THE ROLE OF GOOD FAITH AND FAIRNESS IN CONTRACT LAW:
Where do we stand in South Africa, and what can be learnt from other jurisdictions?

By Keryn Layton-McCann (Student Number: LYTKER001)

In partial fulfilment

Master of Laws, Commercial Law

Supervisor: Tjakie Naudé

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I hereby declare that I have read and understood the regulations governing the submission of LLM dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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ABSTRACT:

Good faith is recognised as an underlying principle in South African contract law, and the contract law of many countries. There has been noticeable reluctance in some common law jurisdictions against the elevation of the role of good faith in contract law. This paper seeks to explore the tension between the Supreme Court of Appeal and the Constitutional Court in the application of good faith and by implication, fairness to South African contractual disputes. It illustrates that the Constitutional Court seeks to elevate the role of good faith while the SCA is not in favour of such an approach. As the two benches are not in step with their approach, this has led to legal uncertainty in this area of South African contract law.

In South African consumer contracts, the concept of fairness is explored, and the remedies at the disposal of consumers to escape the operation of unfair contract terms in different sectors. As South Africa has only provided legislative protection for consumers in the past twenty years, this area of law is comparatively speaking ‘new’ when compared with other countries. There are therefore lessons to be learnt from other countries in this regard as they have the advantage of time and thereby experience gained over South Africa.

For comparative purposes two common law jurisdictions were also explored, namely Australia and the United Kingdom. Both countries are facing similar challenges as South Africa to elevate and expand the role of good faith in the contractual space. Recent notable court decisions in Australia and England in the commercial contract space are explored to demonstrate these challenges. This paper also considers their consumer protection legislation in order to identify if there were lessons to be learnt from their protections that should be considered for South African legislation. Due to the EU membership by the UK, the increased recognition of good faith in civil law jurisdictions has made its way into UK legislation. Good faith as a concept has also found its way into Australian consumer legislation.

It may only be a matter of time before the three countries explored in this paper elevate and expand the role of good faith and fairness beyond consumer contracts. The Constitutional mandate to develop the South African common law, the UK’s (current) need to comply with civil law principles due to EU membership and generally, the conventional practice by common law legislatures, academics and courts of looking to England for legal developments, are factors which will contribute to the development.
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I. INTRODUCTION

The principle of sanctity of contract, *pacta sunt servanda*¹ is one of the fundamental ideas that underpin the modern law of contract.² Freedom of contract and the concept of good faith are other fundamental concepts of contract law.³ Together with the other underlying principles of contract law, these fundamental ideas compete for recognition in contract law. It has been said: ‘throughout the common law world it is a matter of controversy to what extent obligations of good faith are to be found in contractual relationships’.⁴ From one legal system to another, and between the legal systems, the content of the good faith obligation also varies. This paper seeks to explore the position of the principle of good faith and by extension, fairness⁵ in three common law systems - South Africa, the United Kingdom and Australia.

Previously,⁶ I explored the application of good faith, fairness and equity by the Supreme Court of Appeal and the Constitutional Court in South African contract law.

Part A of this paper re-examines the tension that exists between the SCA and the Constitutional Court with respect to the role that good faith⁷ as a guiding principle should play in contractual disputes, demonstrating the discord between the courts by practical application of the *stare decisis* principle. However, Part A of this paper seeks to set out the differences on a more fundamental level than previously attempted, especially highlighting the SCA’s failure to develop the common law in accordance with their Constitutional mandate to do so. It will also seek to illustrate that the Constitutional Court is more inclined to elevate the role of good faith while the SCA takes a more formalistic approach, favouring *pacta sunt servanda* and to a lesser extent freedom of contract. This does not mean that the two courts are completely at odds. Much of the tension is due to the two benches giving different consideration to the same factors. However, the SCA has repeatedly rejected good faith as the basis of an independent remedy for relief for a contracting party seeking to escape the operation of an unduly harsh contract. Contracting parties have had to rely on

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¹ Expressed as the notion that if a contract is freely and voluntarily concluded, it should be strictly enforced.
³ Ibid.
⁴ *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2002] 2 All E.R (Comm) 849 PC [54].
⁵ Sometimes expressed as ‘equity considerations’.
⁶ Keryn Layton-McCann *The evolution of the tension between the Supreme Court of Appeal and the Constitutional Court regarding good faith and fairness in Contract Law, where do we stand?* (unpublished LLM Research Paper, University of Cape Town, 2016).
⁷ By implication, due to the components of good faith, the role of fairness and equity in contract law disputes also.
other accepted remedies such as public policy as a ‘back-door’ mechanism for equity and fairness to be considered in the adjudication of their disputes. Currently, the outcome of litigation on this subject is unpredictable and the approach of the courts is unclear resulting in legal uncertainty. The legal uncertainty unfortunately inadvertently works to the advantage of those against elevating good faith and fairness. The lack of effective judicial relief for parties seeking redress for a contract that operates unfairly in South Africa highlighted a legislative gap that had to be addressed, which is explored in Part B.

Part B starts with the unadopted attempt by the South African Law Commission (SALC) to address the issue of good faith in South African Contract Law.\(^8\) It then sets out the legislative steps taken in South Africa to provide relief in relation to consumers suffering the consequences of unfair contract terms or provisions. The Consumer Protection Act\(^9\) is discussed in this regard specifically looking at the substantive and procedural fairness protection measures provided for consumer contractants. The CPA is not the only recourse available for consumers fighting unfair contracts. From a consumer fairness perspective, very little has been written about other sector specific legislation adopted in South Africa which attempts to combat against unfair contracting practices either directly or indirectly. Part B therefore also sets out how other sectors seek to regulate fairness for consumers in South Africa.\(^10\)

The steps taken by the legislature discussed in Part B came decades after other countries started legislating against unfair contracts terms.\(^11\) As South Africa is years behind in this regard, there is room for further legislative improvement, which is addressed in Part C which sets out the United Kingdom and Australia’s consumer protection legislation for a comparative perspective.\(^12\) With the UK’s membership in the EU, and consequent compliance with some civil law principles, good faith as a concept has increasingly been ‘forced’ on the UK system by placement in legislation. Due to the conventional practice of common law jurisdictions still looking to English law as a foundation for comparative purposes on which to base legislation and to interpret legal

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\(^8\) This started with South African Law Commission Working Paper 54 (Project 47) *Unreasonable Stipulations in Contracts and the Rectification of Contracts* (1994). Two additional reports were published in 1996 & 1998, discussed in section V.
\(^9\) 68 of 2008.
\(^10\) In my previous paper it was only possible to very briefly mention the work done by the SALC and introduce the CPA. This paper is a more in-depth consideration of both and it also considers consumer protection provided in other sectors.
\(^12\) No comparative study was previously undertaken by myself.
principles, good faith has already, and in my view, will continue to have a trickle-down effect on common law jurisdictions. The treatment of good faith by the courts and in legislation by United Kingdom and Australia therefore provide a useful reference point for comparison on this topic.\footnote{Very little has been written on this aspect of law using Australia and the UK for a comparative perspective.} Part C also looks at recent notable decisions in England and Australia when litigants attempted to rely on good faith challenges in a commercial contract setting to establish what the current position is with respect to the recognition of good faith and if the trickle-down effect is having any lasting impact.

**PART A: A CHRONOLOGY OF THE APPROACH BY THE COURTS**

a) **Introduction**

It is stated that in ‘South African law all contracts are *bona fidei*\footnote{Reinhard Zimmermann & Daniel Visser *Southern Cross: Civil law and Common law in South Africa* (1996) 240 note 167.} and the ‘requirement of *bona fides* thus underlies and informs the South African law of contract.’\footnote{Dale Hutchison, ‘Good Faith in the South African Law of Contract’ in Brownsword, Roger, NJ Hurd & G Howells (eds) *Good Faith in Contract: Concept and Context* (1999) at 213 note 4.} If that is accepted as a point of departure, then the issue that arises is, what exactly does that mean? Are all contracts governed by the principle of good faith and as such, does conduct which conflicts with the concept of good faith provide grounds to set aside the contract? Or does it mean that the development and application of contract law should take place based on the underlying principle? This goes to the heart of the issue that has caused so much legal uncertainty in this area of South African contract law.

