

# GOOD FAITH AND POST-REPUDIATION CONDUCT

ANDREW DAHDAL★

*Professor J W Carter recently wrote: ‘Lord Reid’s legitimate interest qualification has always been a puzzle’ ((2012) 128 Law Quarterly Review 490, 491). The qualification Professor Carter is referring to allows a non-repudiating party to a contract to continue performance of the contract if i) the co-operation of the repudiating party is not required and ii) it is in their own ‘legitimate interest, financial or otherwise’ to do so. This article submits that the legitimate interest qualification articulated by Lord Reid in the case of *White and Carter (Councils) Ltd v McGregor* [1962] AC 413 has been (and to the extent that it has not – ought to be – at least in Australia) subsumed by a good faith test pertaining to the behaviour of the non-repudiating party when faced with repudiation. Beyond proffering this observation, this article proceeds to apply and reflect upon the suitability of the elements of good faith in the *White and Carter* scenario. It finds that good faith is not only a viable framework, its analytical depth is essential in unpacking the conflicting considerations present in the context of ‘an insistent performer’ (to use Professor Furmston’s phrase).*

## I INTRODUCTION

The lawfulness of continued performance in a post-repudiation-pre-termination contractual context is determined by a test that asks whether the non-repudiating party has a ‘legitimate interest’ in following through with their (yet to be performed) obligations. This article submits that Australian law has developed to a point where the ‘legitimate interest’ test has been over taken by considerations of good faith in relation to this particular contractual scenario. The good faith approach represents the consensus of academic and judicial opinion on this point of law. Upon a close examination of its internal elements, the doctrine of good faith also proves to be the best suited and appropriately adapted conceptual vehicle for revealing and reconciling the tensions aroused by this aspect of Australian contract law.

In the case of *White and Carter (Councils) Ltd v McGregor*<sup>1</sup> a slim majority

★ Assistant Professor of Commercial Law, College of Law, Qatar University Assistant Professor of Commercial Law, College of Law, Qatar University). Most of the research for this article was undertaken at the Faculty of Business and Economics, Macquarie University.

<sup>1</sup> [1962] AC 413 (hereafter *White and Carter*).

of the House of Lords<sup>2</sup> held that a party is permitted to continue performing their contractual obligations even in circumstances where the other contracting party has clearly disavowed their own obligations (i.e. repudiated the contract). Where the innocent party elects to accept the repudiation, the contract is terminated on the basis of anticipatory breach. If, on the other hand, there is an election to reject the repudiatory overtures then the contract remains binding on both parties and both parties are still legally expected to perform their end of the bargain. This post-repudiation-pre termination situation is hereafter referred to as the ‘*White and Carter scenario*’.<sup>3</sup>

Two qualifications were established by Lord Reid in *White and Carter* limiting the circumstances when continued performance after repudiation would be permitted.<sup>4</sup> The most controversial of these qualifications is the so-called ‘legitimate interest’ test. The legitimate interest test asks whether the non-repudiating party had a ‘legitimate interest’ in continuing performance of the contract even when the other party unequivocally repudiates their obligations under the contract.<sup>5</sup>

Jurists and commentators, almost unanimously, have specifically criticised the legitimate interest test and the *White and Carter* approach more generally for potentially grounding anomalous and unjust outcomes and establishing a legal test that hides more considerations than it reveals.<sup>6</sup> The legitimate interest test fails to reveal the competing elements a judge must weigh up when assessing the lawfulness of continued performance in the face of repudiation. The core dilemma arises from assessing the legal rights of the non-repudiating party versus the fairness of subjecting the repudiating party to unnecessary losses or burdens.

In the last two decades the doctrine of good faith has been increasingly recognised and applied by Australian courts in both pre-contractual contexts<sup>7</sup>

<sup>2</sup> 3:2 (Lord Reid, Lord Tucker and Lord Hodson; Lord Keith of Avonholm and Lord Morton of Henryton dissenting).

<sup>3</sup> *White and Carter* does not apply to employment contracts: *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435, 450 (Latham CJ); Or contracts of service: *Gunton v Richmond-upon-Thames LBC* [1981] Ch 448, 474-5 (Brightman LJ).

<sup>4</sup> *White and Carter (Councils) Ltd v McGregor* [1962] AC 413, 430-31 (Lord Reid).

<sup>5</sup> *White and Carter (Councils) Ltd v McGregor* [1962] AC 413, 431 (Lord Reid).

<sup>6</sup> See M P Furmston, ‘The Case of the Insistent Performer’ (1962) 25(3) *Modern Law Review* 364; AL Goodhart, ‘Measure of Damages when Contract is Repudiated’ (1962) 78 *Law Quarterly Review* 263; PM Nienaber, ‘The Effect of Anticipatory Breach Repudiation: Principle and Policy’ (1962) 20(2) *Cambridge Law Journal* 213; Editor, ‘Anticipatory Breach Right of Plaintiff to Perform’ (1963) 2 *Adelaide Law Review* 103; Samuel Stoljar, ‘Some Problems of Anticipatory Breach’ (1974) 9 *Melbourne University Law Review* 355; Francis Dawson, ‘Metaphors and Anticipatory Breach of Contract’ (1981) 40(1) *Cambridge Law Journal* 83. J W Carter, Andrew Phang and Sock-Yong Phang, ‘Performance Following Repudiation: Legal and Economic Interests’ (1999) 15 *JCL* 97; J W Carter, *Carters Breach of Contract* (1<sup>st</sup> ed., 2011) [11.40]-[11.55].

<sup>7</sup> See *United Group Rail Services Limited v Rail Corporations New South Wales* [2009] NSWCA 177. Cf *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1, 42 (Handley JA).

as well as in relation to the performance of contractual terms.<sup>8</sup> Good faith is now a mature and sophisticated concept within the body of Australian contract law that represents a viable and well adapted legal tool for addressing many of the shortcomings and criticisms associated with the legitimate interest test.<sup>9</sup>

The doctrine of good faith unpacks many latent considerations such as honesty, loyalty to the promise and the reasonableness of conduct when assessing the actions of the non-repudiating party. A recent trend evident in Australian case law lends further weight to the perspective that the 'legitimate interest' test has been overtaken by the doctrine of good faith. When defining and applying the doctrine of good faith, Australian judges now examine the 'legitimate interests' of one (or both) of the parties to a contract as part of the broader set of considerations relevant to determining whether conduct satisfies the requirements of good faith.<sup>10</sup> Although there are minor elements of the doctrine of good faith that continue to evolve within Australian law<sup>11</sup>, good faith still represents the best conceptual foundation for addressing the *White and Carter* scenario. Although there is no High Court authority confirming the applicability of *White and Carter* in the Australian context, there are several lower court precedents that reveal as much.<sup>12</sup> When the *White and Carter*

See also Jack O'Connor, 'The Enforceability of Agreements to Negotiate in Good Faith' (2010) 29(2) *University of Tasmania Law Review* 177.

<sup>8</sup> See generally Elisabeth Peden, 'Good Faith in the Performance of Contract Law' (2004) 42(9) *Law Society Journal* 64.

<sup>9</sup> The main shortcomings being that the test is too one-dimensional. It does not give sufficient scope for examining many of the important factors other than pecuniary/non-pecuniary interests that might influence the decision of a non-repudiating party to continue performance.

<sup>10</sup> *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd* [2010] WASC 222, [92], [97] (Murphy JA); *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268, [146]-[147] (Hodgson JA); See also *Sundararajah v Teachers Federation Health limited* [2011] FCA 1031, [68] (Foster J).

<sup>11</sup> For example the precise source of a good faith implication remains unsettled (implication ad hoc vs. implication in law) (examined below). Also the exact substantive content of the doctrine of good faith remains a point of discussion.

<sup>12</sup> See *J and S Chan Pty Limited v Victor Geoffery Mckenzie and Lynette Anne McKenzie* [1994] ACTSC 1, [37] (Higgins J). The case of *J and S Chan* was a contracts case relating to leases where the central question was whether a landlord was under an obligation to mitigate their losses in circumstances where a tenant vacates the leased premises prior to the end of the lease. The earlier High Court case of *The Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 confirmed that the ordinary rules of contract law apply to leases. When following the *Progressive Mailing House* position, cases prior to *J and S Chan*, such as *Vickers & Vickers v Stichtenoth Investments Pty Ltd* (1989) 52 SASR 90, failed to apply *White and Carter* to the issue of continued performance in relation to leases. *J and S Chan* remedied this failure by confirming that: '*White and Carter* is of general application in the law of contract. It is, accordingly, one of those general contractual principles which applies to leases' ([37] per Higgins J). Some other cases where *White and Carter* has been treated with approval (if not applied): *In the matter of Australia Zhongfu Oil and Gas Resources Pty Ltd* [2012] NSWSC 1208, [21] (Breerton J); *Hayes v*

scenario again comes before Australian Courts, Australian contract law would be well progressed in the recognition that Lord Reid's legitimate interest test has now been (or at least should be) conceptually subsumed with a more comprehensive good faith-orientated approach.

## II REPUDIATION, MITIGATION AND ANTICIPATORY BREACH

### A Mitigation

When a contract is breached the innocent party is under a legal obligation to take 'reasonable' steps to minimise their losses.<sup>13</sup> This means that a plaintiff is not entitled to allow preventable losses from accruing and expect to have those losses compensated by the defendant.<sup>14</sup> Examples of mitigation for breach of contract might include seeking an alternative purchaser for land where the original contract of sale has been breached; or, the pursuit of alternative employment where a party is unlawfully dismissed. Failing to take action to mitigate losses does not entitle the defendant to damages against the plaintiff but rather reduces the liability of the defendant to the plaintiff.<sup>15</sup> The concept of mitigation can also be seen in a statutory context as in the various state sale of goods statutory regimes.<sup>16</sup> The rules of Australian contract law provide that the relevant date when a duty to mitigate arises will be the date when an 'actual' breach of contract occurs. The rules of mitigation are founded upon three propositions:

*Sheenmar and Anor* [2012] QCAT 149, [82] (Michelle Howard, Member); *Westfields Holdings v Adams* [2001] NSWIRComm 293, [137] (Wright J (P), Walton J (VP) and Boland J).

