercial arrangements.'
67. *Concrete Constructions v Nelson* (1990) 169 CLR 594.
68. *O'Brien v Smolonogov* (1983) 53 ALR 107.
69. *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Pty Ltd* (1978) 140 CLR 216.
70. *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, Gibbs CJ 198.

damages in tort is the appropriate one for cases involving misleading or deceptive conduct.[71] Thus, the relevant question for the court in assessing damages is to determine how much worse off the applicant is as a result of her entering the transaction in reliance upon the misleading or deceptive conduct of the respondent, by comparison with her situation if the transaction had not taken place.

However, damages will only be recoverable if the plaintiff establishes a causal connection between a contravention of the Trade Practices Act and the loss or damage suffered. 'What must be shown is that the appellants had suffered or were likely to suffer loss or damage by conduct of the respondent engaged in contravention of a relevant provision of the Act'.[72] Although it is not necessary to show that the contravention of section 52 was the sole cause of the loss suffered,[73] the losses of a plaintiff who chooses to proceed knowing of the misleading or deceptive conduct may not be recoverable. The plaintiff's actions in not rescinding a contract (albeit one induced by misleading or deceptive conduct) may be held to have broken the chain of causation between the breach and subsequent losses.

The High Court has made it clear in recent decisions that a claimant's own conduct may sever causation where it is so unreasonable as to negative the causative effect of the impugned conduct. This falls under the applicant's obligation under section 82 to take reasonable steps to mitigate loss which is consequent upon the respondent's conduct. An applicant cannot recover damages for losses which she could reasonably have avoided.[74] Failing to rescind a contract may amount to an unreasonable omission to act. Where, for example, a plaintiff purchases an unprofitable business relying on misleading or deceptive conduct, it may be legally perilous for her to continue trading. Where a plaintiff has failed to act in the face of mounting losses either to stop trading or to rescind the contract, damages have been reduced accordingly. In *Bateman v Slatyer*,[75] Burchett J acknowledged this, admitting that the circumstances of individual cases would determine when a plaintiff's persistence became unreasonable. In *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd*,[76] the Full Federal Court agreed with the trial judge and unanimously held that since the cross-appellant chose to carry on the business he had purchased despite becoming aware that representations made to him were false, not all his losses could be said to be attributable to the representations:

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71. See *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, Gibbs CJ 7, Mason, Wilson, Dawson JJ 11-12. But see *Marks v GIO* (1998) 196 CLR 494.
72. *Murphy v Overton Investments* [2004] HCA 3, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ para 59.
73. See *Henville v Walker* (2001) 206 CLR 459.
74. See *Brown v The Jam Factory Pty Ltd* (1981) 53 FLR 340, Fox J 351. This principle was confirmed by Lockhart J in *Finucane v NSW Egg Corporation*(1988) 80 ALR 486, 519, although in that case the applicant's delay in commencing litigation did not amount to a failure to mitigate nor was it sufficient to break the chain of causationn.
75. (1987) 71 ALR 553.
76. (1989) 89 ALR 539.

> If a person elects to affirm a contract induced by fraud when possessing information which would indicate to a person acting reasonably that the loss caused, and to be caused ... is best mitigated by rescission of the contract, such further loss may be irrecoverable ...because it is not within the contemplation of section 82.[77]

The Full Federal Court in *Anema E Core Pty Ltd v Aromas Pty Ltd*[78] affirmed the decision of the trial judge that the purchasers of a coffee shop were not entitled to recover their trading losses. The losses were found to have been incurred after the purchasers became aware of the vendor's misleading conduct and were thus held to be due to the purchaser's failure to rescind the contract at that time. In *Henville v Walker,* McHugh J expressed the views of the other members of the High Court when his Honour said:

> No doubt, if part of the loss or damage would not have occurred but for the unreasonable conduct of the claimant, it will be appropriate in assessing damages under s 82 to apply notions of reasonableness in assessing how much of the loss was caused by the contravention of the Act.[79]

This is in obvious stark contrast to Lord Reid's explanation in *White and Carter* that there is no rule of the common law that requires rights to be enforced in a reasonable way.[80]

Thus, should a plaintiff in the Beauty Queen scenario bring an action under section 52 of the Trade Practices Act or its fair trading equivalents, and should she be successful in alleging that the promise to pay her the promised prizes was misleading or deceptive, her subsequent conduct in continuing on with the competition and incurring expenses would be likely to result in a curtailment of, or total disentitlement from, an award of damages under s 82. This would be on the basis that her decision to proceed, despite the statements by organisers that they could not honour the prizes they promised, either broke the chain of causation between the conduct and the loss or because it was a failure to mitigate.