Good faith has been defined as ‘the idea that parties to a contract should behave honestly and fairly in their dealings with one another’.\footnote{Zimmermann & Visser op cit note 14 para 1.8.} An extended definition has been suggested for South Africa:

‘[T]he concept of bona fides or good faith has acquired a meaning wider than mere honesty or the absence of subjective bad faith. According to this extended meaning, it has an objective content which includes other abstract values such as justice, reasonableness, fairness and equity.’\footnote{Mr Justice FDC Brand SC ‘The role of good faith, equity and fairness in the South African law of contract: the influence of the common law and the Constitution’ (2009) 126 *SALJ* 71 at 73.}
But as we know, it does necessarily follow that contracts will be just and fair merely because values such as good faith are recognised in our law.\(^{18}\) Therefore it has been suggested that good faith requires contractants to ‘show a minimum degree of respect for the interests of the other contractant, to the extent that she does not use the contract to protect her own interests unreasonably’.\(^{19}\)

II. GOOD FAITH AND FAIRNESS IN THE PRE-CONSTITUTIONAL ERA

\textit{a)} Application by the Appellate Division

In \textit{Magna Alloys & Research (S.A.) (Pty) Ltd. v Ellis}\(^{20}\) the Appellate Division departed from English law, ruling a restraint of trade would be valid unless the enforcement of the clause would be contrary to public policy.\(^{21}\) Public policy was confirmed to be a variable concept which changes over time.\(^{22}\) The court stated that the mere fact that an agreement operated in an unfair or unreasonable manner would not ordinarily constitute a ground on which to challenge the agreement.\(^{23}\)

The \textit{exceptio doli} (\textit{generalis}) had been used to import equitable doctrines\(^{24}\) from English Law.\(^{25}\) When an attempt was made to use the \textit{exceptio doli} to introduce a substantive defence based on equity in \textit{Bank of Lisbon & South Africa v Ornelas},\(^{26}\) (the \textit{Bank of Lisbon} case) it was rejected. The court confirmed that Roman-Dutch law did not have a general substantive defence based on equity,\(^{27}\) because it was ‘inherently an equitable legal system’.\(^{28}\)

The dissenting judgement of Jansen JA was in favour of the \textit{exceptio doli} as a substantive defence:

‘The \textit{exceptio doli generalis} constitutes a substantive defence, based on the sense of justice of the community. As such it is closely related to the defences based on public policy (interest) or \textit{boni mores}……. Conceivably they may overlap: to enforce a grossly unreasonable contract may in appropriate circumstances be considered as against public policy or \textit{boni mores}.’\(^{29}\)

\(^{19}\) Ibid para 9.265.
\(^{20}\) 1984 (4) SA 874 (A).
\(^{21}\) Supra note 20 at 893A.
\(^{22}\) Ibid at 891G.
\(^{23}\) Ibid at 893H.
\(^{24}\) Estoppel, rectification, and the right to rescind a contract induced by innocent misrepresentation are listed as examples. See Hutchison & Pretorius op cit note 2 at 27 note 75.
\(^{25}\) Hutchison & Pretorius op cit note 2 at 27.
\(^{26}\) 1988 (3) SA 580 (A).
\(^{27}\) In coming to their decision, the court examined the historical origins of the \textit{exceptio doli} defence and concluded it could not have formed part of South African law as it was never part of Roman-Dutch law.
\(^{28}\) Supra at 606A – 606B.
\(^{29}\) Ibid at 617F – 617G.
By stating that there was some level of overlap between the notions of public policy and *boni mores*, the minority judgement planted the idea that public policy could be used as the manner to introduce a defence based on fairness and good faith.\(^\text{30}\) That would give rise to much of the ensuing confusion to follow.

Six months later, in *Sasfin (Pty) Ltd v Beukes*\(^\text{31}\) (the *Sasfin* case) the AD set aside a deed of cession that ceded all rights to Beukes’ income to Sasfin because the manner in which it operated was ‘unconscionable and incompatible with the public interest and therefore contrary to public policy’.\(^\text{32}\) The court stated that they favoured the fundamental principle of certainty of contract,\(^\text{33}\) and individual notions of fairness would not play a role to restrict the underpinning principle of freedom of contract.\(^\text{34}\) The cession was set aside because it was in the interests of the community to consider the element of public harm rather than just fairness between the individual parties.\(^\text{35}\) By classifying the operation of the cession as ‘unconscionable’, the court set a high bar for anyone seeking to have their contract set aside based on public policy. By stating that ‘[one] must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness’,\(^\text{36}\) the court made a clear distinction between conduct that is unfair, and conduct that is unconscionable. Unconscionable implies intolerable injustice, conduct that cannot be countenanced, something more than just unfair.

III. GOOD FAITH AND FAIRNESS IN THE CONSTITUTIONAL ERA

\textit{a) Introduction}

The Constitution of the Republic of South Africa Act 108 of 1996 heralded the new constitutional dispensation in South Africa. While direct, horizontal application of the Bill of Rights was applicable where constitutional rights had been violated, the courts were also required to apply the Bill of Rights indirectly in terms of s 39(2).\(^\text{37}\) Section 39(2) placed a duty on ‘every court, tribunal or forum’ to ‘promote the spirit, purport and objects of the

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\(^{30}\) Brand \textit{op cit} note 17 at 74.

\(^{31}\) 1989 1 All SA 347 (A).

\(^{32}\) Ibid at 13H – 13J.

\(^{33}\) The court cautioned that the power to declare contracts contrary to public policy should be ‘exercised sparingly and only in the clearest of cases’ (9A – 9C).

\(^{34}\) Ibid at 9A – 9C ‘public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammeled by restrictions on that freedom.’


\(^{36}\) Supra note 31 at 9A – 9C.

Bill of Rights’ in their interpretation of legislation, and in the development of common law or customary law. In addition, s 173 granted the High Court, the SCA and the Constitutional Court an inherent power to develop common law ‘taking into account the interests of justice’. There are differing views regarding the interplay between duty to develop the common law, s 39(2), s 173 and the principle of *stare decisis* an in-depth discussion of which is beyond the scope of this paper. It has however been pointed out the Constitutional Court has stated numerous times it is preferable for them to have the views of the High Court and the SCA in matters which raise the question of developing the common law.

**b) The application by the Appellate Division**

The need for clarity regarding a court’s power to intervene when a contract operated in an unjust manner culminated in the SALC investigating this issue. The SALC had published their second working paper on the issue, reaffirming the need for judicial intervention when *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* (the *Saayman* case) was heard. Despite the AD having the (new) mandate to develop the common law in accordance with s 39(2) of the Constitution, no mention was made of the Constitution in either *Saayman* judgement. This is unfortunate as the facts of the case presented a good opportunity for the court to take a bold step forward.

The majority set aside the suretyship contract due to lack of contractual capacity. In his minority judgement Olivier JA stated, ‘*this court itself*’ without referring to the term *bona fides*, still applied the underlying principles, sometimes referring to it as public interest or public policy. It was his view that public policy includes good faith. Effectively, he was suggesting that good faith could not be isolated from public policy.

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39 Judge Malcom Wallis ‘Commercial certainty and constitutionalism: Are they compatible?’ (2015) at 19 note 52. Inaugural lecture as Professor Extraordinary of the Department of Mercantile Law, presented at the University of the Free State.
42 1997 (4) SA 302 (A).
43 Layton-McCann op cit note 6.
44 My translation and emphasis.
45 Supra note 42 at 323H.
46 Supra note 42 at 324A
c) The application by the Supreme Court of Appeal

In *Brisley v Drotsky*47 (the *Brisley* case), the appellant (lessee) alleged application of the Shifren principle to enforce a non-variation clause would have been unreasonable, unfair and in conflict with the principle of *bona fides*. The court acknowledged the underlying value of good faith, but quoting Hutchison48 they confirmed that ‘good faith could not be relied on as an independent, ‘free-floating’ basis for the setting aside of a contract’49 therefore the appeal was dismissed. Good faith was identified as an abstract value rather than a substantive rule that could be relied on directly as a basis for judicial intervention.50

Cameron JA wrote a separate concurring judgement51 and held that ‘neither the Constitution nor the value system it embodies give the courts a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith’.52 Cameron JA then relied on the constitutional values of dignity, equality and freedom as the basis for courts needing to exercise ‘perceptive restraint’53 in adjudicating contractual disputes. ‘Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity.’54 A later judgement55 explained this as ‘the liberty to regulate one’s life by freely engaged contractual arrangements.’56 Cameron JA’s interpretation of the constitutional values of dignity and freedom and his disregard of the inequality of bargaining power in the contractual relationship in the context of the right to equality was criticised.57