<sup>13</sup> See generally *Watts v Rake* (1960) 108 CLR 158. In determining the scope of 'reasonable' the court may consider the circumstances involved in the specific contract: *Banco de Portugal v Waterlo & Sons Ltd* [1932] AC 452, 505-506 (Lord Macmillian). 'Unreasonable' or potentially hazardous steps need not be taken: *London & South of England Building Society v Stone* [1983] 1 WLR 1242, 1263 (Stephenson LJ). Steps that might undermine commercial reputation are considered 'unreasonable': *James Finlay & Co Ltd v NV Kwik Hoo Tong Handel Maatschappij* [1929] 1 KB 400, 418 (Sankey LJ). See also Michael G Bridge, 'Mitigation of Damages in Contract and the Meaning of Avoidable Loss' (1989) 105 (3) *Law Quarterly Review* 39.

<sup>14</sup> The onus is on the defendant to prove that the plaintiff failed to take actions to mitigate their losses: See *Simonius Vischer & Co v Holt & Thompson* (1979) 2 NSWLR 322, 355 (Samuels JA).

<sup>15</sup> *Sotiros Shipping Inc v Sameiet Solholt (The Solholt)* [1983] 1 Lloyd's Rep 605, 608 (Sir John Donaldson MR) (for the Court).

<sup>16</sup> *Sale of Goods Act 1923* (NSW), ss 52(3), 53(3); *Sale of Goods Act 1895* (SA), ss 49(3), 50(3); *Sale of Goods Act 1954* (ACT), ss 53(3), 54(3); *Sale of Goods Act 1972* (NT), ss 52(3), 53(3); *Sale of Goods Act 1896* (Qld), ss 51(3), 52(3); *Sale of Goods Act 1896* (Tas), ss 54(3), 55(3); *Goods Act 1958* (Vic), ss 56(3), 57(3); *Sale of Goods Act 1895* (WA), ss 49(3), 50(3).

- i) A plaintiff *cannot* recover losses that could have been avoided;<sup>17</sup>
- ii) A plaintiff *cannot* recover losses that have in fact been avoided;<sup>18</sup>
- iii) A plaintiff *can* recover the cost of taking action to mitigate losses.<sup>19</sup>

The rules of mitigation only apply when the contract is terminated by breach. They are not engaged in circumstances where one party unilaterally seeks to terminate the contract *prior* to the date of performance – that is, they seek to unilaterally repudiate the contract. If the unilateral repudiation is accepted by the innocent party and met with an election to terminate the contract immediately, it is only then that a duty to mitigate arises. If, however, the repudiation is not accepted, no duty of mitigation arises.<sup>20</sup> The case of *White and Carter* took this reasoning further by confirming that the non-repudiating party can, subject to two qualifications, positively continue in the performance of their contractual duties.

### B Repudiation and Anticipatory Breach

The case of *Horchester v De La Tours*<sup>21</sup> expanded the notion of breach to circumstances where the date of actual performance has not yet arrived. The case of *Horchester* is heralded as the judicial origin of ‘anticipatory breach’.<sup>22</sup> Anticipatory breach requires two elements. First it requires one of the parties (by word or deed) to repudiate the contract. Irrespective of whether repudiation was by word or deed, there must be exhibited a clear intention that the party is unwilling or unable to perform their obligations under the contract.<sup>23</sup> The second requirement is that the innocent non-repudiating party elects to accept the repudiation and thereby terminate the contract immediately (prior

<sup>17</sup> As an aspect of the concept of foreseeability, the obligation upon an injured party to mitigate extends only as far as is reasonable to avert the losses incurred: *Burns v MAN Automotive (Aust) Pty Ltd* (1986) 161 CLR 653, 673 (Brennan J).

<sup>18</sup> See *British Westinghouse Electric and Manufacturing Co Ltd v Electric Railways Co of London Ltd* [1912] AC 673.

<sup>19</sup> See *Simonius Vischer & Co v Holt & Thompson* (1979) 2 NSWLR 322.

<sup>20</sup> *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673, especially Viscount Haldane LC at 689. See also W E D Davies, ‘Anticipatory Breach and Mitigation of Damages’ (1962) 5(5) *University of Western Australia Law Review* 576.

<sup>21</sup> (1853) 2 E & B 678.

<sup>22</sup> See generally J W Carter, *Carters Breach of Contract* (1<sup>st</sup> ed., 2011) Part III.

<sup>23</sup> See *Universal Cargo Carriers Corporation v Citati* (1957) 2 QB 401, 438 (Devlin J). Separating out the concepts of ‘inability’ and ‘unwillingness’ is not necessary as in most cases a party is unwilling to perform their obligations because they are unable. See also R E McGarvie, ‘The Common Law Discharge of Contracts upon Breach’ (1963) 4 *Melbourne University Law Review* 254, 258.

to the intended and originally contemplated performance date).<sup>24</sup>

Upon this analysis, an ‘unaccepted repudiation’ has no legal significance whatsoever. As stated by McGarvie<sup>25</sup>:

It is settled law that the repudiation of a contract has no legal effect in itself except to confer on the other party an option to discharge the contract. ‘An unaccepted repudiation,’ it has been said by Asquith L.J., ‘is a thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind’<sup>26</sup>

An unaccepted repudiation changes nothing in the legal relationship between the two parties in that both are still expected to perform their obligation as originally agreed.<sup>27</sup> The repudiating party cannot compel the innocent party to terminate the contract.<sup>28</sup> Indeed, the party who has evinced an intention to breach the contract has technically yet to do anything wrong. It follows that since the contract is still ‘on foot’<sup>29</sup>, there can be no basis for a remedies claim - yet.

There are several reasons why a contracting party might communicate their intentions not to fulfil their obligations prior to the specified performance date. From an altruistic perspective, such a gesture allows for alternative arrangements to be made in a timely manner. Beneath this veneer of gentlemanly conduct and contractual concern for the wellbeing of one’s associates, is the legal and pecuniary reality that to minimise losses is to minimise eventual liability for breach.

As a branch of contract law, anticipatory breach has been described as ‘still plagued with inconsistency, uncertainty and incoherence’.<sup>30</sup> It is, therefore, difficult to discern the appropriate conduct and level of mitigation expected from the non-repudiating party in the post-repudiation-pre-termination context. The conceptual impasse can be stated as follows: Should the non-

<sup>24</sup> See generally *Foran v Wight* (1989) 168 CLR 385. The breach of several minor terms in the contract may cumulatively establish repudiation of the entire contract: *Hudson Crushed Metals Pty Ltd v Henry* [1985] 1Qd R 202, 205-208 (Connolly, Thomas and Derrington JJ).

<sup>25</sup> McGarvie, above n 23, 260.

<sup>26</sup> *Howard v Pickford Tool Co Ltd* [195] 1 KB 417, 421 (Evershed MR).

<sup>27</sup> Cf J W Carter, ‘Discharge as the basis for termination for Breach of contract’ (2012) 128 (1) *Law Quarterly Review*, 283, 294-301. Carter dissects the concept of ‘unaccepted repudiation’ and argues that it does indeed have legal significance and to pretend that it does not fails to appreciate the contradictions inherent in the application of the rules of election.

<sup>28</sup> McGarvie, above n 23, 261.

<sup>29</sup> The use of metaphors such as ‘on foot’ has been acknowledged as stemming ‘from the fact that they convey the complicated ideas underlying discharge for breach in a format which is immediately comprehensible.’: Francis Dawson, ‘Metaphor and Anticipatory Breach of Contract’ (1981) 40(1) *Cambridge Law Journal* 83, 86. The same realisation is articulated in *White and Carter* by Lord Keith of Avonholm at 438 noting of such a phrase: ‘[it is] ...[t]he graphic phrase ... (that) can give force to a legal principle’.

<sup>30</sup> Qiao Liu, ‘Inferring Future Breach: Towards A Unifying Test of Anticipatory Breach of Contract’ (2007) 66(3) *Cambridge Law Journal* 574, 574.

repudiating party be permitted to ignore the interests of the repudiating party and continue performance of the (still binding and legal) contract? Otherwise stated: should there be some legal limitation imposed upon the conduct of the non-repudiating party preventing them from asserting their full legal rights under the contract? If so, what are the justifications for such limits?

### C *White and Carter*

If indeed there is no duty to mitigate in the face of mere repudiation, to what extent can the non-repudiating party exercise their contractual rights? The law concerning continued performance of a contract subject to repudiation was examined in the well-known House of Lords case of *White and Carter*. The conclusion reached by the Majority in *White and Carter* was that the innocent party is not required to deviate from their original obligations when faced with repudiation. Lord Reid stated two qualifications to this general position. An innocent party could not continue in their contractual performance if:

- i) The performance was co-dependent on some form of co-operation from the repudiating party<sup>31</sup>; or
- ii) The innocent party has ‘...no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages...’<sup>32</sup>

The facts of *White and Carter* involved an advertising contract between the producer of ‘litter receptacles’ (i.e. rubbish bins), White and Carter (Councils) Ltd, and a local garage owner, Mr William McGregor. The business model of White and Carter (Councils) Ltd was that rather than being directly paid by local councils for providing waste services, the company would sell advertising space on the side of bins. It was undisputed that an agent of Mr McGregor (Mr Ward, the sales manager) renewed a contract with White and Carter (Councils) Ltd for the use of the advertising space on the side of the bins. The original contract was from 1954 and was set to expire in November 1957. On June 26, 1957 the renewal contract was executed. On that very same day Mr McGregor contacted (by letter) White and Carter (Councils) Ltd and informed them that he did not desire to proceed with the renewed contract upon the expiration of the existing arrangement. White and Carter (Councils) Ltd rejected the repudiation and proceeded with the advertising campaign.

