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ABSTRACTS

Authors of articles (but not notes) are required to prepare an abstract of no longer than 200 words. The abstract should summarise rather than introduce the argument of the article, and should contain appropriate key words.

CONSTITUTIONALISM, GOOD FAITH AND THE DOCTRINE OF SPECIFIC PERFORMANCE: RIGHTS, DUTIES AND EQUITABLE DISCRETION

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This article will explore the European roots of the doctrine of specific performance and the influence of transformative constitutionalism on these in recent times. The question whether specific performance is available as of right (as in the civil law), or only subject to judicial discretion (as in the common law), will be investigated. The demonstrated impact of constitutional rights on contract law in the mixed system of South Africa will be contrasted with developments in English and Australian contract law, where the common-law rules are more deeply entrenched and the potential scope for human rights-based development of these is arguably smaller, though still important. The article will argue, using comparative rules on specific performance as an example, that the concept of a duty of good faith or contractual fairness is likely to play a greater role in future in all three of the countries under consideration, reducing the common/civil/mixed legal systems divide.

I INTRODUCTION

The interplay between constitutional law and contract law presents a fascinating study in judicial ‘modernising’ of law, and its efforts to transform society into a more just and caring construct. These developments have counterparts in leading Western legal systems around the world.¹ Of course, notions of good faith or equity are nothing new in contract law and are inherent in the notion of justice.² ‘Fairness’, or ‘good faith’ has a role to play at the remedial stage of contracting as well. Indeed, the link between good faith and specific performance has been explored by others, with regard to

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¹ The impact of human rights law on common-law systems, particularly English and Australian law, will be considered below in part III. There will also be a brief analysis of the mixed South African jurisdiction in that part. For a more general survey, which includes civil law countries, see Chantal Mak *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (2008); Stefan Grundmann *Constitutional Values and European Contract Law* (2008).

² A good comparative survey of the historical development of contractual good faith in both the common and civil law is given in Simon Whittaker & Reinhard Zimmermann ‘Good faith in European contract law: Surveying the legal landscape’ in Reinhard Zimmermann & Simon Whittaker (eds) *Good Faith in European Contract Law* (2000) 7.

both the civil and common law,³ as well as with reference to the ‘mixed’ South African jurisdiction.⁴

The primary focus of this article will be on the doctrine of specific performance, focusing on the development of this remedy in the English common law, as well as in two systems which have been influenced by the English conception of the doctrine, namely Australian law and, more tenuously, South African law.⁵ This three-way study was chosen due to the fact not only that it highlights from an historical point of view the connections between the laws of contract of these three distinct jurisdictions, but also because it emphasises the current divergences between these systems, based on the rise to prominence of differing human rights (‘HR’) regimes in all three countries. This means that these various laws of contract must now be reinterpreted in the light of HR, or at least, that this is the case in South Africa and the United Kingdom.⁶ Australia, as shall be demonstrated below, has no justiciable Bill of Rights, yet it is developing its own particular brand of HR-inspired contract law.⁷

The problem with the laws of all three countries in question is that there is only a very limited role played by open norms such as good faith, and which can be used to transform contract law to reflect constitutional values. These open norms place duties on contracting parties to ensure a certain level of respect for the legitimate interests of one’s opposing contracting party, as well as providing an avenue for the modernisation and development of contract law to reflect current needs.⁸ In the English common law good faith plays a minimal role in contract law, relegated largely to specific forms of contract,

³ See for example Daniel Friedmann ‘Good faith and remedies for breach of contract’ in Jack Beatson & Daniel Friedmann (eds) *Good Faith and Fault in Contract Law* (1995) 399. G H Treitel *Remedies for Breach of Contract: A Comparative Account* (1988) notes at 47 with regard to both common- and civil-law systems that specific enforcement may be limited as a remedy where it would impact on the personal freedom of the debtor, or cause undue hardship to him in a way that an award of damages would not, particularly if the mitigation rule were to be applied. See also *ibid* at 66.

⁴ Gerhard Lubbe ‘Contractual derogation and the discretion to refuse an order for specific performance’ in Graham Glover (ed) *Essays in Honour of AJ Kerr* (2006) 77.

⁵ See the discussion of the development of the doctrine of specific performance in part II below.

⁶ Section 2 of the Constitution of the Republic of South Africa, 1996, states that ‘[t]he Constitution is the supreme law of the Republic’. See further for the impact of the Bill of Rights on the South African law of contract: Iain Currie & Johan de Waal *The Bill of Rights Handbook* 6 ed (2013) 60–3. The United Kingdom remains a parliamentary sovereign state and the Human Rights Act, 1998 has only the status of ordinary legislation, yet there is an emerging body of case law reinterpreting English contract law in the light of human rights. See generally Mak *op cit* note 1 at 22–5 and 135–43.

⁷ See part III below.

⁸ See generally Whittaker & Zimmermann *op cit* note 2.

such as insurance.⁹ Australia seems to be diverging from this starting point, although in a guarded and incremental fashion.¹⁰ In South Africa, the status of good faith as an independent doctrine which could be relied upon independently to challenge a contract has long been contested.¹¹ The Appellate Division and its successor, the Supreme Court of Appeal, cut short the development of a duty of good faith in contract from 1988 onwards,¹² although since 2007 the now apex Constitutional Court has been eroding this position, leaving the exact present status of the duty uncertain, due to the fact that South African contract law is evidently in a transitional phase.¹³

Historically in English, Australian and South African law, specific performance has been a way of achieving contractual fairness (or one might say good faith) at the remedial phase of contracting, in the absence of an enforceable duty of good faith. This argument is developed in part II below. In the South African context, Lubbe drew attention to this peculiar feature of the law of contract in 2006:

[T]here is a basis for the view that the judicial discretion in this regard [specific performance] is in conflict with the denial by the courts of a judicial power to derogate from the consequences of contracts on the grounds of reasonableness and fairness. To restrict the discretion to the remedial sphere might offer a way out of this dilemma, but is in itself problematic in a number of ways. . . . The denial of an order for specific performance on account of considerations of public policy, uncertainty or impossibility is, in the final analysis, as much an expression of the interplay between abstract considerations of reasonableness, fairness and other policy considerations as a finding that an agreement tested

⁹ Ibid at 39–48. See further Roger Brownsword ‘Positive, negative, neutral: The reception of good faith in English contract law’ in Roger Brownsword, Norma J Hird & Geraint Howells (eds) *Good Faith in Contract — Concept and Context* (1999) 13; Günther Teubner ‘Legal irritants: Good faith in British law or how unifying law ends up in new divergences’ (1998) 61 *MLR* 11.

¹⁰ See *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15 paras 125 and 189. See further *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349 and *Burger King Corporation v Hungry Jack’s Pty Ltd* (2001) 69 NSWLR 558 in support of this view. The question whether a duty of good faith should be recognised in the performance of all contracts had previously been left open by the High Court of Australia in *Royal Botanic Gardens v South Sydney City Council* (2002) 186 ALR 289. See also notes 139, 140 and 141 below.

¹¹ See generally Reinhard Zimmermann ‘Good faith and equity’ in Reinhard Zimmermann & Daniel Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 217; Dale Hutchison ‘Good faith in the South African law of contract’ in Brownsword, Hird & Howells (eds) *op cit* note 9 at 213.

¹² *Bank of Lisbon & South Africa Ltd v De Ormelas* 1988 (3) SA 580 (A) at 607A–B; *Brisley v Drotsky* 2002 (4) SA 1 (SCA) para 22; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) paras 31–2; *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) para 27.

¹³ *Barkhuizen v Napier* 2007 (5) SA 323 (CC); *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC); *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC); *Botha v Rich NO* 2014 (4) SA 124 (CC); *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC); *Malan v City of Cape Town* 2014 (6) SA 315 (CC).

against the doctrines of substantive legal doctrine does not qualify as a contract.¹⁴

The argument which this article will advance is that a ‘constitutional analysis’ of contract law must focus on values such as reasonableness, fairness and possibly even good faith. The focus here will be on the doctrine of specific performance in particular: this article will examine this remedy in the laws of England, Australia and South Africa in the light of constitutional values of contractual fairness in order to determine the validity of Lubbe’s arguments above. We shall evaluate whether the doctrine of specific performance, as found in the three countries studied, is undergoing some transformation in the light of supervening HR regimes. This will be presented in part III, which will reflect on the living nature of this doctrine and the evolution which is occurring in the three systems under examination. By comparing these three legal systems, we hope to shed light on the impact of constitutional law on contract law, using specific performance as a case study. In part II below, we consider the philosophical reasoning underlying the concept of specific performance, which necessitates a brief overview of its origins by way of contextualisation.

II A HISTORICAL AND PHILOSOPHICAL UNDERSTANDING OF SPECIFIC PERFORMANCE

(a) *Common-law and civil-law doctrines of specific performance*

Specific performance is considered to be an exceptional remedy in common-law countries.¹⁵ In particular, as will be discussed in due course,¹⁶ in English law specific performance is, along with injunction,¹⁷ an equitable remedy granted only when the common-law remedy of damages would be inadequate, and if other specific requirements are satisfied. In addition, the courts have discretion to consider other factors whilst deciding whether or not to order a breaching party to perform.

This approach stands in opposition to that followed within the civil-law tradition, where specific performance plays, at least in theory, a prominent role.¹⁸

¹⁴ Lubbe op cit note 4 at 99.

¹⁵ In this article when we refer to ‘the common law’ we refer to a legal tradition adopted mostly in former English colonies, and which is marked by a number of particular characteristics, mostly derived from English law. We do not refer in this article to the ‘common law’ in its distinctive South African meaning: ie as being a sub-set of South African law which includes elements of both case law and customary law, but which is distinct from legislation or executive regulation.

¹⁶ See part III below.

¹⁷ In South Africa we would say an ‘interdict’.