Later that same year, in *Afrox Healthcare Bpk v Strydom*58 (the *Afrox* case) the SCA considered whether an exclusionary clause could be considered contrary to public interest or in conflict with the principles of good faith.59 The respondent also argued that due to s 39(2) of the Constitution, the clause conflicted with the right of access to healthcare in s

47 2002 (4) SA 1 (SCA).
48 Supra note 47, para 22 referencing Hutchison op cit note 14 at 230.
49 Ibid.
50 Later summarised by Brand op cit note 17 at 81.
51 Which addressed the duty imposed by s 39(2) of the Constitution.
52 Ibid para 93.
53 Ibid para 94.
54 Ibid.
55 Napier v Barkhuizen 2006 (4) SA 1 (SCA) (the *Napier* case).
56 Ibid para 12.
57 Deeksha Bhana & Marius Pieterse ‘Towards a reconciliation of contract law and constitutional values: *Brisley* and *Afrox revisited*’ (2005) SALJ 874 at 882; Lubbe op cit note 38 at 419 - 422.
59 The good faith argument was submitted as an alternative argument if the clause did not conflict with public interest.
27(1)(a) of the Constitution, and as such was against public interest. 60 Unfortunately, none of the arguments put forward by the respondent were able to persuade the court from their ‘traditional bias in favour of the strict enforcement of agreements so as to render the exemption clause in *Afrox* contrary to public policy.’ 61 The court reaffirmed their recent stance on good faith taken in the *Brisley* case. 62 The court held the view that it was in the public interest to enforce contracts freely and seriously concluded in order to give effect to the principles of freedom of contract and *pacta sunt servanda*. 63 Brand JA relied on the passage quoted above by Cameron JA 64 in dismissing the argument put forward by the respondent that the exclusionary clause was against public interest on constitutional grounds. 65

The impression created by the SCA in *Brisley* and *Afrox* was that when adjudicating a dispute in which considerations of public policy came into play, ‘fundamental rights could not be relied upon to attack and subvert contractual principles’. 66 The SCA’s formalistic approach to this area of the law, despite their Constitutional mandate to develop the law, was disappointing. Although they were at this stage applying s 39(2) to the facts at hand, it does not appear the results reflected any change in approach. In fact, the Constitution was being used to defend their overarching emphasis on freedom of contract and *pacta sunt servanda*. Justice Brand who had concurred with Cameron JA’s interpretation and views on the constitutional values of ‘dignity’ and ‘freedom’ in both the *Brisley* and *Afrox* cases subsequently conceded 67 that they ‘may fulfil very different roles’ 68 and therefore are ‘too vague to provide a decisive answer in deciding cases’. 69

The SCA were afforded another opportunity to develop the common law in *Napier* 70 where they considered whether a time-bar clause imposing a 90-day limitation in an insurance contract was contrary to public policy. Cameron JA once again reaffirmed the view of the SCA expressed in the *Brisley* and *Afrox* cases that courts can only invalidate contracts which were against public policy. Judges did not have a ‘general discretion to

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60 Supra note 58 para 16.
61 Lubbe op cit note 38 at 401.
62 Supra note 58 para 32. Set out at notes 49 and 50 supra.
63 Ibid para 23 – 24.
64 See note 54 supra.
65 Supra note 58 para 24.
66 Lubbe op cit note 38 at 417.
67 Ibid op cit note 17 at 86.
68 Ibid.
69 Ibid.
70 Supra note 55.
declare contracts invalid because of what they perceive as unjust, or... on the basis of imprecise notions of good faith'.\(^7\) Cameron JA then confirmed that public policy was to be determined from the founding constitutional values of human dignity, equality and freedom.\(^7\) As previously pointed out,\(^7\) the narrow reliance on only the foundational constitutional values to give content to the notion of public policy has been criticised\(^7\) as it slants the test to favour sanctity of contract using the interpretation Cameron JA did. This goes to the heart of the tension between the SCA and the Constitutional Court: which constitutional principles or values, and which foundational principles of contract law go into the ‘basket of considerations’\(^7\) to determine public policy? How should the component factors be weighed up when considered by a court?

\textit{\textbf{d) The Constitutional Court’s interpretation}}

The Napier case went on appeal to the Constitutional Court in Barkhuizen v Napier\(^7\)\(^6\) (the Barkhuizen case) where it was held that the 90-day time-bar clause was not contrary to public policy. Their conclusion was reached by placing different factors into the ‘basket of considerations’ to determine prevailing public policy and weighting them differently to the SCA. Ngcobo J stated that whether a disputed term is contrary to public policy will depend on our constitutional values.\(^7\) He warned that although this left space ‘for the doctrine of \textit{pacta sunt servanda} to operate... it allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them.’\(^7\) This view differs from the approach of the SCA that favours \textit{pacta sunt servanda}.\(^7\) Ngcobo J then held that the concepts of fairness, justice, equity and reasonableness could not be isolated from public policy\(^7\) and that the concept of \textit{ubuntu} would play a role.\(^7\)

A two-part test was then set out to determine if a contract term would be fair:

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\(^7\) Ibid para 7B.
\(^7\) Ibid.
\(^7\) Ibid.
\(^7\) Ibid.
\(^7\) Layton-McCann op cit note 6.
\(^7\) PJ Sutherland ‘Ensuring contractual fairness in consumer contracts after Barkhuizen v Napier Part 2’ 2009 Stellenbosch LR 51.
\(^7\) Matthew Kruger ‘The role of public policy in the law of contract revisited’ (2011) 128 SALJ 712 at 719.
\(^7\) 2007 (5) SA 323 (CC).
\(^7\) Supra note 76 paragraph 30G.
\(^7\) Ibid.
\(^7\) Ibid paragraph 70C. Ngcobo J goes on to say that ‘While it is necessary to recognise the doctrine of \textit{pacta sunt servanda}, courts should be able to decline enforcement [of a clause] if it would result in unfairness or would be unreasonable.’
\(^7\) Ibid paragraph 51E.
\(^7\) Ibid.
First, was the clause itself unreasonable? This would be determined by weighing up on the one hand public policy as informed by the Constitution, together with other factors such as *pacta sunt servanda* and whether the contract was freely and voluntarily concluded, and on the other hand, the parties’ ability to seek judicial redress.

Secondly, if the clause was reasonable, should it be enforced in the light of the circumstances which prevented compliance with the clause? By applying the test set out, the court concluded that the 90-day time limitation was not unreasonable or unfair and as there was no evidence put before the court of unequal bargaining position between the parties, the contract was upheld.

The obiter remarks by Ngcobo J questioning whether the ‘limited’ role of good faith in our law as an ‘underlying value’ that has ‘a creative, a controlling and a legitimating or explanatory function’ under the Constitution ‘is appropriate’ implies that more development is to come on this matter. Even so, the Constitutional Court’s more progressive approach underpinned by notions of fairness and equity were clearly indicated. First, the court stated that fairness, equity and reasonableness were considerations which could not be separated from public policy. Secondly, in the test set out by the court, the first question considered was if the clause being adjudicated was unreasonable. Lastly, the court held it could decline to enforce a clause if it operated unfairly. Those three factors combined indicate the Constitutional Court’s desire to move away from the SCA’s approach to good faith. The SCA’s favouring of sanctity of contract without acknowledging the need to evolve stands in contrast to the direction the Constitutional Court appears to be steering good faith in contract law.

e) *The Supreme Court of Appeal’s response to the Constitutional Court*

In *Bredenkamp v Standard Bank of South Africa Ltd* (the *Bredenkamp* case) the applicant successfully relied in the *court a quo* on *Barkhuizen* as authority for an interim interdict preventing the respondent cancelling the contracts governing their bank accounts. Jajbhay

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82 Ibid paragraph 56.
83 Ibid paragraph 57 - 58
84 Ibid.
85 Ibid note 76 para 82.
86 Ibid.
87 See note 80 supra.
88 See note 82 supra.
89 See note 79 supra.
90 2009 (5) SA 304 (GSJ).
J referred to *Barkhuizen* and noted its emphasis on fairness when granting the order.\(^{91}\)