In the lower Scottish courts the matter was decided in favour of McGregor. White and Carter (Councils) Ltd appealed the decision to the House of Lords.

<sup>31</sup> *White and Carter (Councils) Ltd v McGregor* [1962] AC 413, 430 (Lord Reid). In not requiring bipartisan co-operation for performance, Lord Reid described the contract involved in the present case as reflecting a ‘peculiarity’ (as in the Scottish case cited at 429: *Langford & Co Ltd v Dutch* (1952) SC 15).

<sup>32</sup> *White and Carter (Councils) Ltd v McGregor* [1962] AC 413, 431 (Lord Reid).

The House of Lords was closely divided but ultimately decided that the appellants (*White and Carter (Councils) Ltd*) could, having not accepted McGregor's repudiation of the contract, proceed in the performance of their original obligations as intended. In dissent, Lord Morton of Henryton was of the opinion that *White and Carter* had acted unreasonably. That was not, however, his Lordship held, a sufficient basis for dismissing their appeal.<sup>33</sup> Rather, his Lordship based his dismissal on the belief that allowing such a rule to stand would result in anomalous contractual outcomes and, perhaps more importantly, was contrary to existing precedent (*Langford & Co. Ltd. v Dutch*<sup>34</sup>). The more powerful logic, however, was expressed by the Majority. Lord Hodson held that: 'It is settled as a fundamental rule of law of contract that repudiation by one of the parties to a contract does not itself discharge it'.<sup>35</sup>

The conclusion reached in *White and Carter* by the Majority is capable of supporting outcomes that might seem altogether anomalous, wasteful, unjust or even perverse. The conclusion was, nevertheless, in a purely legal sense, technically correct. Professor Carter has described the logic of the Majority in *White and Carter* as 'impeccable'.<sup>36</sup>

#### D Responses to *White and Carter*

In the wake of the decision in *White and Carter*, much of the discourse has centred on the second of the two limitations stated by Lord Reid – the legitimate interest test. The idea that an innocent party can only proceed in the face of repudiation if it is in their 'legitimate interest' has been the subject of much debate and criticism.<sup>37</sup> Some of the main criticisms levelled against the legitimate interest qualification were identified by Carter, Phang and Phang as including<sup>38</sup>:

- i) The lack of any clear doctrinal basis
- ii) the tension between the qualification and the decision in *White and Carter* itself;
- iii) certain interpretive problems, and in particular the fact that it is difficult see how it ever could be established that a promisee has no such interest;
- iv) the fact that subsequent decisions applying the principle have treated it as prohibiting unreasonable conduct, notwithstanding that the qualification was not expressed in such terms; and
- v) the failure of the qualification to address the policy and economic

<sup>33</sup> *White and Carter (Councils) Ltd v McGregor* [1962] AC 413, 434 (Lord Reid).

<sup>34</sup> (1952) SC 15.

<sup>35</sup> *White and Carter (Councils) Ltd v McGregor* [1962] AC 413, 444 (Lord Hodson).

<sup>36</sup> Carter et al, above n 6, 102, 103, 116.

<sup>37</sup> See footnote 6.

<sup>38</sup> Carter et al, above n 6, 116.

concerns of the repudiation doctrine.

In recent years Australian jurists have only engaged with this point of law on a few occasions. In the early 1990s Justice Priestley of the NSW Supreme Court<sup>39</sup> and Keith Mason QC exchanged views on the *White and Carter* scenario under Australian law. In a paper presented by Justice Priestley (subsequently published), his Honour contrasted the UK position with the position that prevails in the US. Priestley stated that the American approach is a credible alternative to *White and Carter* in Australia.<sup>40</sup> Speaking extra judicially, Priestley explained how in the US, the doctrine of election in this context has been removed and a duty to mitigate arises immediately upon notification of repudiation. Had the House of Lords in *White and Carter* been made aware of US authorities, Priestley argued, there may not have been a slim majority deciding the case in the way that it was ultimately decided.<sup>41</sup> *White and Carter* did not, by any means, initiate the controversy in this context. As noted by Limburg in *The Cornell Law Quarterly* over a century ago:<sup>42</sup>

No branch of commercial law presents greater difficulties to the practitioner than the determination of the rights and obligations of the parties where a contract has been repudiated before its time for performance has arrived.

The American and UK approaches on repudiation and continued performance have diverged. *White and Carter* represents the UK as well as the Australian position. The American position is discussed below.

Keith Mason QC took an alternative perspective on the *White and Carter* scenario. Mason examined the various legal avenues that may influence Australian law beyond the limitations represented by *White and Carter*.<sup>43</sup> At the

<sup>39</sup> Delivered leading decision in *Renard*.

<sup>40</sup> Lancelot John Priestley, 'Conduct after Breach: the Position of the Party not in Breach' (1991) 3 *JCL* 218, 231. His Honour points to the case of *Rockingham County v Luten Bridge Co* 35 F 2d 201 (1929) as the US equivalent to *White and Carter*. Rather than adopt US precedent directly, Priestley J suggests that the more desirable US position may be reached by means of articulating factual scenarios in terms of accepted common law concepts such as executed and executor obligations: 229-230 (what Mason politely termed 'mental gymnastics': 236). Interestingly, the doctrine of anticipatory breach, or anything similar to it, does not feature in all legal systems. French law, for example, does not (at least up to 1996) include any rule that can allow for contractual enforcement of a contract prior to its due date of performance: Simon Whittaker, 'How Does French Law Deal with Anticipatory Breach of Contract' (1996) 45(3) *International and Comparative Law Quarterly* 662.

<sup>41</sup> Priestley, *ibid*, 225.

<sup>42</sup> Herbert Limburg, 'Anticipatory Repudiation of Contracts' (1914) 10 *The Cornell Law Quarterly* 135, 135. See also Samuel Williston, 'Repudiation of Contracts' (1901) 14 *Harvard Law Review* 317.

<sup>43</sup> Keith Mason QC, 'Commentary on "Conduct after Breach: the Position of the Party not in Breach"' (1991) 3 *JCL* 232.

heart of Mason's approach was the (at the time) emerging equitable concept of 'unconscionability'. The argument presented was that the emergence and refinement of unconscionability may blunt the sharp invocation of contractual rights in *White and Carter* type situations.<sup>44</sup> Mason also noted that pursuing an equitable resolution to the *White and Carter* scenario may not in itself be an ideal path to take. Quoting McHugh JA, Mason argued that equitable doctrines are transforming contract law from 'determining whether a promise was made and broken to determining whether, if a promise was made, it should be enforced'.<sup>45</sup>

Many of the issues litigated under contract law, according to Mason, involved considerations of conduct that takes place after breach. Mason observed that even in this post-contractual<sup>46</sup> context equitable concepts are being recognised as limitations on the type of conduct permissible. On this basis Mason concluded<sup>47</sup>:

If restitutionary concepts operating under the broad rubric of unconscionability can modify the contractual rights and remedies of parties ... it seems a negligible further step to allow the idea of unjust enrichment to control the amount of damages recoverable in the *White and Carter* type of case.

Mason also pointed to subsequent applications of Lord Reid's 'legitimate interest' test in cases such as *The Alaskan Trader*<sup>48</sup> as examples of equitable principles informing the subtext of judicial outcomes. In that case, Lloyd J noted that in finding that the innocent party had no legitimate interest in continuing performance of the contract after it was repudiated<sup>49</sup>:

...what was happening was not the forcing of an innocent party to accept repudiation, but rather the refusal of the court on equitable grounds, to allow the innocent party to enforce his full contractual rights.

Recognising the applicability of equitable principles in the *White and Carter* context was only one of the conceptual approaches posited by Mason. Another approach discussed by Mason involved the concept of a 'penalty'.<sup>50</sup> The line of

<sup>44</sup> The idea that a notion of unconscionability might more properly underlay the limitations expressed in *White and Carter* was recognised nearly immediately after the decision was handed down by the House of Lords: See Nienaber, above n6, 215 (fn 12).

<sup>45</sup> Mason, above n 42, 232: quoting *Air Great Lakes Pty Ltd v Easter Pty Ltd* (1985) 2 NSWLR 309, 338 (McHugh JA).

<sup>46</sup> It is 'post-contractual' not in the sense that the contract has concluded or been terminated, but rather that the conduct of the parties will inevitably lead to the finalisation of the contract.

<sup>47</sup> Mason, above n 43, 234.

<sup>48</sup> [1983] 2 Lloyd's Rep 645.

<sup>49</sup> Mason, above n 43, 234

<sup>50</sup> *Ibid*, 236

reasoning along this path is that if the costs imposed by continued performance are deemed punitive by the courts, and the liability of the repudiating party is considered to go beyond mere compensation of losses caused by the breach of an obligation, continued performance may, on this narrow view, constitute the imposition of a penalty.<sup>51</sup>

Another creative suggestion more recently offered by Dr Qiao Liu in relation to the development of contract law in the context of anticipatory breach is the recognition of an ‘inference test’. Liu argues that repudiation can form the basis of an objectively ascertainable reasonable inference of future breach. Should such a reasonable inference be established to the requisite level of certainty, the contractual relationship would evolve and be treated akin to an ordinary or actual breach of contract.<sup>52</sup> One of the main advantages of Liu’s approach would be the public policy benefits of incentivising the prompt unwinding of capital investments by concluding contractual relations sooner rather than later. Under such an approach, actions for damages/debt by the innocent party would be permitted immediately and encouraged. The duty to mitigate losses might also arise immediately upon notification of repudiation (as with the US position) if the salient facts give rise to an inference capable of grounding future breach along the lines suggested by Liu.