## *White and Carter*

To succeed in an action under the rule in *White and Carter*, a plaintiff in the Beauty Queen case, as in a claim for ordinary contract damages, would need to establish that a binding contract existed and that it had been repudiated. As discussed above, there would appear to be relatively little difficulty, on the available facts, in establishing this.

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77. Ibid, Lee J 556.
78. [1999] FCA 904.
79. *Henville v Walker* (2001) 182 ALR 37, 71; see also *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109.
80. See above n 11.

She would then need to show that she elected to affirm the contract and perform her obligations under it; that her performance of those obligations did not depend upon the cooperation of the other party; and (possibly) that she had a legitimate interest in performing the obligations. In addition, in Australia, she might need to establish that in performing her contractual obligations, she was not acting unconscionably or perhaps, in the absence of good faith.

Despite the uncertainty surrounding the legitimate interest exception and the potential for an unconscionability exception to the *White and Carter* rule, we would suggest that the facts would support a *White and Carter* action. On the available facts of the Beauty Queen case the conduct of the pageant organisers would appear to be prima facie a breach of contract. It would appear that she elected, as was her legal right, not to accept the repudiation of the Australian competition organisers and to proceed with the contract. On the facts as they were reported, it seems that the further performance of her obligations did not require cooperation from the organisers. She could argue that she had a legitimate interest in continuing with the competition, both in terms of her chance to win the Miss World competition and in terms of her enhanced reputation from public engagements and charitable work. There does not appear to the writers to be any basis upon which the organisers could argue that the contestant's conduct was, in the circumstances, unconscionable. This being the case, and in contrast to an ordinary contract damages claim and a section 52 action, the plaintiff would be entitled to claim the full contract price of prize-money and the ongoing support.

## CONCLUSION

In this paper, we have used the Beauty Queen case to highlight the problems inherent in the *White and Carter* doctrine. Our first point is that the application of the *White and Carter* doctrine clearly yields anomalous results when compared to either a conventional damages claim or a section 52 action. Should a plaintiff have based her action in section 52 of the Trade Practices Act, or its fair trading equivalents, and should she be successful in alleging that the promise to pay her the promised prizes was misleading or deceptive, her subsequent conduct in continuing with the competition and incurring expenses would be likely to disentitle her from an award of damages under section 82 of the Trade Practices Act or its equivalents. This would be on the basis that her decision to proceed, despite the statements by organisers that they could not honour the prizes they promised, either broke the chain of causation between the conduct and the loss or because it was a failure to mitigate. In the case of a standard contract action, the failure to mitigate her loss would have reduced her damages entitlement.

Our second point is that a *White and Carter* claim may be out of keeping with the general trend in Australia toward imposing a duty of good faith upon contracting parties. At the beginning of this article, we quoted Lord Reid in *White and Carter* as saying:

> It might be, but it never has been, the law that a person is only entitled to enforce his contractual rights in a reasonable way, and that a court will not support the attempt to enforce them in an unreasonable way. One reason why that is not the law is, no doubt, because it was thought that it would create too much uncertainty to require the court to decide whether it is reasonable or equitable to allow a party to enforce his full rights under a contract.[81]

This point is significant because there is an increasing tendency to impose just such a duty upon contracting parties in Australia.

The decision in *White and Carter* has always been controversial and has attracted considerable criticism over the years. We have sought in this analysis to support the view that *White and Carter* is anomalous and although we recognise that it is the logical extension of the right to election, it sits uncomfortably with changing norms of conduct in the contractual context. Although, to date, *White and Carter* remains good law in Australia, our analysis suggests that the decision requires reconsideration in the contemporary contractual environment.

81. *White and Carter* above n 1, 430.