However, when Lamont J applied the *Barkhuizen* case to the same facts\(^ {92}\) to decide whether the bank’s conduct violated the standard of fairness set by the Constitution, the bank’s conduct was held to be substantively and procedurally fair. That two judges can come to two different outcomes when applying the same test on the same set of facts is exactly the situation the SCA seeks to avoid when they warn against judges exercising equitable discretion.\(^ {93}\)

When the matter reached the SCA,\(^ {94}\) Harms DP pointed out that when considering public policy, a constitutional principle that tends to be forgotten is legality.\(^ {95}\) Referring to *Barkhuizen*, Harms DP stated ‘[w]ith all due respect, I do not believe that the judgment held or purported to hold that the enforcement of a valid contractual term must be fair and reasonable, even if no public policy consideration found in the Constitution or elsewhere is implicated.’\(^ {96}\) Even though ‘fairness is not a freestanding requirement’\(^ {97}\) Harms DP did consider it on the facts and agreed with the approach of Lamont J.\(^ {98}\) The appeal was denied and the appellant sought leave to appeal to the Constitutional Court. The request was denied on the papers, without oral argument.\(^ {99}\) Such practice generally means the higher court finds themselves in agreement with the court below.\(^ {100}\) The Constitutional Court was probably waiting for a more appropriate set of facts, more deserving of an equitable outcome.\(^ {101}\)

Soon thereafter Brand JA held in *Maphango v Aengus Lifestyle Properties (Pty) Ltd*\(^ {102}\) (the *Maphango* case) that ‘[r]easonableness and fairness are not freestanding requirements for the exercise of a contractual right’.\(^ {103}\) Arguably he was issuing a challenge when he then said:

‘Unless and until the Constitutional Court holds otherwise, the law is therefore as stated by this court, for example, in *South African Forestry Co, Brisley*, and *Bredenkamp*. Accordingly, a

\(^{91}\) Supra note 90 para 58.

\(^{92}\) *Bredenkamp v Standard Bank of South Africa Ltd* 2009 (6) 277 (GSJ).

\(^{93}\) ‘Liability cannot depend on the idiosyncratic views of an individual judge. That would cloud the outcome of every case in uncertainty.’ *Fourways Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA).

\(^{94}\) *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA)

\(^{95}\) ‘Making rules of law discretionary or subject to value judgments may be destructive of the rule of law.’ Supra note 94 para 39D.

\(^{96}\) Ibid para 50E.

\(^{97}\) Ibid para 53D.

\(^{98}\) Ibid para 54E.


\(^{100}\) Ibid.

\(^{101}\) Layton-McCann *op cit* note 6.

\(^{102}\) 2011 (5) SA 19 (SCA).

\(^{103}\) Supra note 102 paragraph 23H.
court cannot refuse to give effect to the implementation of a contract simply because that implementation is regarded by the individual judge to be unreasonable and unfair.\footnote{104} Disappointingly for anyone hoping for clarity on the different approaches between the two courts, when the \textit{Maphango} case went on appeal to the Constitutional Court, it referred the matter back to the Gauteng Rental Housing Tribunal.\footnote{105} The minority judgement was in line with the SCA ‘in most material respects’\footnote{106} therefore creating an even more perplexing situation for practitioners.

\textit{f) The Constitutional Court clarifies their position}

\textit{Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd},\footnote{107} (the \textit{Everfresh} case) possibly provided the appropriate facts for judicial intervention to ensure an equitable outcome.\footnote{108} The applicant was a small grocer who sought to rely on a duty to negotiate a new lease in good faith with the deeper pocketed respondent (lessor). Unfortunately, the matter was poorly pleaded and the first time the important constitutional issues raised by the facts\footnote{109} was before the Constitutional Court, and therefore leave to appeal was denied.\footnote{110} In denying the application, Moseneke J’s obiter remarks did shine a light on his view on good faith:

\begin{quote}
‘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.’\footnote{111}
\end{quote}

The implication is, that had the matter been properly pleaded, and if the High court had applied themselves to the duty imposed by s 39(2), Moseneke J may have relied on good faith (and \textit{ubuntu}) to tilt the scales in favour of Everfresh. In his minority judgement,
Yacoob J echoed the obiter sentiments expressed by Ngcobo J in the *Barkhuizen case* stating the duty imposed by s 39(2) should ‘require courts to encourage good faith in contractual dealings and whether our Constitution insists that good faith requirements are enforceable should be determined sooner rather than later’. Although he did not answer the questions posed, he did state that ‘[g]ood faith is a matter of considerable importance in our contract law and the extent to which our courts enforce the good faith requirement in contract law is a matter of considerable public and constitutional importance.’ He went on to say that the development common law of contract ‘should take cognisance of the values of the vast majority of people’, calling for particular recognition of the value of *ubuntu*. Despite Yacoob J’s remarks also being obiter, it is illustrative of another justice on the bench of the Constitutional Court seeking not only to elevate good faith, but in the South African context also recognising *ubuntu*.

In *Botha v Rich* the court considered if enforcing a cancellation and forfeiture clause in a credit instalment agreement would be contrary to public policy when there was an outstanding demand requiring registration of the property in terms of s 27(1) of the Alienation of Land Act. Alternatively, it was considered whether cancellation without restitution would be contrary to public policy and a violation of the applicant’s constitutional rights. The court considered the application of the principle of reciprocity and relied on the underlying value of good faith in order to relax the principle where rigid application would be unfair. The court held that granting cancellation and therefore forfeiture of the instalments already paid, ‘would be a disproportionate remedy for the breach’ and ordered the respondents to effect registration and transfer of the property against simultaneous payment of arrears by the applicant and registration of a mortgage bond over the property in favour of the owner.

The decision has been criticised for the uncertainty it creates for litigants seeking to rely on established rules and precedents. Although the applicant relied on public policy,
the court’s decision did not strictly speaking pronounce the cancellation clause (or the operation thereof without restitution) as contrary to public policy. It has been pointed out that the decision could have been justified on the basis that cancellation and forfeiture would be ‘offensive to the public interest and therefore against public policy’.

Yet, the court chose not to do so. Had they proceeded along the public policy route, it would possibly have been better received. On the other hand, it has also been pointed out that the court came to their decision without referring to its own two stage public policy test set out in Barkhuizen, or the SCA’s understanding thereof set out in Bredenkamp. Bhana therefore argues that the court ‘used a naked “free floating” notion of fairness to defeat pacta sunt servanda in circumstances where it did not think that the Barkhuizen test could yield the desired result.’

Less than three months later, the Constitutional Court heard Cool Ideas 1186 CC V Hubbard. Hubbard refused to make final payment for building work to comply with an arbitration award on the basis that Cool Ideas was an unregistered house builder. The Constitutional Court had to determine whether to make the arbitration award an order of court. Cool Ideas argued it would be unfair to prevent them from receiving payment because the actual building work was done by a registered subcontractor. On the issue of equity, the majority held that ‘equity considerations do not apply.’ They then went on to emphasise legal certainty by invoking the principle of legality:

‘[T]he law cannot countenance a situation where, on a case-by-case basis, equity and fairness considerations are invoked to circumvent and subvert the plain meaning of a statutory provision which is rationally connected to the legitimate purpose it seeks to achieve, as is the case here. To do so would be to undermine one of the essential fundamentals of the rule of law, namely the principle of legality.’

The court declined to make the arbitration award an order of court as by doing so they would sanctioning an illegality in terms of the Housing [Consumer] Protection [Measures] Act. The court also stated that their refusal was required by public policy due to ‘the strongly persuasive reasons advanced by the majority in the Supreme Court of Appeal.’

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123 Brand op cit note 99 at 247. Which would have brought the judgement in line with the Sasfin case.
125 Ibid.
126 2014 (4) SA 474 (CC).
127 Registration is required in terms of the Housing Consumers Protection Measures Act 95 of 1998.
128 Supra note 126 para 52H.
129 Ibid para 52H-53B.
130 Ibid para 53D.
131 Ibid para 60.
That is interesting because, in coming to their decision in *Hubbard v Cool Ideas*, the SCA majority stated that equity considerations played no role due to the illegality of the matter.\(^\text{133}\)

The route taken by the Constitutional Court in *Cool Ideas* is difficult to reconcile with the decision by the same court in the *Botha v Rich*. The judgements had three of the same justices in common: Moseneke ACJ, Skweyiya, ADCJ, Madlanga, J.\(^\text{134}\) Yet, in *Cool Ideas* the Constitutional Court echoed the views of the SCA, emphasising legality and legal certainty instead of equity considerations, whereas in the *Botha* case, the emphasis was on equity considerations. Although legislation played a role in *Cool Ideas*, the actual work was performed by a registered house builder. If the court had allowed any equity considerations to play a role, as they did in the *Botha* case, that fact should possibly have carried more weight.