The approach of aligning equitable principles with the *White and Carter* scenario goes back to the original decision of Lord Reid in that case. Prior to articulating his two qualifications, Lord Reid noted that the power of a superior court to impose a limitation on the ability of a party to assert their full legal rights arose from the equitable jurisdiction of the court.<sup>53</sup> Accordingly, he concluded, ‘some general equitable principle or element of public policy’<sup>54</sup>

<sup>51</sup> In the High Court case of *Andrews v ANZ* [2012] HCA 30 it was confirmed that even without being triggered by a breach, a term in a contract may still constitute a penalty clause. The argument that can be made here is that upon repudiation, an ordinary term may be transfigured into a penalty clause if it imposes excessive and unnecessary costs upon the repudiating party if it is subsequently performed. The fact that the non-repudiating party is not in breach of the contract squares with the ratio in *Andrews* in that breach is unnecessary for recognition of a penalty clause. If, however, in accordance with the traditional penalty doctrine, that term was to be deemed void, that might result in each party being granted the de facto power to unilaterally void elements of the contract by mere repudiation. Obviously that is unacceptable. It would be left, therefore, to the court in its equitable jurisdiction to estop the non-repudiating party from relying on the contract to justify performance that may result in greater and avoidable losses being imposed. See also, generally, See Garry Muir, ‘Stipulations for the Payment of Agreed Sums’ (1985) 10(3) *Sydney Law Review* 503.

<sup>52</sup> See Qiao Liu, ‘Inferring Future Breach: Towards A Unifying Test of Anticipatory Breach of Contract’ (2007) 66(3) *Cambridge Law Journal* 574, 574.

<sup>53</sup> Citing at 430: *Grahame v Magistrates of Kirkcaldy* (1882) 9 R (HL) 91, 92 (Lord Watson).

<sup>54</sup> *White and Carter (Councils) Ltd v McGregor* [1962] AC 413, 430-431 (Lord Hodson). See Carter et al, above n 6, for a more complete treatment of the argument that public policy ought to play a more significant role in determining the legitimacy of continued performance post-repudiation. On this point see also Nienaber, above n 6, 230-33.

operates to qualify the contractual rights of the innocent party when facing repudiation of a covenant. Equitable principles and public policy considerations buttressed the legitimate interest test from its inception. The perspective engendered by an examination of good faith in the *White and Carter* scenario does no more, therefore, than reveal those original ideals buried within Lord Reid's original decision.

Among all these alternative approaches, the concept of good faith has slowly and organically evolved from judicial decisions as the most appropriately adapted conceptual grounding informing expectations in circumstances involving repudiation and questions of continued performance.

### III GOOD FAITH UNDER AUSTRALIAN CONTRACT LAW

Good faith is a concept that has grown in prominence and importance in Australian contract law over the last two decades.<sup>55</sup> As noted by Victorian Chief Justice Warren, speaking extra-judicially, 'whole forests have been felled to produce judicial and academic writing on the meaning of good faith in contract law'.<sup>56</sup>

It was not until the 1992 NSW Court of Appeal decision in *Renard Constructions (MW) Pty Ltd v Minister for Public Works ('Renard')*<sup>57</sup> that the concept of an implied duty of good faith attracted direct judicial and academic attention in Australia.<sup>58</sup> Until *Renard*, there had only been tentative acceptance in Australian jurisprudence of an implied term of good faith.<sup>59</sup> In the US and Europe, by contrast, good faith has been part of the contract and commercial

<sup>55</sup> As a legal doctrine within the body of contract law, good faith has deep roots: See *Carter v Boehm* (1766) 97 ER 1162, 1164 (Lord Mansfield); *Mellish v Motteux* (1792) 170 ER 113, 113-4 (Lord Kenyon).

<sup>56</sup> See generally Marilyn Warren AC, Good Faith: Where Are We At? (2010) 34 *Melbourne University Law Review* 344, 345.

<sup>57</sup> (1992) 26 NSWLR 234. See also *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1.

<sup>58</sup> The concept of good faith itself was not unknown under Australian law prior to 1992. Good faith has featured in legislative provisions (see, for example, *Insurance contracts Act 1984 (Cth)* s13; *Bankruptcy Act 1966 (Cth)* ss120-4; *Corporations Act 2001 (Cth)* s181 (1); *Fair Trading Act 1999 (VIC)* ss32W and s32X; *Transfer of Lands Act 1958 (VIC)* ss77(1)), was recognised in relation to particular common law contexts (i.e. *uberrimae fidei* contracts such as insurance contracts) as well as being part of the DNA of certain equitable relationships such as fiduciary relationships: See Tyrone Carlin, 'The Rise (and fall?) of Implied Duties of Good Faith In Contractual Performance in Australia' (2002) 25 (1) *University of New South Wales Law Journal* 99, 100.

<sup>59</sup> *Burger King Corporation v Hungry Jack's Pty Limited* [2001] NSWCA 187, [146] (Sheller, Beazley and Stein JJA).

landscape for many years.<sup>60</sup>

The growth of good faith in Australia has been anything but steady and predictable. It has been variously described and being ‘a confused, ad hoc process’<sup>61</sup> and existing in a state of ‘utter confusion’<sup>62</sup>. A decade after *Renard* was decided, some commentators were even calling for a return to the pre-*Renard* days.<sup>63</sup>

One of the central criticisms levelled against the recognition and growth of good faith within the body of Australian contract law has been that, in practical terms, it adds little to the rules of contract.<sup>64</sup> As Kuehne points out, for example, an implied duty of good faith, in the performance of a contract, overlaps with the seminal common law requirement that contracting parties co-operate with each other to discharge their respective obligations.<sup>65</sup>

Like it or loathe it, good faith now has a firm foothold within Australian contract law.<sup>66</sup> Distilling developments down to a core set of identifiable trends, Carter and Pedan identified three developments that characterise the scope and nature of good faith under Australian law. These are<sup>67</sup>:

- i) In most contracts (perhaps all contracts) a requirement of good faith must be implied, at least in connection with termination pursuant to an express term of the contract, but perhaps more generally
- ii) Where it is present, the source of the implied requirement of good faith is an implied term of the contract
- iii) The implied requirement of good faith is satisfied by a party who has acted a) honestly; and b) reasonably.

Presently there has been no authoritative guidance from the High Court on the scope and meaning of a good faith obligation.<sup>68</sup> Although good faith continues

<sup>60</sup> See especially Elisabeth Peden, ‘Contractual Good faith: Can Australia Benefit from the American Experience?’ (2003) 15 (2) *Bond Law Review* 186. See also, *Renard Constructions (MW) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 263-4 (Priestley JA).

<sup>61</sup> See Carlin, above n 58, 101.

<sup>62</sup> J W Carter and Elisabeth Pedan, ‘Good faith in Australian Contract law’ (2004) 94 *Australian Construction Law Newsletter* 6, 6.

<sup>63</sup> See Carlin, above n 58, 101.

<sup>64</sup> See Geoffrey Kuehne, ‘Implied Obligations of Good Faith and the Reasonableness in the Performance of Contracts: Old Wine in New Bottle?’ (2006) 33 *University of Western Australia Law Review* 63, 72-73. See also *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* (1993) 117 ALR 393, 405-406 (Gummow J).

<sup>65</sup> Kuehne, *Ibid.* Along similar lines, Carter and Peden, above n 60, also argue that good faith is ‘inherent in all common law contract principle’ rather than a new novel stand-alone concept.

<sup>66</sup> See generally Warren, above n 56.

<sup>67</sup> Carter and Pedan, above n 62, 6.

<sup>68</sup> See *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45, [40] (Gleeson CJ, Gaudron, Gummow, McHugh and Hayne JJ), [156] (Callinan). See also

to evolve within Australian law, the case law has developed to such a level that it is clear that good faith has a credible foundation upon which criticisms of the *White and Carter* scenario can be satisfactorily addressed and remedied.

#### A Source of good faith

Good faith can become part of a contractual relationship in many different ways.

The most direct manner in which good faith can be inserted into a contract is by means of explicit inclusion as an express term of the contract.<sup>69</sup>

With contracts where the utmost honesty between parties is expected, such as insurance contracts, the implication of good faith is even enshrined in statute.<sup>70</sup>

Apart from statutory implication, good faith can be implied into a contract by the courts although there is divided opinion amongst jurists as to the way in which such implications arise.

The case of *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*<sup>71</sup> established the general principles dealing with the implication of terms into a contract. Based on the *BP Refinery* criteria, a term or duty of good faith will be implied into a contract if it is:

- 1) Reasonable and equitable
- 2) Necessary to give business efficacy to the contract, so that no term will be implied of the contract is effective without it;
- 3) So obvious that 'it goes without saying'
- 4) Capable of clear expression
- 5) Not contradict an express term of the contract.

In addition to the above criteria, two main perspectives have developed on exactly when an implied duty of good faith will be recognised.

The first perspective holds that good faith can be implied into a contract

*Strezelecki Holdings Pty Ltd v Cable Sands Pty Ltd* [2011] HCATrans 90 (Kiefel J). Although these issues were raised in this case, the High Court declined to tackle them head on because it was not necessary to do so in order to resolve the matters in dispute.