¹⁸ For an introduction on the origins, essence, and relevance of the common/civil-law divide, see Alan Watson *Roman Law and Comparative Law* (1991); Konrad Zweigert & Hein Kötz *An Introduction to Comparative Law* 3 ed (tr Tony Weir 1998) 63–275; Harold Gutteridge *Comparative Law: An Introduction to the Comparative*

Historically, common-law courts had refused to award specific performance since the end of the twelfth century.¹⁹ To provide for a measure of justice, the courts of equity, given their aim to redress various inadequacies of the common-law judicial system, have instead developed several remedies that were described as *equitable*.²⁰ Any litigant who had reasons to feel unsatisfied with the common-law courts' judgment was allowed to petition the King himself through the Chancellor. With time, the petitions came to be addressed only to the Chancellor until a separated court, namely the Court of Chancery, was created in the thirteenth century with the specific task of dealing with these sorts of claims. The rule was, at least in its early years, that the court had power to resolve disputes according to the *internal conscience* of the Chancellors to rectify defects in the common law. This is the reason why it is usually said that equity, as a separate jurisdiction, acted (and still acts) in personam.²¹

This area of law represents one of the best examples of how morality enters legal discourse and influences law's performative instances,²² as is demonstrated by the fact that in the modern law, equitable remedies still contain a certain degree of discretion, while in the past the courts of equity used their discretionary power more freely. Yet this has inevitably affected both the predictability and certainty of the system of equity and ultimately led Lord

Method of Legal Study and Research (1949); Otto Kahn Freund *Comparative Law as an Academic Subject* (1965); Basil S Markesinis *Comparative Law in the Courtroom and Classroom* (2003); Peter de Cruz *Comparative Law in a Changing World* (2007); H Patrick Glenn *Legal Traditions of the World* (2010) 133–80 and 237–87; Tom Ginsburg, Pier Giuseppe Monateri, Francesco Parisi *Classics in Comparative Law* (2014); Luca Siliquini-Cinelli 'Taking (legal) traditions seriously, or why Australian contract law should not be codified: An unconventional inquiry' (2015) 34 *University of Queensland Law Journal* 99.

¹⁹ John P Dawson 'Specific performance in France and Germany' (1959) 57 *Michigan LR* 457.

²⁰ See Raul C van Caenegem *Judges, Legislators and Professors. Chapters in European and Legal History* (1988); Paul Brand *The Making of the Common Law* (1992); Paul Brand *Kings, Barons and Justices. The Making and Enforcement of Legislation in Thirteenth-Century England* (2003). Also, see Lord Ellesmere's definition of the common law as quoted in *Origines Juridicales or Historical Memorials of the English Laws, Courts of Justice, Forms of Trial, Punishments in Cases Criminal, Law Writers, Law Books, Grants and Settlements of Estates, Degree of Serjeant, Innes of Courts and Chancery* 2 ed (1671–1680); John H Baker *An Introduction to English Legal History* 4 ed (2002); Robert Meagher, James Dyson Heydon, Mark J Leeming *Meagher Gummow & Lehane's Equity: Doctrines & Remedies* 4 ed (2002); Zweigert & Kötz op cit note 18 at 206–12.

²¹ The ad personam label is indicative not of the fact that equity arises from the Chancellor's *discretionary* will as a single judging authority, rather than from the legal system as a whole, but that the equitable remedy is directed against the person rather than the right at the centre of the dispute.

²² Describing the relationship equity-contract law, Oliver Wendell Holmes Jr once said '[n]owhere is the confusion between legal and moral ideas more manifest than in the law of contract'. See *The Path of the Law* ([1897] 2011) 7. See also John Cartwright *Contract Law. An Introduction to the English Law of Contract for the Civil Lawyer* 2 ed (2013) 5–8.

Eldon, the then Lord Chancellor, to call in 1818 for a more coherent method of decision-making.²³

In 1873, the Judicature Act²⁴ abolished the Court of Chancery and established the Supreme Court of Judicature, a single Court of Appeal and a single High Court of Justice in which all judges ‘could and should apply all the relevant rules of law’.²⁵ The Supreme Court of Judicature acts as common law and equity court (giving, however, priority to equity in case of conflict between the two). Despite what was argued by Ashburner, it is reasonable to say that these two streams of substantive and adjectival jurisdiction ‘mingle their waters’.²⁶ Importantly, as we will see in part III, these judiciary reforms were followed in the Australian colonies as well, and the supreme courts in that country were granted the jurisdictional authority to deal with both common-law and equity cases.

That said, the exceptional essence of equitable remedies, and thus of specific performance, cannot merely be explained through the reference to the common lawyer’s preference for the (relative) simplicity of damages awards. It is worth mentioning that, while civil-law systems focus more on the promise implied in a contractual relationship, English law is more concerned with the economic side of the breach of contract, which is understood in terms of a wrong primarily to be punished by damages.²⁷

Although, according to Gaius’s *Institutiones*, praetorian civil actions ended in money judgments,²⁸ the *Corpus Juris Civilis* opted for a clear-cut distinction between different types of obligations. Only for the so-called obligations *dandi* (to give), which concerned the transfer of ownership and which were easily enforceable, did the court grant the remedy of specific performance. This applied for the obligations *restituendi* as well whereas, in cases concerning an obligation *faciendi* (to do or not to do) the court was under

²³ *Gee v Pritchard* (1818) 2 Swans 402, 414; 36 ER 670, 674. Whilst describing the ‘technique of equity’, Ian Spry points out that ‘equitable principles [. . .] are of great width and elasticity’. See *The Principles of Equitable Remedies* 10 ed (2010) 1.

²⁴ Now Senior Courts Act, 1981 (formerly Supreme Court Act, 1981).

²⁵ Cartwright op cit note 22 at 7.

²⁶ Quoted, and challenged, by Lord Diplock in *United Scientific Holdings Ltd v Burnley BC* [1978] 1 AC 904 at 924.

²⁷ Martin Hogg *Promises and Contract Law. Comparative Perspectives* (2011). See further Reinhard Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) who notes at 776–9 that the reason for this attitude lies in the historical origins of modern English contract law in the action of *assumpsit*, which was essentially an early delictual remedy allowing a plaintiff to claim compensation for wrong done under a ‘transaction’ based on agreement. Actions for *assumpsit* could be remedied only by a payment of damages.

²⁸ *Institutiones* IV 48. For an overview of Gaius’s role in the development of Roman law and legal reasoning, see Pier Giuseppe Monateri ‘Black Gaius: A quest for the multicultural origins of the “Western legal tradition”’ (2000) 51 *Hastings Law Journal* 3; Luca Siliquini-Cinelli ‘Legal systemology and the geopolitics of Roman law: A response to Stuart Elden’s critique of Carl Schmitt’s spatial ontology’ (2015) 9 *Pólemos — Journal of Law, Literature and Culture* 411.

the duty to order the defendant to pay a monetary amount should he be found liable.²⁹

The French and German jurists of the seventeenth and eighteenth centuries who delved into this structuralist distinction tried to ascertain whether the primary effect of contractual agreements was that of binding the parties to perform their obligation or not. Avowedly, Domat opted for the former solution, which he promoted through the maxim that agreements have force of law between the contracting parties.³⁰ Domat was fundamentally inspired by the early modern natural law school, which was ultimately aimed at promoting the rational (and, hence universal and constructivist³¹) understanding of legal rules. The same approach was further maintained, despite a few slight differences, by Pothier and Bourjon. Hence, articles 1142–1144 of the French Civil code are officially rooted in Pothier's accounts of the necessary requirements to coerce somebody to do something,³² whereas from a substantive point of view articles 1143 and 1144, in cases of non-performance, resemble more closely Bourjoin's conception of remedies, which focused more on the creditor's satisfaction, rather than on the debtor's alternative options to fulfil the obligation.³³

The role of specific performance within contract-law theory and practice divided private legal scholars on the other side of the Rhine as well.³⁴ The German divide, which lasted until the end of the eighteenth century, helps us to understand why specific performance is still today theoretically considered as a right in civil-law systems. Indeed, although the notion that all (contractual) obligations had to be performed in specie was ultimately rooted in the early Natural law school, the German Protestant Church of the seventeenth and eighteenth centuries had a clear role in promoting this view as well.³⁵ Under the influence of the Church's ultra-terrain doctrines and anti-monetary policies, scholars such as Heineccius, Otto and Walch

²⁹ For an introduction, see Dawson *op cit* note 19; Janwillem Oosterhuis *Specific Performance in German, French and Dutch Law in the Nineteenth Century* (2011) 21–7. For a more theoretical inquiry, see Peter Stein *Regulae Iuris: From Juristic Rules to Legal Maxims* (1966).

³⁰ By way of an example, this rule, which is nothing other than a corollary of the doctrine of the privity of contract, is embodied in the French and Italian Civil codes (respectively, arts 1134 and 1372).

³¹ Friedrich Hayek *Law, Legislation and Liberty* ([1973, 1976, 1979] 2013) 1–165; Siliquini-Cinelli *op cit* note 18.

³² Pothier applied the Commentators' *nemo praecise cogi potest ad factum* maxim, according to which no one can be compelled to act, to all obligations to do or not to do. As a result, he claimed, in these situations damages should always be the preferred solution.

³³ See Oosterhuis *op cit* note 29 at 62–5. Cf also art 1184 on the role of subsequent conditions in synallagmatic contracts.

³⁴ Oosterhuis *op cit* note 29 at 78–84. See also Pier Giuseppe Monateri *Contratto e Trasferimento della Proprietà. I Sistemi Romanisti* (2008); Pier Giuseppe Monateri *Pensare il Diritto Civile* (2006); Antonio Padoa Schioppa *Storia del Diritto in Europa* (2007).