\section*{IV. CONCLUSION PART A}

Good faith has not yet been recognised by either the Constitutional Court or the SCA as a free-standing requirement in South African contract law. However, it is clear from the obiter remarks in *Barkhuizen* and *Everfresh* that the Constitutional Court want good faith to play a more prevalent role. According to the SCA in *Bredenkamp* and *Maphango*, fairness and reasonableness are not freestanding requirements in order to exercise contractual terms. But, as the Constitutional Court pointed out in *Barkhuizen*, the concepts of fairness, justice, equity, and reasonableness cannot be isolated from public policy. In addition, to reflect the values of the majority of the population, the concept of *ubuntu* also has to play a role. What the SCA may be forgetting is that they identified public policy as a variable concept when they were the AD. It appears that the composition of the ‘basket of considerations’ of public policy and the weight given to concepts such as good faith and fairness has changed, and the SCA must acknowledge the change. Until we have certainty, ‘a court does not have a general discretion to decide what is fair and equitable and then to determine public policy with reference to its views on fairness.’\(^\text{135}\)

The Constitutional mandate to develop the common law in the spirit, purport and object of the Bill of Rights, will in my view, ultimately win out. This will enable all courts, with the endorsement of the Constitutional Court to elevate the roles of good faith, *ubuntu*,

\(^{132}\) 2013(5) SA 112 (SCA).
\(^{133}\) Supra note 132 para 14.
\(^{134}\) Layton-McCann op cit note 6.
\(^{135}\) Nyandeni Local Municipality v Hlazo 2010 (4) SA 261 para 78B.
fairness and reasonableness reflecting the updated legal convictions of the community. One of the biggest obstacles in this process will be getting the SCA to move away from their formalistic stance of clinging to sanctity of contract and legal certainty above other principles. However, the lack of consistency shown by the Constitutional Court in this area, if the outcome in Botha is compared to Cool Ideas does, in my view, further complicate the development of the law in this area. Rather than focusing on the development of the law, the focus instead shifts to fear of legal uncertainty which is bound to halt the progress.

PART B: LEGISLATIVE ATTEMPTS TO PROVIDE RELIEF AND CLARITY

V. THE SOUTH AFRICAN LAW COMMISSION

Five years before Bank of Lisbon, the SALC commissioned an investigation into the issue of unfairness in contracts.\textsuperscript{136} The main question posed was ‘whether in the South African law of contract, there should not be a criterion of fairness to be met by all contracts’.\textsuperscript{137} Their recommendations should be considered in the context of the timeline sketched above.\textsuperscript{138} The Working Paper recommended courts be given a general power to test commercial or consumer contracts, substantively and procedurally against the principle of good faith.\textsuperscript{139} The Working Paper referred to Bank of Lisbon and stated the effect of the majority ruling was that there was no longer ‘a general substantive defence based on fairness in the Roman-Dutch Law’\textsuperscript{140} and that the ‘South African courts had consistently refused to exercise equity jurisdiction to release a party from an unfair but otherwise valid contract’.\textsuperscript{141} Two draft bills were published for comment.\textsuperscript{142}

In 1996, the SALC published a Discussion Paper,\textsuperscript{143} which set out to determine if courts should be given the power to grant relief if a contract or its terms were unjust or unconscionable.\textsuperscript{144} They weighed up the concept of unconscionability against the concept

\begin{footnotes}
\item[137] Ibid p(iii) para 2.
\item[138] Not long after the Sasfin case, but before the Saayman case.
\item[140] SALC Working Paper (1994) at 12 para 2.7
\item[141] Ibid.
\item[142] Ibid at 82-89.
\end{footnotes}
of good faith and remarked that the ‘two approaches may be thought to lead to the same result.’ They recommended the use of unconscionability because of the background of South African law and the use thereof ‘by legal systems close to our own.’ Their recommendation was a draft Unfair Contractual Terms Bill which gave the courts the authority to rescind or amend unfair contractual terms if the execution or enforcement thereof would be unreasonable, unconscionable or oppressive. They proposed that the Bill apply to all contracts, even those regulated by other legislation, that it be binding on the State and that the operation thereof could not be excluded or limited.

The SALC’s Final Report on Project 47 was released in 1998. It noted and addressed the respondents’ objections, ranging from the issue of legal uncertainty, to fears that the proposed Bill would discourage foreign investors and isolate South African contracting parties. To allay these objections, the SALC considered foreign jurisdictions, which already regulated unfair contracts, or recognised the need to do so, or were busy adopting measures to address the issue. They found by not enacting legislation, South Africa ‘would rather become the exception and its law of contract would be deficient in comparison with those countries which recognise and require compliance with the principle of good faith in contracts.’ On the issue of legal certainty, the Commission said ‘it is a price that must be paid if greater contractual justice is to be achieved’. Their final recommendations differed from the 1996 Discussion Paper in that they advised guidelines to define the concepts of unreasonableness, unconscionability or oppressiveness, to allay fears of legal uncertainty. They limited the scope of their proposed Bill to exclude contracts governed by certain legislation. The SALC’s
conclusion was that legislation was required to bring about reform in this area of law covering all contracting stages. This led to their proposed Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms Bill\textsuperscript{156} which would provide regulation to ensure ‘that a court may rescind or amend contracts which are contrary to good faith.’\textsuperscript{157}

Instead of South Africa accepting the recommendations of the SALC to develop its legislation to address the issue of unfairness in contracts and remaining in line with other jurisdictions that recognised the need to do so,\textsuperscript{158} it is at this point that the ball was dropped. The proposed Bill was tabled before parliament in 1998,\textsuperscript{159} but unfortunately no legislation was enacted.

VI. THE CONSUMER PROTECTION ACT

\textit{a) Introduction}

Following the abandonment of the abovementioned recommendations of the SALC, and the increasingly questionable decisions in this area of the law, especially by the SCA in 2002,\textsuperscript{160} the need for legislative intervention in this area was pressing. The sentiment that consumers in South Africa needed basic consumer rights and that as a country it was out of step and lagging behind foreign jurisdictions in this regard was recognised by the Department of Trade and Industry.\textsuperscript{161} The DTI Draft Green Paper was the first step in what ultimately would become the CPA. The process and enactment of the CPA is beyond the scope of this dissertation. Instead the focus will be on the way the CPA seeks to address the issue of unfairness in consumer contracts.

The relationship governed by the CPA is that of supplier and consumer, and the reality is that most relationships are governed by standard term contracts. In standard term

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\textsuperscript{156} Op cit note 149 Annexure A.

\textsuperscript{157} Ibid.

\textsuperscript{158} See note 151 supra.

\textsuperscript{159} Alfred Jacobus Barnard \textit{A critical legal argument for contractual justice in South African law of contract} (LLD thesis, University of Pretoria, 2005) at 206. Available at: \url{http://repository.up.ac.za/bitstream/handle/2263/25640/Complete.pdf?sequence=7&isAllowed=y}, accessed on 19 March 2017.