<sup>69</sup> *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1 (Kirby P, Waddell AJA and Handley JA (dissenting)); Cf *Breen v Williams* (1996) 186 CLR 71. In *Breen*, the High Court held that it was not a matter for the contracting parties to explicitly create fiduciary obligations between themselves. As an equitable doctrine, fiduciary obligations were, the court held, based on principle rather than assertions.

<sup>70</sup> In 2004, a total of 154 Commonwealth statutes used the term 'good faith': *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105, 129 (French J).

<sup>71</sup> (1997) 180 CLR 266, 283 (Lord Simon of Glaisdale).

based on the salient features bearing on that particular instrument.<sup>72</sup> According to this view, the implication of good faith is endogenous to that particular contract and springs from within its four corners based on what a judge perceives to be the actual intentions of the parties. The extension of this view is that not all contracts embody an implied duty of good faith. This type of implication is sometimes referred to as an ‘implication in fact’ or an ‘implication ad hoc’.<sup>73</sup>

The second perspective sees good faith as a general law implication applying equally to all contracts *of a particular kind* unless it is explicitly excluded by the parties.<sup>74</sup> This category of implications is referred to as ‘implication by law’ and operates on the basis of whether the term is reasonable and necessary for that category of contract.<sup>75</sup> As noted in *Breen v Williams* by Gaudron and McHugh JJ ‘the distinction between terms implied by law and terms implied by fact can tend in practice to “merge imperceptibly into each other”’.<sup>76</sup>

In summary, Australian courts have shown a willingness to imply a good faith obligation where contracting parties must negotiate, perform or otherwise exercise contractual rights. This implication can arise from several sources. Within the limits of the *BP Refinery* criteria, an implication of good faith can be made by the courts if such a conclusion would embody the actual intentions of the parties (‘implication ad hoc’ or ‘implication in fact’). Alternatively, if the contract falls into a class of contracts where it is reasonable and necessary for a good faith implication to be recognised, the courts will imply the good faith obligation on *that* basis rather than on the basis of the expressed or implied intentions of the contracting parties. This latter approach is known as implication by law.<sup>77</sup>

In relation to both implication by law and implication *ad hoc*, an implied

<sup>72</sup> *Renard Constructions (MW) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 255-256 (Priestley JA).

<sup>73</sup> The Hon Margaret Beazley AO and Myles Pulsford, ‘Good Faith in Contract’ (2013) *Australian Contract Law Reporter* (¶28-500 to ¶28-660).

<sup>74</sup> *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 448-449 (McHugh and Gummow JJ).

<sup>75</sup> *Burger King Corporation v Hungary Jack’s Pty Ltd* [2001] 69 NSWLR 558, [167] (Sheller, Beazley and Stein JJA).

<sup>76</sup> Quoting Glanville Williams, ‘Language and the Law – IV’ (1945) 61 *Law Quarterly Review* 384, 401. See also Carter and Harland, *Contract Law in Australia* (3<sup>rd</sup> ed., 1996) 203, 210-211: *Breen v Williams* (‘*Medical Records Access case*’) (1996) 186 CLR 71, [10] (Gaudron and McHugh JJ).

<sup>77</sup> In the Federal jurisdiction there is support for good faith to be implied in law and in fact. In New South Wales and South Australia the case law supports implication by law. Victorian and Tasmanian case law reflects greater support for the ‘implication in fact’ approach. The law in Western Australia and Queensland is unclear on this point: The Hon Margaret Beazley AO and Myles Pulsford, ‘Good Faith in Contract’ (2013) *Australian Contract Law Reporter* (¶28-500 to ¶28-660) at ¶28-640.

term requiring a party to act in good faith will not be recognised if it is inconsistent with an express term.<sup>78</sup>

### B Content of good faith obligations

Separate from the question concerning how a contractual duty of good faith might be implied or otherwise arise, is the question of what exact substantive content such a requirement may encompass.

As a starting point, a contractual term, particularly one that is sought to be implied, must be clear and not vague or uncertain.<sup>79</sup>

At the highest level of magnification, good faith represents a framework that seeks to temper the potential abrasiveness caused through a strict recognition, insistence and enforcement of contractual rights. The manner in which this broad outcome is achieved remains subject to debate. The case law in Australia, across several state jurisdictions, has seen a variety of approaches taken to articulating the content of the good faith requirement. Invariably, however, the central tenets of good faith revolve around the ideas of honesty and fairness. Upon this basis, a more specific set of core requirements has been stated by former Chief Justice Sir Anthony Mason as including<sup>80</sup>:

- i) An obligation on the parties to co-operate in achieving contractual objects (loyalty to the promise itself)
- ii) Compliance with honest standards of conduct; and
- iii) Compliance with the standards of conduct that are reasonable having regard to the interests of the parties.

‘Loyalty to the promise’ means that both parties to a contract will do all they can to ensure that the objects of the contract are realised. Put another way, the parties are not permitted to conduct their affairs in any particular way or undertake any actions that would prevent the intended benefit under the contract from accruing.<sup>81</sup>

<sup>78</sup> *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2012] NSWCA 184, [146] (Bathurst CJ). See also *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15.

<sup>79</sup> See generally *Raffles v Wichelhaus* (1864) 2 H & C 906.

<sup>80</sup> Anthony Mason AC, ‘Good Faith and Equitable Standards in Fair Dealing’ (2000) 116 *The Law Quarterly Review* 66, 69. These requirements were first noted in *Alcatel Australia v Scarcella* (1998) 44 NSWLR 349, 367 (Sheller JA) and *Burger King Corporation v Hungary Jack’s Pty Ltd* [2001] 69 NSWLR 558, 570 (Sheller JA, Beazley JA, Stein JA). The three elements identified by Sir Anthony have been described as being ‘consistent with Australian Authority’: *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268, [146] (Hodgson JA).

<sup>81</sup> Cf See Geoffrey Kuehne, ‘Implied Obligations of Good Faith and the Reasonableness in the Performance of Contracts: Old Wine in New Bottle?’ (2006) 33 *University of Western Australia Law Review* 63 – Kuehne argues that this is nothing new and that is a foundational common law rule of law.

The 'honesty' requirement applies to both the ends and means by which a contractual term is to be satisfied. The exercise of any rights or powers conferred under contractual terms must be exercised in a manner consistent with the exact powers and rights granted. That is, if contractual objectives specify means to achieve those objectives, honesty requires that both the ends and the means are satisfied. Achieving the contractual objectives deceptively by means of an alternative manner not stipulated in the contract would therefore upset the honesty requirement. In the case of *Sundararajah*, for example, Foster J concluded that where a contractual term creates a 'broad unqualified power' to terminate a contract for no reason, the requirement that a party act honestly cannot apply for there are no substantive criteria against which to measure the fidelity of the conduct.<sup>82</sup>

'Reasonableness' has been the subject of significant judicial discourse both aligning<sup>83</sup> and distinguishing<sup>84</sup> it from good faith. The concept of reasonableness is well known in the common law tradition. It is no surprise, therefore, that the ideal of reasonableness has been deeply entwined with good faith in Australia from as far back as the case of *Renard*. In *Renard*, Priestley JA noted that '[t]he kind of reasonableness' being discussed had 'much in common with the notion of good faith'.<sup>85</sup> Justice of Appeal Priestley further drew on the language of 'fair and reasonable' as being associated with the lack of good faith and unconscionability and noted a 'great deal of overlap in their content'.<sup>86</sup>

Sir Anthony Mason's three-part formulation, noted above, is constantly invoked in the majority of treatments relating to good faith in Australia. Other views that relate to the substantive content of a good faith contractual requirement have been less definitive than the views expressed in this formulation. The least specific of such views being that good faith is the absence

<sup>82</sup> *Sundararajah v Teachers Federation Health limited* [2011] FCA 1031, [70] (Forster J). See also *United Group Rail Services Limited v Rail Corporation* [2009] NSWSCA 177. In the *United* case the contract required the parties to negotiate in good faith to settle any disputes within 14 days after which the parties would submit to commercial mediation or arbitration.

<sup>83</sup> *Renard Constructions (MW) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Burger King Corporation v Hungary Jack's Pty Ltd* [2001] 69 NSWLR 558; *Sundararajah v Teachers Federation Health limited* [2011] FCA 1031; *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd (No 3)* [2010] WASCA 222.

<sup>84</sup> See Elisabeth Peden, 'The Meaning of Contractual Good faith' (2002) 22 *Australian Bar Review* 235, 242-3. J W Carter, *Contract Law in Australia* (6<sup>th</sup> ed. 2013) 29.

<sup>85</sup> *Renard Constructions (MW) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 263 (Priestley JA).

<sup>86</sup> 265. In *Burger King Corporation v Hungary Jack's Pty Ltd* [2001] 69 NSWLR 558, 570 (Sheller JA, Beazley JA, Stein JA) the Court of Appeal noted that 'Australian cases make no distinction of substance between the implied term of reasonableness and that of good faith'. See also *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268, [15] (Allsop P).

of bad faith - thus leaving the core content of good faith largely undefined.<sup>87</sup>

C *Will recognition of good faith in the White and Carter scenario cause instability?*

One of the main fears associated with good faith is that it is seen as a flexible and unknown entity capable of unsettling and undermining the certainty of contracts.<sup>88</sup> The lack of High Court guidance on good faith has led some critics to view the doctrine as problematic. A contractual obligation that is undefined, it is argued, can only destabilise and promote uncertainty in a legal context built on certainty and predictability. As noted by Warren CJ in the *Esso* case<sup>89</sup>:

The modern law of contract has developed on the premise of achieving certainty in commerce. If good faith is not readily capable of definition then that certainty is undermined.