³⁵ Harold J Berman *Law and Revolution. The Impact of the Protestant Reformations on Western Legal Tradition* ([2003] 2006) 29–130 and 156–75.

expressly favoured the enforcement of contractual duties and spent great efforts in claiming that specific performance ought to be the primary (if not the only) remedy to be given to the creditor. This view was ultimately embodied in § 241(1) of the Bürgerliches Gesetzbuch ('BGB').³⁶

(b) *The South African doctrine of specific performance*

As a mixed legal system, it is unremarkable that the South African law of contract would display elements of both common- and civil-law thinking on specific performance. Since the earliest reported cases in that country, a plaintiff's right to this remedy has been recognised.³⁷ The authority given for this was to be found in the Roman-Dutch sources, which were the official basis of modern South African contract law. Yet even in these earliest cases, there was a limit to how far a court would go in awarding specific performance. In *Thompson v Pullinger*, Kotzé J, drawing on Roman Dutch sources, noted that the right of a plaintiff to specific performance 'is beyond all doubt', but qualified this remedy with the statement that where a substitute performance was 'daily dealt in on the market', payment of compensation would be a 'full and satisfactory' remedy.³⁸ This qualification was described with reference to English authorities.³⁹

After 1910, the Appellate Division confirmed that specific performance was available as of right.⁴⁰ Good faith has always been a central underlying value of South African contract law, arising out of the Roman-Dutch view that good faith was the basis of consensual contracts.⁴¹ Thus there was always a need for courts to give effect to the equitable requirements of good faith in deciding contract cases, although this requirement was typically given effect to through the medium of more specific rules.⁴² A need to ensure that fairness was achieved in the outcomes of specific cases resulted in recognition of a rule that an award of an order of specific performance was always subject to judicial discretion.⁴³ As to guidelines as to how to exercise this discretion, the citing of English textbooks and cases as persuasive authority, saw a pervasive

³⁶ Cf. also §§ 284, 286, and 326(1) BGB. Similarly, compare also arts 1453 and 2930 of the Italian Civil Code.

³⁷ The first reported instance of specific performance as a remedy in South Africa appears to be *Cohen v Shires, McHattie and King* 1882 Kotzé's R 41 at 45.

³⁸ (1894) 1 OR 298 at 301.

³⁹ *Ibid.*

⁴⁰ *Farmers' Co-operative Society v Berry* 1912 AD 343 at 350; *Woods v Walters* 1921 AD 303 at 309–10.

⁴¹ For a good historical account of the basis of South African contract law in the medieval concept of *iudicia bona fidei*, see for example: Zimmermann op cit note 11; Hutchison op cit note 11.

⁴² See the sources cited in notes 12 and 64, especially the finding of the Supreme Court of Appeal in *Brisley* supra note 12 at para 22.

⁴³ The leading cases on the role which discretion plays in an award of specific performance are *Haynes v King William's Town Municipality* 1951 (2) SA 371 (A) and *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A). See further Lubbe op cit note 4.

influence of common-law thinking on this topic.⁴⁴ As Zimmermann notes, this led to the position that for much of the twentieth century, despite the fact that specific performance was nominally permitted as of right, the inroads made into this right by a list of factors guiding judicial discretion were largely the same as those applied by the English courts.⁴⁵

These grounds were summarised by the Appellate Division in 1951, in *Haynes v King William's Town Municipality*, which was for many years the leading case:

'(a) where damages would adequately compensate the plaintiff; (b) where it would be difficult for the Court to enforce its decree; (c) where the thing claimed can readily be bought anywhere; (d) where specific performance entails the rendering of services of a personal nature. . . (e) where it would operate unreasonably hardly on the defendant, or where the agreement giving rise to the claim is unreasonable, or where the decree would produce injustice, or would be inequitable under all the circumstances.'⁴⁶

The first four of these grounds stated the previously established general grounds for refusing specific performance, while the fifth, taken from Wessels on *Contract*,⁴⁷ sums up what might broadly be termed a discretion exercised on equitable grounds, or that specific performance would not be awarded where the awarding of this remedy would run counter to good faith.⁴⁸

Then in 1986, in what is today the leading case on the topic of specific performance, the Appellate Division undercut much of its earlier concretisation of the above listed grounds for an exercise of judicial discretion in response to a request for specific performance. This decision in *Benson v SA Mutual Life Assurance Society*⁴⁹ concerned the question whether or not to enforce a demand to deliver shares, which could freely be bought elsewhere on the market and possibly even at a lower price than that stipulated for in the contract. Hefer JA made three points for a unanimous court:

- (1) It was settled law that a grant or refusal of specific performance was at the court's discretion;
- (2) The plaintiff's right to delivery of the shares had been factually established; and
- (3) The right to specific performance was a 'cornerstone' of South African law and that there could be no curtailment of the plaintiff's right to performance by any rule as to how judicial discretion should be exercised. Nevertheless, this judicial discretion was not completely

⁴⁴ See further: Philip Gross 'Specific performance of contracts in South Africa' (1934) 51 *SALJ* 347 at 364–8; A A Roberts (ed) *Wessels The Law of Contract in South Africa* 2 ed (1951) 830–4 ('Wessels'); Andrew Beck 'The coming of age of specific performance' (1987) 30 *CILSA* 190 at 206.

⁴⁵ Zimmermann op cit note 27 at 782.

⁴⁶ *Haynes* supra note 43 at 378H–379A.

⁴⁷ Wessels op cit note 44 at 830–4.

⁴⁸ Beck op cit note 44 at 197–8. Compare the discussion of Treitel op cit note 3 at 47 and 65–6.

⁴⁹ *Supra* note 43.

unfettered but must always be granted and withheld in accordance with 'legal and public policy', so that it does not operate unduly harshly on the defendant. In addition, a court would never order specific performance where this was impossible (distinguishing between impossibility which would extinguish the obligation and absolve liability and the situation where performance was impossible but the debtor was still contractually bound).⁵⁰

The defendant was ordered to deliver the shares to the plaintiff.⁵¹ On the question of the authoritative source of South African law on specific performance the Appellate Division had the following to say:

'[W]hereas the substance of the law relating to the specific performance of contracts was sought and discovered in the Roman-Dutch authorities, English law became the source of its practical application. Had the two systems of law been compatible the subject on which they thus became married, there could have been no objection. But they are not. . . . Despite this distinctly different approach, rules deriving purely from Chancery practice were applied in South Africa. . . . Some of our textbook writers, particularly the older ones, naturally followed suit. . . . [A]nd so it came about that English cases came to be followed somewhat indiscriminately without noticeable regard to the fundamentally different approach which the Courts in England adopt when it comes to the exercise of the discretion to order performance. There is neither need nor reason for this process to continue.'⁵²

Thus one may read in modern South African contract-law textbooks that specific performance is the 'primary' remedy for breach of contract.⁵³ The Appellate Division has done away with the previously established English-law grounds for exercising discretion in this context, subsuming all discretionary considerations under the dual banners of impossibility and policy considerations (which would include 'fairness').⁵⁴ Commentators have drawn attention to the inherent tension between balancing a right to specific performance against the necessity to use discretion in each case to ensure fairness *inter partes*.⁵⁵ Indeed, fairness and a 'right' to specific performance may often cut in opposite directions, particularly where one enters the difficult realm of constitutional rights. In the next part, this article will relocate to the contemporary era to consider the potential impact of the constitutional development of South African contract law on the doctrine of specific performance as expounded in *Benson*. In particular, the question will

⁵⁰ *Ibid* at 781G–783F (original text paraphrased).

⁵¹ *Ibid* at 785G–H.

⁵² *Ibid* at 784I–785E.

⁵³ Dale Hutchison & Chris-James Pretorius *The Law of Contract in South Africa* 2ed (2012) 321. Compare R H Christie & G B Bradfield *The Law of Contract in South Africa* 6 ed (2011) 545; Louis F van Huyssteen & Catherine J Maxwell *Contract Law in South Africa* 3 ed (2014) 183.

⁵⁴ *Benson* *supra* note 43 at 783C–H. Compare Beck *op cit* note 44 at 201.

⁵⁵ Alfred Cockrell 'Breach of contract' in Zimmermann & Visser (eds) *op cit* note 11 at 328.

be posed, with reference to the comparative common law, how a justiciable Bill of Rights will affect the discretionary grounds on which a judge may decide whether to award specific performance or not.

III CONSTITUTIONAL LAW AND SPECIFIC PERFORMANCE

(a) *South Africa: a new constitutional law of contract and its impact on the remedy of specific performance*

The final South African Constitution came into force on 4 February 1997.⁵⁶ This instrument contained, for the first time in South African history, a justiciable Bill of Rights.⁵⁷ This Bill of Rights has been interpreted by the Constitutional Court to apply horizontally, albeit indirectly, and hence to govern transactions between private parties.⁵⁸ The common law of contract in South Africa has not been immune from this process: there is no express constitutional right to freedom of contract, nor indeed to good faith or fairness in contracting, but the Constitutional Court has been developing a jurisprudence which seeks to balance these (often competing) values since the decision in *Barkhuizen v Napier* in 2007.⁵⁹ Emerging from this development is the obvious conclusion that the Constitutional Court sees fairness as being an integral component of contracting, which will at times limit a party's right to freedom of contract.⁶⁰ This doctrine of 'fairness' has been developed under various concepts familiar to the South African law of contract, including public policy and good faith.

Prior to the constitutional development of this aspect of contract law, the Supreme Court of Appeal had denied a role for an independent doctrine of good faith in South African contract law, reasoning that good faith was a doctrine underlying the law, which could find expression in its more specific rules.⁶¹ This line of cases was severely undercut by the decision in *Barkhuizen*,

⁵⁶ The interim Constitution had already come into force on 27 April 1994, along with the introduction of a new democratic era in South Africa.

⁵⁷ Chapter 2 of the Constitution of the Republic of South Africa, 1996.

⁵⁸ Currie & De Waal op cit note 6 at 60–3; *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) at paras 33–60, interpreting the obligation in s 39(2) of the 1996 Constitution to develop the common law in the light of the Constitution. In a contractual context, see the passages cited from *Barkhuizen* supra note 13 below.

⁵⁹ See *Barkhuizen* and the other cases cited in note 13 supra.

⁶⁰ See *Barkhuizen* ibid para 51; *Everfresh* supra note 13 para 72; *Maphango* supra note 13 para 55 (interpreting the requirements of 'fairness' as set out in the Rental Housing Act 50 of 1999); *Botha* supra note 13 paras 45–6. For further discussion of fettering of contractual powers based on a constitutional duty of reasonableness, see Alistair Price & Andrew Hutchison 'Judicial review of exercises of contractual power: South Africa's divergence from the common law tradition' (2015) 79 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 768.