\textsuperscript{160} In the \textit{Afrox} case and \textit{De Beer v Keyser} 2002 1 SA 827 (SCA) discussed at note 194 infra.

contracts, due to the unequal bargaining position of the parties, the consumer has little leverage and will usually agree to the terms offered despite the contract not necessarily being reflective of their will. In this situation, it is arguable that when the bargain was struck, real consensus was not reached in the first place. The impracticality of agreeing terms on an individual basis for the multitude of contracts required in day to day life mean that standard form contracts are a way of life. As such, consumers as the weaker contracting party often need protection from a contract that may operate unfairly.

b) Purpose of the CPA

The broad purpose of the CPA is ‘to promote and advance the social and economic welfare of consumers in South Africa’.\(^{162}\) Two of the ways the Act seeks to achieve this purpose is through promoting fair business practices\(^{163}\) and protecting consumers from unconscionable, unfair, unreasonable, unjust, or otherwise improper trade practices.\(^{164}\) To promote the objectives of the CPA, various fundamental consumer rights are set out in Chapter 2. In keeping with the theme of fairness, this paper will concentrate on the right to fair and honest dealing in Part F and the right to fair, just and reasonable terms and conditions in Part G of the Act as mechanisms for consumers to achieve substantive and procedural fairness in contracting.

c) Application of the CPA

The CPA applies to all transactions occurring in South Africa,\(^{165}\) unless the transaction is excluded by s 5(2), or the Minister grants an industry wide exemption in terms of s 5(3) & 5(4). For the purposes of the Act, a consumer is defined as a natural or a juristic person\(^{166}\) and therefore the Act can apply to both ‘business-to-business’ as well as ‘business-to-consumer’ transactions. However, due to the limitation in s 5(2)(b), a consumer who is a juristic person is only protected if its asset value or turnover does not exceed the threshold amount set by the Minister.\(^{167}\) A further relevant limitation in the application of the Act is

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\(^{162}\) s 3(1).  
\(^{163}\) s 3(1)(c).  
\(^{164}\) s 3(1)(d)(i).  
\(^{165}\) s 5(1)(a). A transaction is defined in s 1 of the CPA as the supply or promotion of goods or services.  
\(^{166}\) s 1. While the definition of juristic person in s 1 ‘includes’ a body corporate; a partnership or association; or a trust, no mention is made of a sole proprietor.  
\(^{167}\) The threshold is currently set at R2m in terms of GN 294 in GG 34181 of 1 April 2011. Sole proprietors are not listed in the consumer definition (see note 166 supra), therefore they may in theory rely on the CPA for protection even if their asset value or turnover exceeded the threshold amount. Franchise transactions are not excluded due to threshold considerations in s 5(2)(b) due to s 5(7) read with s 5(6)(b) – (e).
that the CPA does not apply to credit agreements under the National Credit Act. However, the goods or services that credit agreements relate to are subject to the CPA. Section 66 of the Financial Services Laws General Amendment Act exempts many of the financial services sector participants from complying with the CPA. The full extent of the exclusion is contained in the s 1 definition of a ‘financial institution’ in the Financial Services Board Act 97 of 1990. The scope of application of the CPA means that the Act does not provide relief to all parties seeking to escape from the operation of an unfair consumer contract.

d) Substantive Fairness under the CPA

Section 48 prohibits unfair, unreasonable and unjust contract terms, creating what has been referred to as a ‘general standard of unfairness for consumer agreements’. What constitutes unfair, unreasonable and unjust terms is set out in s 48(2), but effectively only s 48(2)(a) and (b) relate to content that may constitute unfair, unreasonable and unjust contract terms as s 48(2)(c) and (d) state that if the procedural requirements in s 41 or s 49(1) are not met, that will amount to unfair, unreasonable and unjust conduct. It has been suggested that the guidelines for what qualifies as unfair conduct in s 48(2) ‘are too broad and imprecise to be of any real assistance’. On the other hand, it has also been suggested that s 48 is the South African equivalent of the German ‘Generalklausel’ or the French ‘La clause generale’ and as such ‘the content is to be determined by the courts and the legislature [by way of a constant process of concretisation and re-evaluation]’. Either way, the duty of interpretation will fall on the courts. Now that legislation provides actual protection from unfair, unreasonable and unjust terms, rather than a general underlying principle of common law as before, hopefully the courts will take a less formalistic approach to give effect to the CPA’s purposes. The CPA does contain in s 52(2) a list of

168 34 of 2005.
169 45 of 2013, which became effective on 28 February 2014.
170 Elizabeth de Stadler ‘Section 5’ in Tjakie Naudé & Siegfried Eiselen (eds) Commentary on the Consumer Protection Act (OS 2014) 5-10 para 20.
173 Sharrock op cit note 172 at 308.
175 Ibid at 361 – 362.
factors which a court must consider in adjudicating a challenge based on s 48.\textsuperscript{176} They mostly refer to the bargaining power of the parties and the procedural unfairness in contracting.\textsuperscript{177} It has been suggested s 52(2) does not really provide sufficient guidance with respect to substantive fairness.\textsuperscript{178}

Other relief in such a situation may be found in Regulation 44(3)\textsuperscript{179} which creates a ‘grey-list’ of terms that are considered prima facie unfair, but may be proved to be fair depending on the circumstances of the case.\textsuperscript{180} This is a welcome development, especially considering some of the case law discussed above. The grey-list only applies to business-to-consumer contracts,\textsuperscript{181} where the consumer is a natural person.\textsuperscript{182} The presumptions do however also apply to negotiated terms.\textsuperscript{183} Should a consumer in a business-to-business transaction look to challenge a term that is covered by the grey-list, it has been submitted that a court can certainly consider this in their adjudication and application of a s 48 challenge.\textsuperscript{184}

For the purposes of illustration, had the CPA applied when the Afrox case was heard, the respondent would have been able to rely on Reg 44(3)(a) which creates a presumption that a clause excluding liability for death or personal injury to the consumer is unfair and unreasonable. Despite other considerations in the CPA, the Afrox case has been submitted\textsuperscript{185} as an example of the protection that the Regulation is seeking to provide, and that the clause in question should be ‘substantively unfair, regardless of whether the consumer knew about it.’\textsuperscript{186} Barkhuizen would also likely have had a different outcome if Reg 44(3)(z)\textsuperscript{187} had been prevailing law when the case was heard.

Due to the power granted to courts in s 2(2) of the CPA to consider ‘foreign and international law’, and ‘international conventions, declarations or protocols’, and because

\textsuperscript{176} These factors are also relevant when considering a challenge based on s 40, see section 22 below.
\textsuperscript{177} Tjakie Naudé ‘Section 48’ op cit note 170, 48-20 para 16.
\textsuperscript{178} Tjakie Naudé & Charlotte Koep, ‘Factors relevant to the assessment of the unfairness or unreasonableness of contract terms: Some guidance from the German law on standard contract terms’ (2015) 26 Stellenbosch Law Review 85 at 109.
\textsuperscript{179} The Minister is empowered to make regulations in s 120(1)(d) ‘relating to unfair, unreasonable or unjust contract terms’. Such Regulations were promulgated in GN 293 of 2011 in GG 34180.
\textsuperscript{180} Sharrock op cit note 172 at 309.
\textsuperscript{181} Reg 44(1).
\textsuperscript{182} That is due to the use of the word ‘individual’ in Reg 44(1).
\textsuperscript{184} Tjakie Naudé ‘Regulation 44’ op cit note 170, Reg 44-5 para 5&6.
\textsuperscript{185} Tjakie Naudé ‘The consumer’s right to fair, reasonable and just terms under the new Consumer Protection Act in comparative perspective’ (2009) 126 SALJ 505 at 510; Hawthorne agrees: op cit note 174 at 367.
\textsuperscript{186} Naudé op cit note 185 at 510.
\textsuperscript{187} According to which a term which imposes a limitation period shorter than common law or legislation for legal steps to be taken by a consumer, is presumed to be unfair.
the list in s 48(2) is not exhaustive, authors\textsuperscript{188} have suggested courts rely on how international jurisdictions have interpreted the concept of unfairness should further guidance be necessary.\textsuperscript{189} Section 51 is the CPA equivalent to European ‘black-list’ of prohibited terms. These are ‘Prohibited transactions, agreements, terms or conditions’. The Act attempts to cover a wide ambit of prohibited terms, taking its inspiration from s 90 of the National Credit Act (NCA).\textsuperscript{190} Included in the black-list are exemption clauses in respect of gross negligence.\textsuperscript{191} It has been suggested that a general prohibition clause preventing any limitation of the supplier’s obligations or consumer rights conferred by the CPA would have been preferable to the lengthy prohibitions in s 51(a) and (b).\textsuperscript{192} Hawthorne is however in favour of specific examples,\textsuperscript{193} due to our courts having made some ‘surprising decisions’ like \textit{De Beer v Keyser},\textsuperscript{194} where the practice of a borrower handing over an ATM card and PIN to a creditor was not held to be contrary to public policy. With examples like that, there does appear to be a need to be specific, and sketch clear guidelines for courts to follow to ensure consumer protection.