Justice Margaret Beazley recently undertook a comprehensive examination of good faith under Australian contract law.<sup>90</sup> In addressing this central concern relating to the promotion of uncertainty, Beazley J has noted that good faith in Australia has evolved in a way whereby it is anything but a ‘free radical’.<sup>91</sup> Examining how good faith has featured in Australian case law, her Honour argued:

The meaning of good faith in contract has always been considered having regard to the terms of the contract. In *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268, Allsop P (as his Honour then was) said, at [70], that “[t]he phrase ‘good faith’ ... takes its content from the particular contract and context in which it is found”: at [9]. See also *United Group Rail Services Ltd v Rail Corporation New South Wales* [2009] NSWCA 177; 74 NSWLR 618. Hodgson JA (Macfarlane JA agreeing) commented to the same effect, at [137]: “The promise of ... good faith must be construed having regard to the terms of the contract and the circumstances known to the parties in which it was entered into.”

Justice Beazley’s methodical evaluation of good faith concluded that the fear that good faith represents an unpredictable and destabilising development in

<sup>87</sup> See *Garry Rogers Motors Aust Pty Ltd v Subaru (Aust) Pty Ltd* [1999] FCA 903, [37] (Finkelstein J); *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* [2005] FCA 288, [65] (Finkelstein J).

<sup>88</sup> See Tyrone Carlin, above n 57 (Australian context); See also David James, ‘Why a Common Law Duty of Contractual Good Faith is not required’ (2002) 8 *Canterbury Law Review* 529 (New Zealand context).

<sup>89</sup> *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* (‘*Esso*’) [2005] VSCA 228.

<sup>90</sup> The Hon Margaret Beazley AO and Myles Pulsford, ‘Good Faith in Contract’ (2013) *Australian Contract Law Reporter* (¶28-500 to ¶28-660), ¶28-620.

<sup>91</sup> *Ibid.*

the body of contract law is over stated.<sup>92</sup> It was observed that good faith exists within the bounds of the contract to which it applies and it would thus be wrong to perceive good faith as an external insensitive force that is blind to the exigencies of each contractual transaction.

In the context of pre-contractual relations, and even conduct connected with performing the contract, concerns focused on instability and uncertainty may carry weight. In the context of repudiation, however, the contract is in its terminal stages and the law is dealing with what one may term 'post-contractual relations'. In the realm of post-contractual relations the certainty of the contract has already been undermined by the repudiation of one of the parties. Imposing a good faith obligation in this phase of the contractual lifecycle has no impact whatsoever on enhancing or otherwise undermining the certainty of a given contract. Good faith, therefore, is arguably better suited to promote reasoned and fair outcomes in the *White and Carter* scenario than in any other contractual context where good faith may apply.

#### IV GOOD FAITH (AND ITS ALTERNATIVES) IN THE *WHITE AND CARTER* CONTEXT

In recent years the marriage of good faith with the *White and Carter* scenario has gained some support in the Australian discourse. It was most strongly foreshadowed by Carter, Phang and Phang in 1999, although at that early stage the learned authors perceived good faith not yet ready (or widely accepted enough) to address the complications associated with repudiation, continued performance and mitigation:<sup>93</sup>

...there is the idea that the law should promote good faith between contracting parties. Although there are signs that the law is indeed moving in this direction (footnote omitted), there is little support at present for a general requirement that parties act in good faith when exercising common law rights...[s]ince a hallmark of good faith as a concept is the need to have regard to the interests of the other party (footnote omitted), in our view this is a statement that good faith governs the decision whether or not to continue with performance, and gives content to the legitimate interest qualification.

More recently, Baron and Freilich reopened the *White and Carter* conversation in Australia by contrasting the facts in that case with those in a more recent (and colourful) case.<sup>94</sup> Rather than involving rubbish bins as had the original case, the case examined involved a young woman, Ms Stratton, who had won

<sup>92</sup> *Ibid.*

<sup>93</sup> Carter et al, above n 6, 118.

<sup>94</sup> Paula Baron and Aviva Freilich, 'Of Rubbish Bins and Beauty Queens: Independent Obligations in Contract' (2005) 32 *University of Western Australia Law Review* 194.

the Miss World Australia beauty pageant in October 2003. After the financial backers of the pageant withdrew their support, the pageant organisers informed Ms Stratton that she would not receive the \$250 000 prize money and they would not reimburse her for any expenses she incurs fulfilling her charitable and other obligations associated with her tenure as the title holder. Ms Stratton subsequently competed in the corresponding international contest in China (incurring expenses) as well as maintaining her own itinerary and charitable engagements throughout the year of her reign.<sup>95</sup> This case re-aroused interest in the *White and Carter* scenario. After reflecting on the *White and Carter* approach in a modern Australian legal context, Baron and Freilich concluded that although:<sup>96</sup>

*White and Carter*...[is]... a logical extension of contractual principles, [it] 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.

Good faith is not the only proposed conceptual solution to the potentially ‘anomalous’<sup>97</sup> outcomes justified upon the reasoning in *White and Carter*. Several other, less well suited, approaches have appeared in the literature. Two of the most prominent alternative arguments are based upon the equitable doctrine of unconscionability and the broader economic perspectives associated with public policy considerations.

The doctrines of equity are capable of blunting the sharp consequences associated with the application of black letter law. As explained below, however, the peculiar factual circumstances of the *White and Carter* scenario prevent equity from completely squaring with the requirements involved in seeking equitable redress.

Public policy considerations focus mainly on limiting or controlling the potentially wasteful actions of the non-repudiating party. A pure public policy approach is essentially utilitarian. It improperly discounts the legality of continued performance and subjugates the immediate rights of a faithful contracting party to the economically desirable outcomes of the group. Although public policy considerations are undoubtedly an important ingredient in the analytical mix, public policy alone is insufficient as a basis for determining when continued performance is justified.

Good faith is left as the only viable doctrine capable of balancing competing interests and transparently justifying judicial outcomes.

<sup>95</sup> Ibid, 194-5.

<sup>96</sup> Ibid, 195.

<sup>97</sup> Ibid, 194.

### A *Equitable doctrines*

The doctrines of equity prevent the abuse of power or unfair exploitation of the weaker or more vulnerable party in a transaction. Equitable doctrines such as unconscionability, estoppel, fiduciary obligations and relief against forfeiture provide a basis for limiting the ability of a contracting party to fully assert their contractual rights when doing so would unreasonably harm the counterparty.

Equitable doctrines do not sit well with the *White and Carter* scenario. For starters, the vulnerable party is the party in repudiation of the contract. They are the party who is exposed to potential losses dependant on the actions of the non-repudiating party. The potentially 'harmful conduct' to which this party may be subject is no more than the continued performance of the contract (they themselves have rejected) according to its terms. For ordinary performance of the contract to be curtailed on the basis of equitable doctrines, all surrounding circumstances must evolve to render performance obviously unfair and decidedly harmful or otherwise explicitly contrary to the spirit of equity.

It should always be remembered that the repudiating party has put themselves in this vulnerable situation by repudiating the contract in the first place. Given the adage: 'parties must come to equity with clean hands' it is unlikely that the doctrine of unconscionability would easily apply in the *White and Carter* scenario.<sup>98</sup> The dereliction or rejection of contractual obligations taints the repudiating party and thus makes it extremely difficult, although not necessarily impossible, for them to seek equitable relief.

### B *Public policy*

An additional perspective on the legitimate interest qualification is that this particular rule of contract law ought to incorporate, to a greater degree, an explicit evaluation of public policy considerations.

Drawing upon the Singaporean experience, Carter, Phang and Phang argue that one of the unacknowledged but main underlying reasons informing the legitimate interest qualification was the preservation of scarce resources.<sup>99</sup> The economic basis of this argument is that the wider community and broader economy have an interest in preventing a contracting party from wasting scarce resources associated with continued performance of a contract when an equally beneficial alternative is available. This argument does not mean that 'individual rights should be arbitrarily over ridden'<sup>100</sup> in favour of collective ends. Rather this perspective is intended to balance the considerations at play in that 'as the

<sup>98</sup> See Zechariah Chafee Jr., 'Coming into Equity with Clean Hands' (1949) 47(7) *Michigan Law Review* 877.

<sup>99</sup> Carter et al, above n 6.

<sup>100</sup> Carter et al, above n 6, 100.

law currently stands (as expressed in the majority decision *White and Carter*), far too little consideration has been accorded to the community interest...'.<sup>101</sup>

The public policy perspective, with its collectivist thrust, might be understood as flowing counter to the sentiments captured by the doctrine of good faith and its individualistic focus. Carter, Phang and Phang reconcile these competing currents by aligning the promotion of good faith with the common good. They argue that 'logically, any policy objectives must involve a concern to control the conduct which is unconscionable, [and] to promote *good faith* in performance'.<sup>102</sup>

Good faith and public policy goals, therefore, need not be opposing forces with one focused on individual concerns and the other upon collective needs.

A party who is acting honestly and fairly in determining whether they ought to continue performance of a repudiated contract is also acting 'reasonably'.<sup>103</sup> They are deciding what their future course of action might be based upon an evaluation of surrounding circumstances and their own determination of what their own best interest is at that particular moment in time. *It is the element of reasonableness that sensitises and aligns the individual actions of contracting parties with more objective standards of conduct.*

A recognition of public policy perspectives within the 'reasonableness' element of the doctrine of good faith strengthens and enhances the ability of the doctrine of good faith to promote transparency in the judicial decision making process. Public policy is an important concern that is relevant to the satisfactory resolution of the dilemmas arising from the *White and Carter* scenario. Obviously public policy alone cannot be the sole basis upon which the continued performance of a contracting party can be measured. Public policy, as a basis for judicial consideration, can (and should), however, be incorporated into an analysis of *White and Carter* type circumstances, but only alongside other criteria that pays greater deference to the circumstances of the parties in dispute.