⁶¹ *Bank of Lisbon* supra note 12 at 607A–B; *Brisley* supra note 12 para 22; *Afrox* supra note 12 paras 31–2; *SAFCOL v York Timbers* supra note 12 para 27; *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) paras 50–1.

and the Constitutional Court has gone on to reinforce and clarify its reasoning in that case in several later decisions.⁶² Whether the Constitutional Court will develop the South African doctrine of ‘fairness’ into something akin to the open norm of good faith, whether as capable of founding a cause of action independently, or as a term implied by law in all contracts, remains to be seen. South African contract law is in a state of flux and there are at present too few decisions to give full content to the doctrine. Thus the possible limitations which constitutional law will in time place upon the law of contract is open to speculation. What we can assert with confidence at this stage, however, is that the Constitution is relevant at all stages of contracting, from negotiation to conclusion to performance and, if necessary, enforcement.

The first concept which requires unpacking is ‘indirect horizontality’: in *Barkhuizen*, the Constitutional Court held as follows:

‘Ordinarily constitutional challenges to contractual terms will give rise to the question of whether the disputed provision is contrary to public policy. . . . What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provision of the Bill of Rights.’⁶³

In the same case, the court attempted to shed further light on the concept of public policy and its role in the enforcement of contractual terms:

‘Notions of fairness, justice and equity, and reasonableness cannot be separated from public policy. Public policy takes into account the necessity to do simple justice between individuals. Public policy is informed by the concept of ubuntu.’⁶⁴

Thus in this case, which concerned a challenge to a time-bar clause in a short-term insurance policy, the court weighed the term itself, as well as the enforcement thereof, against public policy, informed by the right of access to the courts.⁶⁵ In this way, the Bill of Rights could be brought to bear on contractual terms through the medium of the public policy rule.

The Constitutional Court then sets out a two-pronged test for testing for the fairness of a contractual provision:

‘There are two questions to be asked in determining fairness. The first is whether the clause itself is unreasonable. Secondly, if the clause is reasonable,

⁶² See the list of cases in note 13 above.

⁶³ *Barkhuizen* supra note 13 paras 28–9.

⁶⁴ Ibid para 51. ‘Ubuntu’ is an African customary law notion which ‘emphasises the communal nature of society and carries in it the ideas of humaneness, social justice and fairness’. (Quoting a description from *Everfresh* supra note 13 para 71.) See further: T W Bennett ‘Ubuntu: An African equity’ in Frank Diedrich (ed) *Ubuntu, Good Faith & Equity* (2011) 3.

⁶⁵ Section 34 of the Constitution of the Republic of South Africa, 1996.

whether it should be enforced in the light of the circumstances which prevented compliance with the . . . clause.’⁶⁶

The determination as to the validity or otherwise of contractual terms thus extends the discretion of a judge beyond merely the remedial phase of a contract.⁶⁷ Thus, rather than holding that a contract is valid, but refusing thereafter to specifically enforce it, a court may at the outset hold that a contractual provision is contrary to public policy and hence unenforceable. This would use the first prong of the test: namely whether the term of the contract is valid *per se*. The second prong of the test, which relates to the enforceability of a contractual provision implicates specific performance directly. Thus specific performance may be denied where this would be contrary to public policy. This second prong is wider than just that, however: it could prevent the exercise of a power under a contract, since a court may use its public policy discretion to fetter the exercise of that power.⁶⁸ The direct effect of the *Barkhuizen* decision is thus that a court has a broader discretion to rule on the constitutional validity of contractual terms. Even if a term passes constitutional muster on the face of it, the judicial discretion extends into deciding whether a term may be specifically enforced or given effect to in the light of constitutional-type policy considerations.

Following from this, it seems logical to assert that if a constitutionally informed public policy is the major benchmark for an exercise of discretion in specific performance claims, considerations of what may broadly be termed ‘fairness’ would inform a decision as to whether to award the remedy of specific performance. As we have seen above, this is not a massive shift from the *Benson* decision, but it is easy to conclude that this element of judicial discretion is now guided by constitutional values. Given the broad carve out for judicial discretion to ensure fairness under the notion of public policy set out in *Barkhuizen* above, it is possible that the discretion as to whether or not to award specific performance has grown. Of course, more traditional restrictions on the availability of specific performance may also now be justified with reference to the Constitution. Thus, for example, the right to freedom of expression may prevent a contractual undertaking to apologise from being specifically enforceable.⁶⁹ Likewise, the right to

⁶⁶ *Barkhuizen* supra note 13 para 56.

⁶⁷ Compare the argument of Lubbe *op cit* note 4, especially at 90 and 98–9.

⁶⁸ Such as a restriction of a contractual right to cancel a contract, as in *Botha* supra note 13 (discussed below). See generally Price & Hutchison *op cit* note 60.

⁶⁹ For a South African discussion of apology as a remedy for a defamation suit in South Africa, see C J Visser ‘The revival of the *amende honorable* as applied to defamation by the media’ (2011) 128 *SALJ* 327 and Eric Descheemaeker ‘Old and new learning in the law of *amende honorable*’ (2015) 132 *SALJ* 909. For an interesting case where freedom of expression actually required specific performance of an obligation to restore a billboard advert, see *Boycott, Divestment and Sanctions SA v Continental Outdoor Media (Pty) Ltd* (2013/19700) Gauteng Local Division, Johannesburg (11 September 2014). With respect to the Australian scenario, see Robyn Carroll ‘Apologies as a legal remedy’ (2013) 35 *SLR* 317; Robyn Carroll & Normann Wit-

freedom of trade, occupation and profession,⁷⁰ or the right to fair labour practices,⁷¹ may prevent specific performance of a contract for personal services.⁷²

It may be argued that these types of cases were already established in the first half of the twentieth century. One might further argue that these grounds embody long-established principles of justice, or a ‘common-law Bill of Rights’.⁷³ The point, however, is that the doctrine of ‘fairness’ towards which the Constitutional Court is groping represents a marked departure from the views of the Supreme Court of Appeal in this regard. A judge may today refuse to award specific performance of a contract where the conclusion of terms, or even the preceding process of negotiation, was not in good faith,⁷⁴ or, as discussed above, where the terms themselves are contrary to public policy.⁷⁵

Conversely, if ‘fairness’ is to be an independent ground for intervening in contractual relationships, the ambit of specific performance as a remedy may be increased to allow enforcement of obligations arising outside of what was in the past viewed as the contractual sphere. In *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* the majority judgment of the Constitutional Court stated in response to a call to enforce a duty to negotiate in good faith clause contained in a so-called ‘agreement to agree’:

‘Were a court to entertain Everfresh’s argument, the underlying notion of good faith in contract law, the maxim of contractual doctrine that agreements seriously entered into should be enforced, and the value of ubuntu, which inspires much of our constitutional compact, may tilt the argument in its favour. Contracting parties certainly need to relate to each other in good faith. Where there is a contractual obligation to negotiate, it would be hardly imaginable that our constitutional values would not require that the negotiation must be done reasonably, with a view to reaching an agreement and in good faith.’⁷⁶

The minority judgment would have gone even further in enforcing the clause: ‘If, for example, the High Court had found that the clause obliged

zleb ‘It’s not just about the money — Enhancing the vindicatory effect of private law remedies’ (2011) 37 *Monash University LR* 216. See also *Summertime Holdings Pty Ltd v Environmental Defender’s Office Ltd* [1998] 45 *NSWLR* 291.

⁷⁰ Section 22 of the Constitution of the Republic of South Africa, 1996.

⁷¹ Section 23.

⁷² For an interesting discussion of the issues involved from a South African perspective, see Tjatie Naudé ‘Specific performance against an employee: *Santos Professional Football Club (Pty) Ltd v Igesund*’ (2003) 120 *SALJ* 269. Further references to the international case law and literature on this topic can be found therein.

⁷³ For a discussion of the notion of a ‘common-law Bill of Rights’, albeit in a different context, see Ettiene Mureinik ‘Administrative law in South Africa’ (1986) 103 *SALJ* 615; George Devenish *Interpretation of Statutes* (1992) 43–8. This scholarship draws on Ronald Dworkin *Taking Rights Seriously* (1977).

⁷⁴ Compare the argument of Friedmann op cit note 3 at 403–6, and 408–9.

⁷⁵ *Barkhuizen* supra note 13 para 30; Lubbe op cit note 4 at 90.

⁷⁶ *Everfresh* supra note 13 para 72.

Shoprite to make at least one counter-offer, the obligation would not have been too vague to be enforced.⁷⁷

In the light of *Everfresh*, a plaintiff may well seek specific performance of an undertaking to negotiate contained in a preliminary agreement to agree. This would certainly stretch the discretion of a judge beyond pre-established boundaries and would require careful balancing with the notion of freedom of contract, in the form of freedom *not* to contract. There is no doubt that an order to negotiate would be difficult for a court to supervise, absent a deadlock-breaking mechanism, such as an arbitration clause.⁷⁸

In one of the most recent cases in point, *Botha v Rich NO*, ‘good faith’ was used by the Constitutional Court to restrict the rights of a seller of land on instalments to cancel for breach.⁷⁹ Ms Botha had defaulted on her payments under the contract of purchase, which had led to the purported cancellation of the contract by the seller. Despite this purported cancellation, the Constitutional Court held that Ms Botha was entitled to specific performance of the seller’s obligation under the Alienation of Land Act⁸⁰ to register the property in her name, due to the fact that she had paid over half of the purchase price. The exact effect of this case is open to a degree of interpretation, but it could be read as limiting the availability of the remedy of cancellation in the event of a breach of contract. If this purported cancellation was overturned on constitutional or ‘good faith’ grounds, then this would mean that specific performance of an obligation could be available even where there had been a purported attempt to exercise a contractual power to cancel for breach, on the grounds that a constitutionally developed notion of fairness demands that the contract remain enforceable.

The Constitutional Court stated at the outset that

‘[t]he issue at stake entails the constitutionality of the enforcement of a cancellation clause in a contract of a sale of immovable property in circumstances where more than half of the purchase price was paid and demand for transfer of the property in terms of section 27(1) [of the Alienation of Land Act] was refused by the seller’.⁸¹

It went on to find that

‘to deprive Ms Botha of the opportunity to have the property transferred to her under section 27(1) and in the process cure her breach in regard to the arrears, would be a disproportionate sanction in relation to the considerable portion of the purchase price she has already paid and would thus be unfair’.⁸²

⁷⁷ *Ibid* para 35.