e) \textit{Procedural Fairness under the CPA}

Terms relating to parties’ conduct during the bargaining process, and measures aimed at promoting transparency between parties relate to procedural fairness.\textsuperscript{195} Part F of the Act addresses the consumer’s Right to Fair and Honest dealing. Section 40 prohibits ‘unconscionable conduct’ relating to the way consent was obtained, as such it can be considered to relate to procedural fairness.\textsuperscript{196} The extent of the protection offered by s 40 can be considered ‘consistent with the principle of good faith underlying the South African law of contract’\textsuperscript{197} in that a contracting ‘party should not display \textit{dolus}\textsuperscript{198} and their agreement must be reflective of both parties’ intentions. The relevance of this is that the section seeks to promote transparency to ensure a contract truly reflective of both parties’

\begin{footnotesize}
\textsuperscript{188} Tjakie Naudé ‘Section 48’ op cit note 170, 48-22 para 22; Sharrock op cit note 172 at 309.
\textsuperscript{189} The tests to determine fairness in the UK and Australia are considered below.
\textsuperscript{190} Tjakie Naudé ‘Section 51’ op cit note 170, 51-3 para 3.
\textsuperscript{191} s 51(1)(c)(i) and (ii).
\textsuperscript{192} Tjakie Naudé ‘Section 51’ op cit note 170, 51-3 para 2.
\textsuperscript{193} Hawthorne op cit note 174 at 365.
\textsuperscript{194} See note 160 supra.
\textsuperscript{195} Tjakie Naudé ‘Unfair contract terms legislation: The implications of why we need it for its formulation and application’ (2006) \textit{Stell LR} 361 at 377.
\textsuperscript{196} Jacques du Plessis ‘Section 40’ op cit note 170, 40-1 para 1.
\textsuperscript{197} Ibid 40-3 para 5.
\textsuperscript{198} Ibid footnote 1.
\end{footnotesize}
intentions is concluded. To achieve its goal, s 40(1) sets out general examples of unconscionable conduct by listing examples of prohibited behaviour, while s 40(2) additionally covers instances where a supplier “knowingly’ takes advantage of a consumer’s inability to protect their own interests”.

Section 41 seeks to promote transparency by seeking to prevent parties from being misled regarding aspects of the goods, service, price or terms. The section restates the common law position prohibiting false, misleading or deceptive representations concerning material facts. However, in terms of s 48(2)(c), if a consumer relied on such a representation to their detriment, the term is automatically considered unfair, unreasonable or unjust.

The CPA creates an ‘information obligation’ to educate consumers about the risks of their bargains. Section 49 forms part of this, and provides that ‘notice is required for certain terms and conditions’. This section applies in respect of four types of terms: exemption clauses, assumption of risk clauses, indemnity clauses or an acknowledgement of fact by the consumer. The terms must be written in plain language and drawn to the attention of the consumer in a conspicuous manner and form likely to attract the attention of an ordinarily alert consumer. Lastly, the consumer needs an adequate opportunity to contemplate the terms. It is clear that s 49(4) requires these four types of terms be brought to the consumer’s notice before the conclusion of the agreement.

Section 49(2) attempts to create a measure of additional transparency by requiring a consumer to be alerted to terms which apply to their agreement to the extent that they might be unusual, unexpected, or relate to serious injury or death. Practically speaking the

199 Section 40 has however been criticised for not addressing the substantive element of unconscionability (Graham Glover ‘Section 40 of the Consumer Protection Act in comparative perspective’ (2013) TSDAR 689.)
200 Jacques du Plessis ‘Section 40’ op cit note 170, 40-1 para 7. In addition, s 4(5)(b) contains a general prohibition on unconscionable conduct.
201 s 41(1)(a). Subsections (b) and (c) list exaggeration, innuendo or ambiguity of material fact and failure to disclose the same, and failing to correct a false misapprehension.
202 Hawthorne op cit note 174 at 356.
203 Which is also in Part G of the Act.
204 s 49(1)(a).
205 s 49(1)(b).
206 s 49(1)(c).
207 s 49(1)(d).
208 s 49(3) read with s 22 of the CPA.
209 s 49(1) read with s 49(4). This must be done at the earliest time of: entering into the transaction, beginning to engage in the activity, entrance into or access of the facility, or when consideration is required.
210 s 49(5).
211 Tjakie Naudé ‘Section 49’ op cit note 170, 40-3 para 6.
consumer is required to sign or initial the provision or notice as an acknowledgement of the risks. 212 Unfortunately, an acknowledgement signature does not necessarily mean the terms were read and understood. In addition, due to the weaker bargaining position of the consumer, they are still mostly left with little to no choice but to accept the terms as provided.

The plain and understandable language requirement213 of the Act is another measure which promotes transparency. This must be considered in the context of literacy levels of much of the population and the extent to which they can practically benefit from this requirement or if it poses an additional hurdle instead. Another illustration of a consumer’s ‘right to fair, just and reasonable terms and conditions214 is s 50 which enables the Minister to prescribe that certain consumer contracts must be in writing.215 A written account would help to create certainty and leave less room for differing accounts after the fact.

Procedural and substantive fairness of the contracts are interdependent. The transparency promoted by the procedural requirements in the Act should in theory enable the consumer to make an informed decision, thereby helping to achieving substantive fairness. It is not just sufficient for a contract to meet the procedural requirements but still operate in a substantially unfair manner, which is why a term in an agreement which meets the procedural requirements set out in s 49 could still be deemed to be substantially unfair when tested against s 48 read with s 52.216

f) Enforcement of the CPA

The National Consumer Commission (NCC)217 has investigative powers set out in Part B of the Act.218 Since 2012 the NCC no longer investigates individual consumer complaints, instead the focus has been to use individual complaints to determine trends in the marketplace, intervening as a matter of policy.219 The NCC did for example investigate whether timeshare contracts were making use of unfair contract terms.220 However, due to

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212 s 49(2)(c).
213 s 22.
214 Part G of CPA.
215 This power has not yet been used.
216 Tjakie Naudé ‘Section 49’ op cit note 170, 49-4 para 9.
217 Established by s 85 of CPA.
218 s 72 – 75.
219 Tanya Woker ‘Evaluation the role of the national consumer commission in ensuring that consumers have access to redress’ (2017) 29 SA Merc LJ 1 at 6-7.
technical issues the matter was withdrawn from the National Credit Tribunal (NCT)\textsuperscript{221} so the investigation did not result in a finding of prohibited conduct or a penalty.\textsuperscript{222}

Section 69 of the CPA creates the impression that it sets out the procedure for a consumer to enforce ‘any right in terms of this Act’. In terms of s 69(a) if a direct referral is permitted to the NCT that would be the forum to use. However, if the supplier falls within the jurisdiction of an ombud, then the matter should be referred to them.\textsuperscript{223} If the supplier is not covered by an ombud, then the matter must be referred to an industry ombud;\textsuperscript{224} or a provincial consumer court;\textsuperscript{225} or an alternative dispute resolution agent;\textsuperscript{226} or by filing a complaint with the NCC. Section 69(d) provides that ‘if all other remedies available… have been exhausted’ a court\textsuperscript{227} may be approached.

This is confusing as s 52 sets out ‘[p]owers of court to ensure fair and just conduct, terms and conditions’. The section sets out factors\textsuperscript{228} a court (specifically defined in the CPA as not including a consumer court) should consider when considering a contravention of s 40, 41, or 48 of the Act and what the court may order.\textsuperscript{229} Section 52 appears to bestow on ordinary courts the power to adjudicate matters relating to unconscionable conduct, misrepresentation, unfair, unreasonable or unjust contract terms, even though s 69(d) creates the impression an ordinary court may only be approached if all other forums have been exhausted. Naudé explains that the Department of Justice was concerned that the ordinary courts’ jurisdiction was being eroded by tribunals, so they reached a compromise with the DTI whereby ‘contractual disputes’ would remain the exclusive jurisdiction of the courts.\textsuperscript{230} This ‘compromise’ is unfortunately not fully evident from the drafting of the Act. To create further confusion, in terms of provincial consumer protection legislation, unfair business practice disputes fall within the jurisdiction of provincial consumer courts.\textsuperscript{231} As provincial legislation runs concurrently with the CPA, the wide definition of unfair business

\begin{itemize}
\item \textsuperscript{221} NCC Annual Report 2015-2016 at 11, available at https://nationalgovernment.co.za/entity_annual/987/2016-national-consumer-commission-annual-report.pdf, accessed 20 August 2017. The NCT is established by s 26 of the NCA.
\item \textsuperscript{222} Woker op cit note 219 at 7.
\item \textsuperscript{223} s 69(b).
\item \textsuperscript{224} s 69(c)(i).
\item \textsuperscript{225} s 69(c)(ii).
\item \textsuperscript{226} s 69(c)(iii).
\item \textsuperscript{227} Court is defined as not including a consumer court in s 1.
\item \textsuperscript{228} s 52(2).
\item \textsuperscript{229} s 52(3).
\item \textsuperscript{230} Tjakie Naudé ‘Enforcement procedures in respect of the consumer’s right to fair, reasonable, and just contract terms under the Consumer Protection Act in comparative perspective’ (2010) 127 \textit{SALJ} 515 at 525 and notes 56 & 57.
\item \textsuperscript{231} Ibid at 526.
\end{itemize}
practices ‘could clearly include the use of unfair contract terms.’