### C *The limits of the 'legitimate interest' test*

The most recent cases decided by the House of Lords where the legitimate interest test was applied saw remarkably minimal development in its clarification.<sup>104</sup> For years judges have tried to find some substantive content in

<sup>101</sup> Ibid.

<sup>102</sup> Ibid, 108.

<sup>103</sup> In the context of an implied duty of good faith, the consideration of whether a term is 'reasonable' is raised at the most preliminary stages through the initial *BP Refinery* criteria associated with the recognition of implied terms generally.

<sup>104</sup> *Isabella Shipowners SA v Shangang Shipping Co Ltd (The Aquafaith)* (2012) 2 All ER (Comm) 461. In *The Aquafaith Case* Cooke J concluded that the plaintiff would have a legitimate interest in completing performance post-repudiation unless their conduct was 'wholly unreasonable' (quoting *The Odenfeld* (1978) 2 Lloyd's Rep 357, 374 (Kerr J)).

order to inform the requirements of what may constitute a legitimate interest. All that has been accomplished, however, is the compilation of a wider vernacular about when continued performance will be unacceptable.<sup>105</sup> Professor Carter is therefore correct in observing '[t]o the extent the focus is on the conduct of the plaintiff, the case seems to involve a good faith inquiry'.<sup>106</sup>

The legitimate interest test is limited<sup>107</sup> - particularly when compared to the doctrine of good faith where a wide range of perspectives can be incorporated into the legal analysis.

Recent Australian case law confirms that the evaluation of 'legitimate interests' has become a vital part of the standards of good faith and its associated elements. What this means for the *White and Carter* scenario is that Lord Reid's legitimate interest qualification need not be dropped and replaced wholesale as it may still apply but only as a constituent part of a broader good faith tapestry. In the case of *Strzelecki Holdings*, for example, Murphy JA noted that when examining the third 'reasonableness' element making up the prevailing tripartite definition of good faith, 'The reference to the interest of the parties...is to be understood as the 'legitimate' interest of the party'.<sup>108</sup> The same language was used by Hodgson JA in the *Macquarie Health* case in the context of defining good faith:<sup>109</sup>

A contractual obligation of good faith does not require a party to act in the interests of the other party or to subordinate its own legitimate interest to the interests of the other party; although it does require it to have due regard to the legitimate interests of both parties

Requiring due regard to the legitimate interest of both parties is, however, a step beyond the understood *White and Carter* position where only the legitimate interests of the non-repudiating party are to be considered in relation to continued performance.

In order to illustrate the limitations of the legitimate interest test we can consider, in an objective sense, some general situations where a party may be understood to have a legitimate interest in continued performance of a repudiated contract.

<sup>105</sup> Some of the expressions the Courts have identified when examining whether a non-repudiating party may continue performance of the contract include: 'Perverse', 'Beyond the pale', 'beyond all reason', 'ought, in all reason, to accept repudiation', 'extremely unreasonable' and simply 'unreasonable': *Isabella Shipowners SA v Shangang Shipping Co Ltd* (The Aquafaith) (2012) 2 All ER (Comm) 461, [44].

<sup>106</sup> J W Carter, 'White and Carter v McGregor - How unreasonable?' (2012) 128 *Law Quarterly Review* 490, 492.

<sup>107</sup> See Carter et al, above n 6, 108-116.

<sup>108</sup> *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd* [2010] WASCA 222, [92] (Murphy J).

<sup>109</sup> *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268, [146]-[147] (Hodgson JA); See also *Sundararajah v Teachers Federation Health limited* [2011] FCA 1031, [68] (Foster J).

i. Pecuniary considerations:

If continued performance is financially beneficial to the non-repudiating party (compared with accepting repudiation and pursuing anticipatory breach) then continued performance is clearly justified. Pecuniary considerations can also delegitimise continued performance. For example, if continued performance is neither financially more beneficial than accepting repudiation - and may in fact even stand as detrimental to the financial interests of the non-repudiating party, continued performance cannot be justified on the basis of the non-repudiating party pursuing their 'legitimate interest'. Although we must also consider whether there are any non-pecuniary factors that might justify continued performance.

ii. Non-pecuniary considerations:

Factors other than financial or material gain are also important in determining whether the non-repudiating party is pursuing their legitimate interest. Reputational considerations might encourage a non-repudiating party to continue performance of their obligations. For example, if a consultant is contracted to compile a report and as part of this project conducts interviews with several high profile industry figures; the non-publication of the report might harm the reputation of the consultant in the eyes of those influential industry players who gave up their time for the specific purpose of contributing to a report they expect to be published. In order to maintain a reputation as someone who 'finishes what they start' or 'follows through on their word', continued performance may be justified on non-pecuniary grounds and be seen as the pursuit of a 'legitimate interest'.

Beyond this two-dimensional pecuniary and non-pecuniary divide, it is difficult to imagine and articulate within the bounds the expression 'legitimate interest' how other relevant factors such as honesty might apply. Considerations such as honesty and public policy do not comfortably align with the legitimate interest test as it stands but must be deliberately read into the subtext of any analysis.

Conduct that is conceived and indeed intended to be deliberately harmful to the interests of the repudiating party would be the benchmark for when continued performance is not justified.

What if, hypothetically, the conduct of the non-repudiating party is at the same time deliberately harmful yet also seemingly consistent with the pursuit of their own legitimate interest?<sup>110</sup> In such circumstances, the underlying

<sup>110</sup> For example, the consultant discussed in the above example expending money in order to meet in person the high profile interviewees and explains to them face-to-face that they cannot

intentions animating continued performance are not discernible in any one singular sense. The only conceptual way forward from this position is to examine the detriment to the repudiating party and set it off against the benefit derived by the non-repudiating party. More objective considerations regarding economically wasteful conduct and social benefit (as discussed by Carter, Phang and Phang) are even more difficult to draw into the limited two dimensional discursive dichotomy of this 'legitimate interest' discussion.

The elements that make up the doctrine of good faith provide greater depth and sophistication than the legitimate interest test in being able to examine the varied considerations aroused by the *White and Carter* scenario.

#### D How good faith might apply

If the doctrine of good faith were to apply in the *White and Carter* context, there is the initial question of determining the source of the obligation.

Good faith is not a free-floating rule of law that applies to all contracts by default.<sup>111</sup> Good faith must either be explicitly included in the terms of a contract or otherwise implied by statute or the courts (see Part III A above).

If good faith applies to a contract, there is no reason why that requirement would cease upon repudiation by one of the parties. As already established above, an unaccepted repudiation and an election to continue performance does nothing to change the status of the underlying contract. The non-repudiating party remains bound by all the terms of the contract including the good faith obligation.

On a conceptual level, difficulties may arise in relation to contracts where the courts are not willing to imply a good faith obligation. Requiring a non-repudiating party to suddenly abide by the doctrine of good faith in the continued performance of the contract (post repudiation) is anomalous; particularly in circumstances where the original contract did not expressly or implicitly contain such a requirement. The lack of an explicit or implicit duty of good faith, however, need not be an insurmountable obstacle for these types of contracts.

Currently, under the *White and Carter* regime, a party is only permitted to continue performance of a repudiated contract if it is in their legitimate interest to do so. Recognising a good faith standard in this context ought not to be seen

publish the report. The non-repudiating party (the consultant) has a legitimate interest in maintaining important relationships and extending professional courtesy. Apart from imposing additional costs on the repudiating party (travel expenses); such meetings might likely also magnify the loss of face of the repudiating party in the eyes of these industry heavy weights.

<sup>111</sup> Unlike the US, in Australia there is also no free-standing tortious good-faith liability: *CGU Workers Compensation (NSW) Limited v Carlos Garcia* [2007] NSWCA 193; Cf Nicholas Seddon and Manfred Ellinghaus, *Cheshire & Fifoot's Law of Contracts* (8<sup>th</sup> ed., 2002), 430-431.

as jettisoning the legitimate interest approach wholesale- only broadening it. As discussed above (see part IV C) considerations of the legitimate interests of one (or both of) the parties is already a core component of the good faith analysis. Applying a standard of good faith in the *White and Carter* context, therefore, is a conservative suggestion regarding the direction of legal development on this point of law.

#### E *Applying the elements of good faith to the White and Carter scenario*

Considerations such as ‘loyalty to promise’, ‘honesty’ and ‘reasonableness in the circumstances’ are all understood to be encapsulated in the legal test of good faith. The main practical question to be asked is how these concepts might apply in the *White and Carter* scenario and how can they improve the related legal analysis? Rather than examining how these three considerations might apply to a hypothetical scenario, it is more fruitful and illustrative to explore these elements in the context of *White and Carter* itself.

The first element of ‘loyalty to promise’ requires that both parties by implication agree ‘to do all things that are necessary...to enable the other party to have the benefit of the contract’.<sup>112</sup> In a general sense this would mean that a non-repudiating party that elects to continue performance of the contract after being informed of the repudiation must perform their part of the contract to the best of their ability. The continued performance cannot be sub-standard and merely ‘going through the motions’. Continued performance is to be held to the same standard as would have been the ordinary performance in circumstances where the contract was still on foot. The non-repudiating party must discharge all of their obligations to the same level of quality and fidelity such that their counterparty would receive all of the benefits under the contract. Failure to do so would demonstrate a lack of loyalty to the initial promise therefore undermining good faith and limiting the ability of the non-repudiating party to justify their continued performance.