⁷⁸ These issues are explored in detail in Andrew Hutchison ‘Agreements to agree: Can there ever be an enforceable duty to negotiate in good faith’ (2011) 128 *SALJ* 273 and ‘Liability for breaking off contractual negotiations’ (2012) 129 *SALJ* 104.

⁷⁹ *Supra* note 13.

⁸⁰ Act 68 of 1981.

⁸¹ *Botha supra* note 13 para 23.

⁸² *Ibid* para 49.

The court settled on awarding specific performance to Ms Botha of her rights under the Act as interpreted, but balancing this against the rights of the seller by ordering that Ms Botha pay her outstanding arrears and register a first mortgage bond over the property in favour of the seller.⁸³

In the same case, the Constitutional Court further clarified its view as to the name to be given to this 'fairness' doctrine:

'Bilateral contracts are almost invariably cooperative ventures where two parties have reached a deal involving performances by each in order to benefit both. Honouring that contract cannot therefore be a matter of each side pursuing his or her own self-interest without regard to the other party's interests. Good faith is the lens through which we come to understand contracts in that way.'⁸⁴

Viewed in the light of the above conception of this doctrine as one of 'good faith', which imposes duties of concern for the legitimate interests of an opposing party, this must also inform the question as to the extent to which judicial discretion may be exercised in awarding specific performance.⁸⁵ Beyond even the ordinary dictates of direct infringements of constitutional rights, as per the examples listed above, the increasing scope of good faith imposes duties on not only the parties in how they relate to each other, but also on the judge of a contractual dispute, to ensure that fairness *inter partes* is preserved. This means that the fifth ground stipulated in *Haynes* for refusing to award specific performance, namely that an award of specific performance should not operate unduly harshly on the defendant, will in future predominate in claims for specific performance.⁸⁶ The law as stated in *Benson* regarding the plaintiff's untrammelled right to specific performance may thus be undercut by a need to ensure that hardship is not thereby unfairly placed on the defendant, since enforcing a contract under these circumstances would not be in good faith.

Furthermore, the grounds for exercising discretion in this type of case may need to be crystallised to take account of the need in a precedent-based system to treat like cases alike. It may well be, as Lubbe argues with reference to the German law under § 138 and § 242 of the BGB, that typical cases of denying or enforcing specific performance may arise.⁸⁷ Our developing law of good faith in contracting may then necessitate an expansion of these grounds from those previously adopted from English law.

This article will now turn to a consideration of the comparative common law on this topic, where the concept of discretion as a limiting factor to an

⁸³ *Ibid* paras 49 and 53.

⁸⁴ *Ibid* para 46. Compare *Barkhuizen* *supra* note 13 paras 79–82, where the question as to the role of good faith in South African contract law was left open.

⁸⁵ Compare Lubbe *op cit* note 4 at 99. For an example of judicial discussion of the necessity of taking into account a party's legitimate interests in the context of performance, see *Mpange v Sithole* 2007 (6) SA 578 (W).

⁸⁶ *Haynes* *supra* note 43 at 378H–379A (discussed above at part II(b)).

⁸⁷ Lubbe *op cit* note 4 at 79 and 95–8. For further discussion of the so-called 'Fallgruppen' approach of German law in the context of § 242, see Whittaker & Zimmermann *op cit* note 2.

award of specific performance seems to be the most developed. If English law has been South Africa's guide and inspiration in this regard in the past, we may today learn from the impact of the European HR regime on the English doctrine of specific performance. Australian law is also relevant in this regard, for a doctrine of contractual fairness and good faith in contracting is being incrementally developed by the legislature and the courts, which can further demonstrate the impact of increased equitable discretion for judges on the remedies available for breach of contract.

(b) *The English and Australian landscape: specific performance, human rights, good faith, and fairness*

Given what we have discussed above, it seems to us that the key concept which characterises the current development of the doctrine of specific performance in South African contract law is that of 'fairness'. Furthermore, it is our suggestion that contractual fairness is also increasingly becoming the standpoint from which the courts commence their legal reasoning in order to determine whether specific performance may be granted or not in the English and Australian legal systems. Yet, as we aim to demonstrate, this common trend towards contractual fairness is characterised by a clear divergence of positivist methodologies. We refer particularly to the nature (and hierarchical attitude) of the legal sources used in this process: the Constitution in South Africa; the equitable tradition and European HR regime in the UK; and the equitable tradition in Australia.

The importance of gaining a full understanding of how the three legal systems under investigation differ is, we believe, related to the fact that, although the essence of specific performance as an equitable remedy has long been investigated,⁸⁸ the reason for this dichotomy between the civil (or Roman-Dutch) law and the common law lies in the different role that good faith plays within these legal traditions, rather than in the *pacta sunt servanda* doctrine.

Common-law systems have a soft approach to good faith, which is understood more as an underlying principle (or implied duty) than a rule of law. On the contrary, in civil-law countries the parties to a contract are explicitly required to act in good faith in all phases of their contractual relationship.⁸⁹ In particular, this legal duty is rooted in the anthropological

⁸⁸ Gareth Jones & William Goodhart *Specific Performance* 2 ed (1986); Robert J Sharpe *Injunctions and Specific Performance* 2 ed (1992); Edward Yorio *Contract Enforcement: Specific Performance and Injunctions* (1989); Sir Jack Beatson *Anson's Law of Contract* 28 ed (2002) 632–41; Donald Harris, David Campbell & Roger Halson *Remedies in Contract & Tort* 2 ed (2002) 166–97; Sarah Worthington *Equity* 2 ed (2006); Spry op cit note 23 at 51–321; Mindy Chen-Wishart *Contract Law* (2012) 537–66; Ewan McKendrick *Contract Law* 10 ed (2013) 372; Denis S K Ong *Specific Performance* (2013); Katy Barnett & Sirko Harder *Remedies in Australian Private Law* (2014) 230–56.

⁸⁹ For an investigation on why and how *Fides*, the white-haired goddess, became secularised in Roman contract law theory and practice, see Alain Supiot *Homo Juridicus. On the Anthropological Function of the Law* (tr Saskia Brown [2005] 2007) 90–4. It

understanding of the contract's 'civilising mission',⁹⁰ and requires that the party takes into account the other party's legitimate interests and rights at all contracting stages.⁹¹

If we adopt an unconventional approach to this dichotomy with the aim of identifying its essential features, it emerges that it is precisely the essence of good faith as an obligation to take care of the other party's *specific* (rather than monetary and thus neutral) interests and rights that led the civilian 'scientific' approach to law to promote the notion of specific performance as a *right* rather than as an exceptional remedy subjected to the discretion of the courts. The principle *pacta sunt servanda* encompasses every aspect of the agreement, including the duty to act *specifically* in good faith, and thus, to perform specifically (either spontaneously or because of the court's order) according to the other party's rights as written down in the contract. Considering the essence of the process through which we place faith in someone as unconditional abandonment to the power of the other, the understanding of specific performance as a right makes sense only in civil-law countries, because it is only in these legal systems that there is an a priori (and *specifically* enforceable⁹²) duty to act in good faith — that is to take into consideration the other party's *specific* needs and privileges. In other words, it is precisely the structure and function of the parties' ex ante specific duty to act with bona fides that leads to an ex post right to claim for specific performance in case of breach of contract. Kant's ontology of duty⁹³ has clearly influenced this approach and makes it evident that in civil-law systems specific performance is theoretically understood as a powerful device to be used in order to achieve the contractual balance that was threatened by the breach of contract.

Importantly, our suggestions are confirmed by the essence of the liability rule in which damages are rooted. As Kronman has indeed correctly noted, '[i]n contract law, a liability rule permits a promisor to breach his promise

was 1861 and 1906 when Rudolf von Jhering and Gabriele Fagella demonstrated the importance of having a strong approach to bona fides and culpa in contrahendo. In particular, Fagella showed the importance of distinguishing three different periods of good faith (the period before any offer has been drafted; the period during which an offer is drafted; the period when the offer has been made). See, respectively, *Culpa in contrahendo: oder Schadensersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen*, IV (1860); *Dei Periodi Precontrattuali e della loro vera ed esatta costruzione scientifica*, in *Studi Giuridici in Onore di Carlo Fadda*, III (1906) 271. The value of Fagella's theory was recognised by Raymond Saleilles in 'De la responsabilité précontractuelle; à propos d'une étude nouvelle sur la matière' (1907) *RTD civ* 697. The Italian Civil Code of 1942 was the first in Europe to contain a specific provision on pre-contractual good faith (art 1337). For a comparative glance on good faith see Hugh Beale, Bénédicte Fauvarque-Cosson, Jacobien Rutgers, Denis Tallon & Stefan Vogennauer *Cases, Materials and Text on Contract Law* (2010) 371–426.

⁹⁰ Siliquini-Cinelli op cit note 18; Supiot op cit note 89.

⁹¹ Muro Bianca *Il Contratto* (1987) 500–10.

⁹² Compare, for instance, art 1338 of the Italian Civil Code.

⁹³ Giorgio Agamben *Opus Dei. An Archaeology of Duty* (Adam Kotzotr, 2013) (2012) 89–13.

provided he compensates the other party by payment of money damages'.⁹⁴ Paraphrasing Kronman's account, we may argue that specific performance does not allow such a breach because it forces the defendant to perform what was promised in the contract. This is why, in Lord Selborne LC's words, 'specific performance presupposes an executory as distinct from an executed agreement, something remaining to be done . . . in order to put the parties in the position relative to each other in which by the preliminary agreement they were intended to be placed'.⁹⁵

Conversely, the fact that the *ex ante* duty to act in good faith is understood in terms of a mere soft duty (or underlying principle) within the common-law tradition makes it evident that in the legal systems which adopt it, the *ex post* order to perform (and thus to take care of the plaintiff's interests and rights *in specie*) cannot be anything but exceptional, and damages are usually preferred.⁹⁶

That said, it is evident that within the common-law tradition specific performance can also only be claimed if a contract exists which is enforceable at law. Yet the notion of 'enforceable' is an extensive one, and there have been cases in which the courts have ordered specific performance in the absence of an enforceable contract.⁹⁷ However, the orthodox statement about the role of specific performance is that, given its equitable essence, it will not be granted when damages offer a relatively adequate remedy for the protection of the creditor's rights and interests.⁹⁸ This means that, as Lord Redesdale said, specific performance will not be ordered should damages fully compensate and be able to put the creditor in a position 'as beneficial to him as if the agreement were specifically performed'.⁹⁹

⁹⁴ Anthony T Kronman 'Specific performance' (1978) 45 *University of Chicago LR* 351 at 352. For an investigation on the multi-faceted structure of the comparative law and economics method, see Francesco Parisi & Barbara Luppi 'Quantitative methods in comparative law' in Monateri (ed) *op cit* note 28 at 306–16; Francesco Parisi & Barbara Luppi 'Comparative law and economics: Accounting for social norms' in David S Clark (ed) *Comparative Law and Society* (2012) 92–104; Vincy Fon & Francesco Parisi 'Litigation and the evolution of legal remedies: A dynamic model' (2003) 116 *Public Choice* 414. See also Francesco Parisi & Vincy Fon *The Economics of Law Making* (2009).

⁹⁵ *Wolverhampton and Walsall Railway Company v London and North-Western Railway Company* (1873) LR 16 Eq Cas 433 at 439.

⁹⁶ This comparative perspective explains the preference of the World Trade Organisation for the common-law approach to business as expressed by Beck and Levine's law and finance neutral (that is, mechanic and dehumanised) approach. The rule that specific performance will not be granted in favour of a plaintiff whose claim is simply for the payment of money confirms this suggestion. See *Turner v Bladin* (1951) 82 CLR 463.

⁹⁷ Spry *op cit* note 23 at 52.

⁹⁸ *Harnett v Yelding* (1805) 2 Sch & Lef 549; *Johnson v Agnew* [1980] AC 367 at 400–1.

⁹⁹ *Harnett v Yelding* *ibid* at 553. See also *South African Territories Ltd v Wallington* [1989] AC 309. In the words of Alan Schwartz, '[s]pecific performance is the most accurate method of achieving the compensation goal of contract remedies because it

The limit of such an understanding of specific performance emerged in a series of cases.¹⁰⁰ As Spry notes, the current tendency of common-law judges is to ask ‘as the ultimate question whether it would be more just to grant specific performance than to award damages’.¹⁰¹ Hence, should damages be inadequate, the court’s discretion may nevertheless lead to a refusal of specific performance. On the other hand, since land is a unique property with a determined value, damages are usually considered to be an inadequate remedy for the breach of a contract for its sale¹⁰² or occupancy.¹⁰³

As in South Africa, the decision to grant specific performance in the common-law jurisdictions is therefore never automatic or neutral: it always implies a significant decree of discretion, which is historically rooted in the origins of the equitable remedies as discussed above.¹⁰⁴ The legal reasoning which lies behind the drafting of s 52(1) of the English Sale of Goods Act, 1979¹⁰⁵ is testament to this.

In making his or her decision, the equitable judge always takes into consideration factors which would be ignored by a common-law judge.¹⁰⁶ In trying to offer a better understanding of the ratio decidendi which may lead to a grant or refusal of the order, it was argued that ‘specific performance is best understood by reference to the factors that weigh *against* the remedy’.¹⁰⁷ This claim served to pave the way for a roadmap that divided these factors into three categories: claimant-sided considerations, defendant-sided considerations, and administrative considerations. In particular, it clearly emerges from the case law that specific performance will not be granted when the contract is the result of mistake, misrepresentation, or unfairness.¹⁰⁸

In addition, a court also considers factors which arose after the finalisation of the agreement (such as, impossibility of the performance, unsuitability of

gives the promise the precise performance that he purchased’. See Alan Schwartz ‘The case of specific performance’ (1979) *Yale LJ* 271 at 274.

¹⁰⁰ *Tito v Waddell* (No 2) [1977] Ch 106. See also *Beswick v Beswick* [1968] AC 58 at 77, 83 and 88, where it was stated that a specific performance should be ordered if it would ‘do more perfect and complete justice’, but that a contract in favour of a third-party beneficiary may be enforced by specific performance.

¹⁰¹ Spry op cit note 23 at 60.

¹⁰² *Hasham v Zenab* [1960] AC 316.

¹⁰³ *Verrall v Great Yarmouth Borough Council* [1981] QB 202.

¹⁰⁴ See part I.

¹⁰⁵ According to which, ‘[i]n any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the plaintiff’s application, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages’. Compare also s 48A–48E in Part 5A, which allow specific performance to be ordered to compel the (commercial) seller to repair or replace non-conforming goods. See Spry op cit note 23 at 289–321.

¹⁰⁶ Ex pluribus, see the recent *McLeary v Swift* [2014] NSWSC 870; *Galafassi v Kelly* [2014] NSWCA 190; *Mohareb v Jankulovski* [2014] NSWSC 745.

¹⁰⁷ Chen-Wishart op cit note 88 at 540.

¹⁰⁸ Leading cases are *Manser v Beck* (1848) 6 Hare 443 at 448, *Tamplin v James* (1880) 15 Ch D 215, and *Wedgwood v Adams* (1843) 6 Beav 600.

the obligation, hardship, mutuality, insolvency, a prior breach of contract committed by the claiming party), and other practical evaluative criteria (such as supervision by the court, or avoiding multiple suits) to determine whether the specific performance option is practical or not.¹⁰⁹ By way of an example, in the recent *Wright Prospecting Pty Ltd v Hancock Prospecting Pty Ltd*,¹¹⁰ a delicate case on a property purchase option arising from a commercial partnership, the defendant was ordered to execute the deed of assignment within a specified time and that, if it were to fail to do so, the registrar of the court would be authorised to execute it.

Other elements are considered as well. In particular, given the aim of this study, it is worth mentioning that the proximity of the *pacta sunt servanda* doctrine¹¹¹ would lead a court not to grant the order to perform should the contract prescribe differently for the event of its breach. Yet a belief in the absolute freedom of contractual relationships has been abandoned by legal discourse since the beginning of the twentieth century, when legal scholars started realising that only under conditions of perfect competition and without asymmetric information would individuals not exert undue influence over others. Hence, the court of equity has developed an important test to determine whether such a reductionist clause ‘constitute[s] a genuine attempt to pre-estimate the loss expected to result from the breach in question,’¹¹² and is thus admissible. The same approach is followed in other jurisdictions as well. In the US, for instance, the judicial unwillingness to honour contractual provisions which allow a private abuse of an equitable remedy was affirmed in the well-known case of *Stokes v Moore*.¹¹³

It is of pivotal interest that the court will not grant specific performance should this be interpreted as a way to put intolerable limitations on personal liberty — something which, of course, cannot be legally or morally accepted. This method of decision-making is anything but surprising and may be fully understood only through the lenses of the Human Rights Act, 1998 (‘HRA’), the ultimate instrument through which the UK ‘has moved from liberties to rights’.¹¹⁴

¹⁰⁹ A comprehensive list of cases may be found in Spry op cit note 23 at 89–244; Beatson op cit note 88, at 634–7; Harris, Campbell & Halson op cit note 88 at 178–93; Chen-Wishart op cit note 88 at 537–66.

¹¹⁰ [2014] WASC 149.

¹¹¹ On the ‘civilising mission’ of this doctrine, see Suptot op cit note 89 at 78–109.

¹¹² Harris, Campbell & Halson op cit note 88 at 195.

¹¹³ 262 Ala 59, 77 So 2d 331 (1995).

¹¹⁴ R. Costigan & P A Thomas ‘The Human Rights Act: A view from below’ in Luke Clements & Philip A Thomas (eds) *Human Rights Act: A Success Story?* (2005) 51 at 51. Scholarship on the Human Rights Act is literally endless. For an introduction, see Nicholas Kang-Riou (ed) *Confronting the Human Rights Act 1998: Contemporary Themes and Perspectives* (2013); John Cartwright op cit note 22 at 29–30; Lord Irvine of Lairg *Human Rights, Constitutional Law and the Development of the English Legal System* (2003); Frances Butler (ed) *Human Rights Protection: Methods and Effectiveness* (2002); Anthony Bradney ‘Another legal revolution’ (2002) 15 *The JBS Journal* 14; Jonathan Cooper & Adrian Marshall-Williams (eds) *Legislating for Human Rights. The*

Notably, the aim of the HRA is to incorporate the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 ('ECHR') by rendering Convention rights enforceable before domestic courts. In particular, as the Introduction to the HRA states, the HRA gives further effect to the rights and freedoms guaranteed under the Convention's regime. From the contract-law perspective, relevant articles are all those that regulate the (peaceful enjoyment of) possession of goods (art of Protocol 1), the right to respect for a person's home and private/family life (art 8(1)), the right to freedom of association (art 11), and the right to protection against any possible form of discrimination (art 14).

In addition, while art 4(2) of the ECHR states that 'no one shall be required to perform forced or compulsory labour', according to art 6(1) of the HRA 'it is unlawful for a public authority to act in a way which is incompatible with a Convention right'. This means that, the UK court being a public authority, its duty to act consistently with the Convention rights will lead it to refuse to order specific performance every time a different decision is seen as a breach of the ECHR.

In this sense, one of the major difficulties that the contract-law interpreter faces whilst assigning a role to specific performance within the new legislative scenario is to determine to what extent the EU HR regime impacts on domestic contract law, and how the courts should effectively deal with it. Indeed, while the literal interpretation of the relevant norms and case law suggest that the UK courts will rarely use their power to undermine domestic contract-law regulation and the freedom to bargain that they express,¹¹⁵ it was argued that, '[i]f it is likely that the claimant will win in Strasbourg, the courts are more likely to anticipate the predicted outcome even though it has not yet happened'.¹¹⁶ The latter suggestion, however, not only stands against the original intention which led to the drafting of the HRA,¹¹⁷ but is also inconsistent with Parliament's unwillingness for UK judges merely to follow the European supra-national dicta.¹¹⁸

(i) *Australia's weak approach to equal treatment*

It is precisely because of what was analysed thus far that the Australian landscape may shed some light for the South African contract lawyer. As in South Africa, where the Constitution increasingly plays a pivotal role at all stages of contracting, even without express mention of a value of contractual fairness, in Australia conceptions of contractual fairness and good faith are also slowly, yet efficiently, filling the gap left by weak constitutional

Parliamentary Debates on the Human Rights Bill (2000); Francesca Klug 'The Human Rights Act 1998, *Pepper v Hart* and all that' 1999 *Public Law Review* 246.