In the factual context of the case of *White and Carter*, the advertising contactors (*White and Carter (Councils) Ltd*) would be expected to roll out McGregor’s unwanted advertising in a manner that meets all the quality standards characteristic of such advertising campaigns in the past. McGregor should not be ‘sold-short’ in the performance of this contract on the basis that prior to performance they renounced the contract.

The second ‘honesty’ element of the doctrine of good faith is perhaps the most important part. As noted by Foster J in the case of *Sundarajah*, ‘[t]he essence of the good faith requirement is honesty’.<sup>113</sup> Honesty in the context of good faith requires that the purpose inspiring the parties to deal with each

<sup>112</sup> *Butt v MacDonald* (1896) 7 QJLJ 68, 70-71 (Griffith CJ).

<sup>113</sup> At [68].

other is transparent and they are not deceiving the other party as to their intentions.<sup>114</sup> The means and the ends of the contractual relationship are clearly known to the other contracting party. The case of *Strezelecki* involved an express good faith requirement contained in a memorandum of understanding (MOU) regarding the negotiations for a contract pertaining to the sale of land. In that context, negotiating with no intention to enter the main contract and only in order to waste the time of the other party would be considered dishonest and therefore lacking in good faith. *Strezelecki*, however, is a pre-contractual situation whereas the *White and Carter* situation involves post-contractual behaviour.

On the facts of *White and Carter*, the element of honesty would apply upon the conduct of the advertising agent post-repudiation. In order to satisfy the honesty requirement, the election of the advertising agent to continue performance would have to be motivated by the original intentions associated with creating the contract (presumably generating profit from advertising operations). If that original purpose for entering and performing the contract with McGregor ceases to be the reason for the continued performance, the conduct would be dishonest, lacking good faith and therefore unjustified.

There are some readily conceivable circumstances where the conduct of White and Carter (Councils) Ltd might be considered dishonest. For example if they rolled out the unwanted advertising campaign at the behest of a rival garage for the purpose of distracting or complicating McGregor's operations, that would be dishonest. If White and Carter (Councils) Ltd saw this opportunity as a chance to get rid of some material inventory and avoid losses by producing some less than stellar advertising that might also be dishonest.<sup>115</sup> Indeed any intention motivating White and Carter (Councils) Ltd to continue performance that is contrary to the original reason for entering the contract would, according to the prevailing legal understanding of 'honesty' in this context, be dishonest.

The final and most controversial<sup>116</sup> element in relation to the doctrine of good faith is 'reasonableness'. The addition of reasonableness as a separate category constituting good faith has evoked some criticism on the basis that it brings nothing new or unique to the analytical table.<sup>117</sup> In the *White and Carter* scenario the concept of reasonableness seems to play a pragmatic and

<sup>114</sup> *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd* [2010] WASCA 222, [47] (Pullin JA, Newnes JA agreeing).

<sup>115</sup> If the use of inventory material meant that the advertising campaign looked shabby or sub-standard that might also see White and Carter (Councils) Ltd failing to exhibit 'loyalty to the promise'.

<sup>116</sup> See Elizabeth Pedan, "The Meaning of Contractual 'Good Faith'" (2002) 22 *Australian Bar Review* 235, 242.

<sup>117</sup> J W Carter, *Contract Law in Australia* (6<sup>th</sup> ed., 2013) 29.

grounding role. As noted by Carter, Phang and Phang<sup>118</sup>:

...although the conceptions of the concept of 'reasonableness' in both the policy of avoiding waste as well as the doctrine of mitigation of damages may differ, there is an overlap as well; the concept of 'reasonableness' straddles...a spectrum of both factual and legal contexts – and contains an astonishing datum core that must surely be considered as *objective* in nature.

In an objective sense, therefore, to act *unreasonably* in the face of repudiation means that a party would engage in conduct that no reasonable person presented with the same circumstances would engage in. Reasonable conduct would not be profligate or unnecessarily wasteful. If a less wasteful but equally beneficial course of action is available to the non-repudiating party, an objective standard of reasonableness dictates that the less wasteful course is pursued.

Reasonableness thus becomes the vehicle through which public policy and broader economic considerations can be incorporated into the *White and Carter* analysis when subjected to a good faith standard.

In the factual context of the case of *White and Carter*, it would have been unreasonable for the advertising company to continue performance of the contract if alternative arrangements with another client could have been made. If the advertising materials had already been produced but not yet installed on the rubbish bins and McGregor had offered to pay the expected profit margin pursuant to the original contract price, it would be unreasonable for White and Carter (Councils) Ltd to refuse that offer.<sup>119</sup> If White and Carter (Councils) Ltd reject this offer and proceed with the advertising campaign (knowing it would be immediately pulled from the market) and demand that McGregor pay the full contract price of all materials produced and the costs associated with their removal, that would be wasteful and therefore unreasonable, lacking in good faith and unjustifiable.

In what circumstances, therefore, would unwanted performance *not* be wasted or wasteful? In a general sense continued performance would not be wasted if no other equally beneficial alternative course was open to the non-repudiating party. Although assessments of what is wasteful might consider the circumstances of both parties, it is the circumstances of the non-repudiating party that would have to carry more weight given that it is they who have been wronged.

<sup>118</sup> Carter et al, above n 6, 124.

<sup>119</sup> If McGregor did not want the advertising to proceed on the basis that it contained information that was no longer valid (i.e. a special car service price that had become uneconomical to offer), the amount paid by McGregor in lieu of the forgone profits would still amount to a lesser sum than all the costs associated with taking down or replacing the unwanted advertising.

Whether wastefulness is present in the unwanted advertising campaign promulgated by White and Carter (Councils) Ltd depends on the facts of the case. In particular whether the advertising materials had been produced by White and Carter (Councils) Ltd at the time they were informed of McGregor's repudiation. If the advertising materials had already been produced, then continued performance may indeed be the less wasteful course of action compared to destroying the materials without them having ever seen the light of day. There is also the issue of whether the materials, if displayed, would have to be removed immediately upon the direction of McGregor. This would also play into any calculation of which course of action is more wasteful.

The actual contract was signed on 26 June 1957 and constituted a renewal of a similar arrangement in place since 1954. It would not be inconceivable that the advertising materials may have been pre-prepared in anticipation of a renewal of arrangements. The fact, however, that the advertising started on 2 November 1957 when the contract was signed some five months earlier (and repudiated on the same day) indicates that no materials had yet been produced. The summary of facts appearing in the case header also confirms that after June 1957 White and Carter (Councils) Ltd proceeded with the 'preparation of the plates' that were to be displayed. The facts indicate that White and Carter (Councils) Ltd acted in an unreasonable manner by generating unwanted advertising materials when suing upon the debt was equally advantageous and an available course of action to pursue.

Applying the elements of good faith to the *White and Carter* scenario produces an outcome that is contrary to that of the House of Lords majority in the original 1964 case. Based on the doctrine of good faith, the conduct of the advertising agent - White and Carter (Councils) Ltd - might be loyal to the promise (if the advertising were of appropriate quality). It may also satisfy the element of honesty if continued performance was motivated by the same initial reasons for entering the contract. Although in the context of the reasonableness requirement, it is most probable that the advertising produced was unwanted, unnecessarily wasteful and therefore unreasonable. White and Carter (Councils) Ltd could have pursued anticipatory breach and sued upon the debt. Under today's law White and Carter (Councils) Ltd may have also obtained reliance or expectation losses based on the *Amann Aviation*<sup>120</sup> principle.

## V CONCLUSION

To the extent that this article crystallises the consensus of academic and judicial

<sup>120</sup> *Commonwealth of Australia v Amann Aviation Pty Ltd* (1992) 174 CLR 64; The distinction between an action for debt and an action for damages is important when considering the rules of mitigation. Mitigation will offset the award of compensatory damages for loss; whereas with an action for debt the applicability of mitigation is less clear. To allow this point to be muddled is to allow 'form to triumph over substance': Carter et al, above n 6, 120.

opinion on the legitimate interest test, it makes a modest contribution to the literature. Sometimes it is important to call a spade a spade. For too long the law has continued, some would say by mere inertia, upon the unsatisfactory path laid down by the Majority in *White and Carter*. Non repudiating parties can continue performance if it is in their legitimate interests financial or otherwise. The opaqueness of this test is troubling. By contrast the elements of good faith shed some much needed light on the factors and framework needed to better discern when continued performance is justified. Failure to acknowledge or engage with the elements of good faith renders any legal analysis worth its while, with respect, decidedly sub-optimal in relation to what a mature transparent legal system should expect.

The legitimate interest test has been variously criticised for being too one-dimensional and lacking the requisite conceptual breadth or versatility required for addressing the competing interests raised by the *White and Carter* scenario.<sup>121</sup> The clandestine nature of judicial reasoning and the hidden assumptions underpinning final judicial outcomes render the legitimate interest test a poor-quality rule of law. The expression 'legitimate interest' straddles a fault line of competing considerations; but rather than revealing and relieving those tensions, the words 'legitimate interest' conceal and cover over those conflicting forces.

Although the doctrine of good faith has been subject to some minor criticisms, over the past two decades those criticisms have proved unfounded or overstated. In the context of post-contractual relations, the main criticism - that good-faith breed's contractual uncertainty - is a moot point given that the certainty of the contract has already been shattered by the other party when they unilaterally chose to repudiate the contract.

In the post-repudiation-pre-termination context, the doctrine of good faith and its constituent elements provides a well suited and useful conceptual tool that legal scholars already acknowledge as suitable or in the least explains the latent approach of the court. Australian judges would be well-advised also recognising, embracing and employing this perspective.

<sup>121</sup> See above, note n 6.