¹¹⁵ Cf s 2(1)–(2) HRA. See *Wilson v First County Trust Ltd* (No 2) [2003] UKHL 40.

¹¹⁶ Brenda Hale 'High points and low points in the first ten years' in Kang-Riou (ed) *op cit* note 114 at 54.

¹¹⁷ Francesca Klug & Helen Wildbore 'Follow or lead? The Human Rights Act and the European Court of Human Rights' (2010) 6 *European Human Rights LR* 621.

¹¹⁸ *Hansard (HL Debates)*, 3 November 1997, col 1245.

equal-treatment provisions. This trend confirms that Dawson J was right when he claimed that the founding fathers of modern Australia had deliberately left the administration and protection of individual rights to the courts and Parliament.¹¹⁹

This is clearly demonstrated by the fact that while Australian contract law gives to specific performance the analogous exceptional role that it plays in English law by subjecting it to similar limitations,¹²⁰ Australia does not have a European HR regime, nor does its democratic Constitution have a Bill of Rights upon which a court may 'hook' any possible judicial refusal to grant equitable remedies. More precisely, the Australian Constitution contains just a few express guarantees of fundamental rights from legislative power.¹²¹ In addition, the notorious circumstances that Australian federal law has 'weak' equal treatment provisions¹²² and that, as Gaudron J has noted, 'until 1967, the Constitution, itself, was blatantly discriminatory',¹²³ make it evident that the power of the Australian judge to decide whether or not to grant specific performance may reach levels of discretion which are unknown within English law.

In this regard, it is worth mentioning that, although Australia has ratified both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, their content is enforceable under domestic law only to the extent that they have been incorporated by legislation.¹²⁴

¹¹⁹ *Kruger v Commonwealth (Stole Generation Case)* (1997) 190 CLR 1 at 61.

¹²⁰ See, for instance, ss 53, 58, 51, 51, 56, 55 and 56 of the Sale of Goods Act of, respectively, Queensland, Victoria, South Australia, Western Australia, Australian National Territory, and Northern Territory (there is no equivalent provision in New South Wales). For an introduction, see Lindy Willmott, Sharon Christensen, Des Butler & Bill Dixon *Contract Law* 4 ed (2014) 267–88; N C Seddon, R A Bigwood & M P Ellinghaus *Cheshire and Fifoot Law of Contract* 10 ed (2012) 54 and 1179–1204; Jeannie Paterson, Andrew Robertson & Arlen Duke *Principles of Contract Law* 4 ed (2012) 561–72; John W Carter *Cases and Materials on Contract Law in Australia* 6 ed (2012) 1001–13; Philip Clarke & Julie Clarke *Contract Law. Commentaries, Cases and Perspectives* 2 ed (2012) 702–21; Dilan Thampapillai, Vivi Tan & Claudio Bozzi *Contract Law Text and Cases* (2012) 549–58; Andrew Burrows *A Casebook on Contract* 3 ed (2011) 462–77; Daniel Khoury & Yvonne Yamouni *Understanding Contract Law* 8 ed (2010) 463–6; Stephen Graw *An Introduction to the Law of Contract* 4 ed (2002) 422–6. By way of an example, *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, a leading case which shows the House of Lords' reluctance to expand the availability of the specific remedy within contract law, is still good law.

¹²¹ Commonwealth of Australia Constitution Act 1900, ss 51(xxxi), 80 and 116.

¹²² Such as ss 25, 51(i)–(ii), 88, 92, 117.

¹²³ *Kruger v Commonwealth* supra note 119 at 112, while describing the former s 127 of the Constitution.

¹²⁴ *Chow Hung Ching v The King* (1948) 77 CLR 449; *Dietrich v The Queen* (1992) 177 CLR 292; *Kioa v West* (1985) 159 CLR 550. Examples are the Racial Discrimination Act 1975 (Cth), the Sex Discrimination Act 1984 (Cth), and the Human Rights (Sexual Conduct) Act 1994 (Cth).

Attempts to achieve a comprehensive, federal legal protection of human rights and fundamental freedoms have not yet succeeded, although they date back to the first Australasian Federal Convention in 1891.¹²⁵ The Australian Capital Territory and the state of Victoria are the only Australian jurisdictions to have enacted a charter or bill of rights to date.¹²⁶ Importantly, the ‘weakness’ of Australia’s approach to the HR doctrine and equal treatment policies is well demonstrated by the essence of the powers granted to the Australia Commission on Human Rights.¹²⁷ More precisely, although the Commission has the power to supervise the compliance with equal-treatment dispositions, it can neither sanction the discriminatory conduct brought to its attention, nor can it back up its compliance notices to organisations that are not following the law with a court order.¹²⁸ Importantly, the Commission cannot take to court an organisation that breaks an agreement made with it regarding what they are required to do to make sure that they are complying with the law.¹²⁹

That having been said, given that Australia is a system of common law in which ‘everybody is free to do anything, subject only to the provisions of the law’,¹³⁰ for present purposes it should be noted that the recent intention of the current Attorney-General, Senator the Hon George Brandis QC, ‘to review Commonwealth legislation to identify provisions that unreasonably encroach upon traditional rights, freedoms and privileges’¹³¹ has caused general dismay. In a legal system in which there is the clear necessity of (and opportunity for) having a consistent federal approach to equal treatment in terms of a rule of law,¹³² and in which the Constitution does not create

¹²⁵ Amongst others, see J Else-Mitchell (ed) *Essays on the Australian Constitution* 2 ed (1961); John A Nauze *The Making of the Australian Constitution* (1972); Richard D Lumb *Australian Constitutionalism* (1983).

¹²⁶ Respectively, Human Rights Act 2004 and Equal Opportunities Act 2010. See also the Charter of Human Rights and Responsibilities Act 2006 (Vic).

¹²⁷ Australian Human Rights Commission Act 1986 (Cth).

¹²⁸ Conversely, in the UK, a failure to comply with the Equality and Human Rights Commission’s notice is a criminal offence.

¹²⁹ A series of possible alternative schemes for enforcing Australia’s anti-discrimination laws with a particular focus on the role of the equal opportunity agencies were discussed at the seminar given by Dr Dominique Allen entitled ‘A new regulatory model for enforcing anti-discrimination law’ Thursday 14 August 2014, School of Law, Faculty of Business & Law, Deakin University.

¹³⁰ *Lange v Australian Broadcasting Authority* (1997) 189 CLR 520 at 564.

¹³¹ See <http://www.attorneygeneral.gov.au/MediaReleases/Pages/2013/Fourth%20quarter/11December2013-NewAustralianLawReformInquiryToFocusOnFreedoms.aspx>, accessed on 15 August 2014.

¹³² The need for a major procedural and substantial reconsideration of Australia’s normative regulation of human rights issues was at the centre of the recent campaign ‘Invisible Discriminator’. More details may be found at <https://www.humanrights.gov.au/news/stories/commission-commends-invisible-discriminator-campaign>, accessed on 15 August 2014.

private rights enforceable by an action for damages,¹³³ any political intervention which is aimed at broadening the (liberal¹³⁴) notion of what is permitted by law may represent a threat to the results that have been achieved thus far.¹³⁵

(ii) *Contractual fairness and good faith as substitutes of constitutional equal treatment in Australia*

In the light of the foregoing, the fact that Australian law is developing, not without difficulties and contradictions, an implied duty of good faith in contracting¹³⁶ is anything but surprising and may be seen as a way to promote within contract law theory and practice the notion of equal treatment which is not provided by constitutional provisions. Indeed, although the Australian High Court is yet to endorse the implied term of good faith and socio-legal scholars are debating about the basis for its implication at law¹³⁷ (and, thus, whether it should be implied in commercial contracts¹³⁸), several indicia support this view.

¹³³ *Kruger v The Commonwealth* supra note 119 at 46–7; *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30.

¹³⁴ Paul W Kahn *Putting Liberalism in its Place* (2008).

¹³⁵ The essence of this threat was discussed during the seminar given by Professor Simon Rice and entitled ‘Race, civility and the changes to the Racial Discrimination Act’, Wednesday 30 July 2014, School of Law, Faculty of Business & Law, Deakin University.

¹³⁶ See E McKendrick & Q Liu *Contract Law. Australian Edition* (2015) 69–70 and 271–7; Geoff Lindday *Contract* 7 ed (2014) 154–8; Willmott et al op cit note 120; Seddon, Bigwood & Ellinghaus op cit note 120 at 461–79; Paterson, Robertson & Duke op cit note 120 at 341–9; Carter op cit note 120 at 29–46; Clarke & Clarke op cit note 120 at 101; Thampapillai, Tan & Bozzi op cit note 120 at 231–6; Burrows op cit note 120 at 71–5; Graw op cit note 120 at 77–9. Unfortunately, the scope of this comparative investigation does not allow us to deal with the development of the doctrine of good faith in employment, insurance, and consumer contracts in Australia — the analysis of which would deserve an entire article. It is however noteworthy that in the recent *Bhasin v Hrynew* case the Canadian Supreme Court held that good faith is a general organising principle of the common law of contract in Canada. In particular, through a unanimous judgement, the Court stated that good faith is a ‘general organising principle’ of Canadian contract law, and that as far as *general duties* are concerned, this implies not a particular duty of loyalty or disclosure, but a general obligation to act with ‘honesty’. See *Bhasin v Hrynew* [2014] SCC 71 paras 33, 63, 73–4 and 86.

¹³⁷ For an introduction, see James Allsop ‘Good faith and Australian contract law: A practical issue and a question of theory and principle’ (2011) 85 *Australian LJ* 341; Elisabeth Peden ‘Contractual good faith: Can Australia benefit from the American experience’ (2003) 15 *Bond LR* 186; John W Carter & Elisabeth Peden ‘A good faith perspective on liquidated damages’ (2007) 23 *Journal of Contract Law* 157; John W Carter & Elisabeth Peden ‘Good faith in Australian contract law’ (2003) 19 *Journal of Contract Law* 155.

¹³⁸ Elisabeth Peden ‘Implicit good faith — Or do we still need an implied term of good faith?’ (2009) 25 *Journal of Contract Law* 50; Elisabeth Peden ‘When common law trumps equity: The rise of good faith and reasonableness and the demise of unconscionability’ (2005) 21 *Journal of Contract Law* 226; Elisabeth Peden ‘The mis-

By way of an example, although there is as of yet no clear statement from the courts or legal scholars as to *what* the implied duty of good faith requires,¹³⁹ a general duty to co-operate reasonably¹⁴⁰ is well established in Australian contract law.¹⁴¹

Whilst trying to provide the interpreter with a clear definition of this duty, in *Vermeulen v SIMU Mutual Insurance Association*¹⁴² it was stated that the parties have to perform their obligation(s) with scrupulous fairness and honesty. Since then, community standards of decency and fair dealing are taken into account in order to determine whether the party's behaviour was legal or not.¹⁴³ The duty to act with bona fides applies to both pre-contractual negotiations and post-contractual obligations, as well as to the method through which a claim is made and then handled.¹⁴⁴

In the well-known cases of *Dowsett v Reid* and *Norton v Angus*¹⁴⁵ it clearly emerged that whilst promoting this policy of contractual fairness with the intent to achieve an effective balance of opposite interests as a substitute for weak constitutional equal-treatment provisions, the courts will never grant specific performance should the order cause hardship to the defendant that would not be caused by an award of damages. Spry summarises this line of legal reasoning whilst highlighting that specific performance will be refused any time that 'the actual consequences of enforcement would operate so harshly and oppressively towards the defendant that the grant of relief would be unjust in all the circumstance'.¹⁴⁶ Importantly, in order to achieve

take of looking for legislative influence in contractual good faith' (2002) 16 *Commercial Law Quarterly* 20; Elisabeth Peden *Good Faith in the Performance of Contract* (2003); Elisabeth Peden 'The meaning of contractual good faith' (2002) 22 *Australian Bar Review* 235; Howard Munro 'The "good faith" controversy in Australian commercial law: A survey of the spectrum of academic legal opinion' (2009) 28 *The University of Queensland LJ* 167.

¹³⁹ *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228.

¹⁴⁰ *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596; *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349; *Howtrac Rentals Pty Ltd v Thiess Contractors (NZ) Limited* [2000] VSC 415.

¹⁴¹ *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* *ibid* at 607. See also *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Hughes Aircraft Systems International Pty Ltd v Airservices Australia* (1997) 76 FCR 151.

¹⁴² (1987) 4 ANZ Ins Cas 60-821 at 74.

¹⁴³ Kenneth Sutton *Insurance Law in Australia* 3 ed (1991) 158.

¹⁴⁴ *CGU Insurance Ltd v AMO Financial Planning Pty Ltd* (2007) 235 CLR 1, [2007] HCA 36; *Distillers Co Biochemicals (Australia) Pty Ltd v Ajax Insurance Co Ltd* (1974) 130 CLR 1; *Imagining Applications Pty Ltd v Vero Insurance Ltd* [2008] VSC 178.

¹⁴⁵ Respectively, (1912) 15 HCA 75 and (1926) HCA 35.

¹⁴⁶ Spry *op cit* note 23 at 196. Such a hypothetical situation is, in part, similar to that in which the order to perform would result unfair in light of considerations ante factum, such as when the conduct of the plaintiff renders it unfair for the courts to require the defendant to carry out his/her obligations, and thus for specific performance to be granted. For possible examples like undue influence, unconscionable dealing and misrepresentation, see *Blomley v Ryan* (1956) 99 CLR 362; *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447; *Louth v Diprose* (1992) 175 CLR 621.

contractual fairness and balance between the opposite interests of the parties, the courts will weigh any possible hardship to the defendant against the possible hardship that would be caused to the plaintiff should specific performance not be granted.¹⁴⁷ Surprisingly, the reasoning which lies behind such a refusal is substantially similar to that that led to the drafting of the aforementioned art 4(2) of the EHCR, which is applied in English law through art 6(1) of the HRA, and which is aimed at avoiding any oppressive, and thus unjust, use of legal remedies. This clearly emerges from one of the leading cases on the remedies available for breach of contract, *Giumelli v Giumelli*.¹⁴⁸ Indeed, on that occasion it was established that specific relief will not be awarded every time should it be unconscionable or unjust to the estopped party or even third parties.

With the similar intent to move towards a comprehensive promotion of contractual fairness and equal treatment, in *Bahr v Nicolay (No 2)*¹⁴⁹ it was stated that it is inappropriate to decree specific performance in favour of a plaintiff who is *unable* or *unwilling* to perform an essential term arising from the contract.¹⁵⁰ The legal reasoning which led to this powerful decision is rooted in what was previously stated in another leading case, namely that, whilst considering the opportunity for granting specific performance, the courts will always take into account whether the plaintiff is *ready* to fulfil all of his or her obligations.¹⁵¹

IV CONCLUSION

This contribution has attempted an understanding of contract law theory and practice in the light of constitutional law developments. A full treatment of the relationship between contract and constitutional law would, of course, require an extended attention, certainly more than can be provided here. Thus, we have focused our efforts on three main components of the contract law dimension: good faith, contractual fairness, and specific performance.

More precisely, in trying to offer a solid justification for our argument on the necessity of analysing the development of contract law rules and practices through the lens of constitutional-law issues, we have argued that (1) the understanding of specific performance as a right makes sense only in civil-law countries because it is only in these legal systems that there is an a priori (and *specifically* enforceable) duty to act in good faith — that is to take into consideration the other party's *specific* needs and privileges; (2) the key

¹⁴⁷ *Easts v Russ* [1914] 1 Ch 468 at 480. If the hardship which would be suffered by the defendant should specific performance take place would be much greater than the detriment that would be suffered by the plaintiff, the latter will be forced to accept monetary compensation. See *Coles Supermarket Aust Pty Ltd v Australian Retail Freeholds Pty Ltd* (1996) 16 WAR 282.

¹⁴⁸ [1999] HCA 10, (1999) 196 CLR 1010 [34]–[50].

¹⁴⁹ (1988) 164 CLR 604.

¹⁵⁰ Should the term be inessential, the court may still discretionally refuse to grant the order. See *Green v Sommerville* (1979) 141 CLR 594.

¹⁵¹ *Mehmet v Benson* (1965) 113 CLR 295.

element which characterises the current progression of the doctrine of specific performance in South African, English, and Australian contract law is that of 'fairness'.

With respect to the latter point, it is our suggestion that contractual fairness is increasingly becoming, in all these three legal systems, the standpoint from which the courts commence their legal reasoning in order to determine whether specific performance may be granted or not. This is so, we argue, because of the intrinsic essence of every *specific* remedy, which is to give to the creditor the opportunity to make the court coerce the debtor into performing or not performing a certain contractual obligation.

Yet, despite this common feature, this evolutionary process is taking place in three different ways. Although in South Africa specific performance is today considered as the primary remedy for breach of contract, the unavoidable and increasing relevance of good faith in contract law theory and practice means nothing more than that the court dealing with a contractual dispute must make sure that the outcome of the judgment will preserve the fairness which characterised the (no longer operative) contractual relationship. In this sense, it seems reasonable to argue that the pre-eminence of the 1996 Constitution and its Bill of Rights does not leave any choice to the South African judge but to infer the content of (contractual) fairness in accordance with what is argued in the more recent Constitutional Court cases. If this reasoning is correct, it becomes evident that the question whether or not the court would grant an order to perform specifically in the light of the contractual agreement is one that cannot be answered without an analysis of the very notion of contractual good faith as it emerges, for instance, from the *Botha v Rich NO* case. Put bluntly, this means that, although in South Africa (as in civil-law countries) specific performance is theoretically (and historically) conceived of as a right freely enforceable by the creditor for his or her own satisfaction, its actual awarding is subject to a degree of judicial discretion which cannot be understood without an a priori understanding of why the Constitution is increasingly becoming a protagonist in all stages of contracting, from negotiation to enforcement.

By contrast, in English and Australian law priority is given to the remedy of damages in the light of the historical and philosophical reasons investigated in part II of our study. As we mentioned, in these legal systems specific performance is an exceptional remedy whose origins are rooted in the equitable jurisdiction of the Court of Chancery. Given the coercive nature of any specific remedy, several factors are considered by the courts whilst deciding whether to 'force' the debtor to specifically perform, and thus fulfil his/her contractual obligations, or not. For present purposes, what is relevant is that the UK has adopted, with the HRA, the European HR regime. HR policies are therefore always taken into account in the decision-making process with the aim of evaluating whether the order to perform would eventually result in a breach of the ECHR. It is therefore evident that such a decision would then in turn shed some light on the original fairness of the contractual obligation as well, because the court will not allow the

a posteriori performance of a contractual activity which puts intolerable limitations on personal (legal) liberty. In sum, this means that, through the European HR filter, English law may indirectly achieve the regime of contractual fairness (and good faith) which common-law systems usually lack.

Australia's democratic Constitution has extremely weak equal-treatment provisions and lacks a federal Bill of Rights — the Australian Capital Territory and the state of Victoria being the only Australian jurisdictions to have enacted charters of this kind. This means that it is only within English law that the order to perform (as taking care of the other party's needs) may be refused on the ground of mandatory equal-treatment evaluations. In this sense, the need to fill the gap voluntarily left by its founding fathers through contract law rules is, in our opinion, the reason why Australia is moving towards an implied duty of good faith to promote contractual fairness, in clear opposition to the very essence of the common-law tradition.

If this, as we think, is correct, it means that the geopolitical divide between civil-law, common-law, and mixed legal systems is weaker than many often think.

TO CONTRIBUTORS

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