In Vodacom Service Provider Company (Pty) Ltd v National Consumer Commission the NCT declined to answer the question of whether only a court of law has jurisdiction over unfair contract terms. With respect to contractual disputes, the NCT has stated that it was not ‘mandated to adjudicate’ in Primi World (Pty) Ltd v National Consumer Commission. There are currently two accredited industry ombuds who ‘do not have the power to make determinations or to enforce their decisions.’ The exact path to resolving a CPA dispute is thus somewhat murky.

One of the aims of the CPA is to ‘provide for an accessible, consistent, harmonised, effective and efficient system of redress for consumers.’ With respect to accessibility, the free service in each of the provinces, the provincial consumer courts, is a good start. Unfortunately, they are not all consistently applying the CPA, but largely rather legislation that mirrors the repealed National Consumer Affairs (Unfair Business Practices Act). These offices are also in the capitals, and do not provide relief for indigent people in smaller towns and cities. In terms of efficiency, a centre might be hearing a dispute of a similar nature to another, and there is no way to share rulings or ensure legislation is being consistently applied between centres as there is no binding precedent. At the NCT level, although the judgements are published and made available on SAFLII, the search engine is cumbersome and difficult to navigate and as a result unfortunately largely ineffective. Given the important subject matter, it is important that the judgements are effectively communicated into the public domain. This is important for legal practitioners and to ensure offenders on the supplier side are being brought to the public’s attention. The damage to an offender’s reputation in the court of public opinion can be a more effective deterrent than a fine. It has been noted that none of the forums have provided guidance on the unfair terms in Reg 44(3) in the first five years they have been operational. Nor have

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the high courts reported on the fairness of Reg 44 in that time. In terms of effectiveness, the various different resolution forums appear to be hindering the process, as consumers are not entirely sure where to turn.

Recently, Pillay J delivered an extensive judgement testing a very poorly drafted single page standard form lease agreement against both common law principles and the CPA in *Four Wheel Drive Accessory Distribution CC v Rattan NO.* Unfortunately, as the claim was dismissed due to lack of *locus standi* the extensive analysis was *obiter.* But, as it is one of the only cases to reach a High Court pertaining to the discussion at hand, it bears further mention. The lease agreement pertained to a courtesy vehicle provided for 72 hours to the late Mr Rattan, who was shot and killed in the vehicle 48 hours into the lease period. The vehicle was damaged and it was not returned within the 72-hour period, which led to a claim against the deceased’s estate for damages. The plaintiff claimed that the deceased had to insure the vehicle, or return it within 72 hours. The agreement used the word ‘overleaf’ numerous times, but it was a single page, and there was no reference to an insurance obligation. The court could not make out the terms in the agreement, even with the aid of a magnifying glass, and the plaintiff’s representative who concluded the agreement was not fully aware of the content. Pillay J found that the lease agreement violated s 22 (the plain and understandable language requirement) of the CPA as its content was so lacking. As the plaintiff based its claim on terms not contained in the agreement, and the deceased was not able to accept or refute the claims, nor was he physically able to meet them at the time, the agreement was found to be unfair, unreasonable and unjust in terms of s 48(2). By requiring the deceased to assume obligations, and imposing them as a condition to transact, the conduct was held to amount to unconscionable conduct in s 40(1). Cumulatively, the agreement violated s 4(5)(a) and (b) of the CPA and had the defendant asked for a punitive costs order, Pillay J would have been inclined to grant it in terms of s 52(3).

The case is in my view, a thorough and in-depth application of the CPA and demonstrates exactly how the CPA can assist to ensure fairness. It should serve as a warning

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242 Ibid.
244 Ibid para 27.
245 Ibid para 62. It also failed to meet s 50(2)(b)(i).
246 Ibid para 66. It was excessively one sided (s 48(2)(a)); the terms were so adverse to the deceased they were inequitable (s 48(2)(b)).
247 Ibid para 67. Pillay J also suggested extending the definition to include conduct ‘otherwise unethical or improper to a degree that would shock the conscience of a reasonable person’.
to unscrupulous suppliers who attempt to strong-arm consumers. However, there are limited consumers with the means to enforce their rights in the High Court. As such, the transparency, effectiveness and efficiency of the less costly alternatives should be improved and streamlined.

VII. THE NATIONAL CREDIT ACT

a) Provisions Relating to Fairness in the NCA

Among the relevant objectives that the NCA sets out to achieve are ‘to promote a fair and non-discriminatory marketplace for access to consumer credit’ and ‘to prohibit certain unfair credit and credit marketing practices’\(^248\). The NCA applies to all credit agreements\(^249\) ‘between parties dealing at arm’s length, and made within, or having an effect within the Republic’\(^250\) subject to certain exemptions set out in s (4)(1)(a)-(d). Similarly to the CPA, generally speaking,\(^251\) the NCA does apply where the consumer of a credit agreement is a juristic person, provided their asset value or annual turnover is below the threshold amount set by the Minister.\(^252\) Section 89(2) lists agreements which are considered unlawful in terms of the Act, while s 90(2) lists what amounts to unlawful provisions in terms of the Act. Section 90(2)(a) appears to be the general catch all provision, as it declares a contractual provision unlawful if it defeats the purpose or policies of the Act. As such, if a term in a credit agreement would lead to an unfair credit practice, s 90(2)(a) could be relied on for relief. Section 90 declares a wide range of contractual provisions unlawful, so an unfair practice could be listed in a specific provision in the Act, and therefore a complainant may not need to rely on the catch all provision and the court’s interpretation of whether a term does in fact defeat the purpose of the Act.\(^253\) Unlawful supplementary credit agreements are prohibited by s 9.

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\(^{248}\) Preamble to NCA.

\(^{249}\) ‘For an agreement to qualify as a credit agreement, two elements are required: there must be a deferral of repayment or prepayment; and a fee, charge or interest must be imposed on the deferred payment, or a discount given when prepayments are made.’ (Michelle Kelly-Louw ‘Introduction to the National Credit Act’ (2007) JBL 147 at 151).

\(^{250}\) s 4(1).

\(^{251}\) Subject to limitations in s 6.

\(^{252}\) s 4(1)(a)(i) and s 4(1)(b) read with The Threshold Regulations, 2006. Currently the level of the asset value or annual turnover is set at R1m.

\(^{253}\) See note 190 supra. Section 51 of the CPA was inspired by s 90 of the NCA.
b) Enforcement of the Provisions Relating to Fairness in the NCA

The National Credit Regulator (NCR) is established in terms of s 12 of the Act. The NCR’s functions include the promotion and support of a fair credit market; enforcing the Act by promoting informal dispute resolution between role-players, and receiving complaints about and investigating alleged contraventions of the Act. Decisions of the NCR are binding on the NCR, provincial credit regulators, consumer courts, and alternative dispute resolution agents. If a credit agreement is unlawful in terms of s 89, ‘despite any other legislation or any provision of an agreement to the contrary, a court must make a just and equitable order including but not limited to an order that’ the credit agreement will be void retrospectively. Courts are now granted an equitable discretion to deal with unlawful credit agreements. This was previously not the case.

In terms of s 90(3) of the Act, unlawful provisions are void, and in terms of s 90(4) a court must sever the unlawful provision, or if it is reasonable to do so, alter the provision to render it lawful, having regard to the whole agreement. Section 90(4)(b) then provides the courts with a further alternative wide discretion to declare the whole agreement unlawful based on the unlawful provision. It has been suggested that courts should use this power sparingly, rather keeping with the past practice of the courts to sever an unlawful provision and enforce the remainder of the contract if possible. ‘Court’ is not defined in the Act, but ‘consumer court’ is defined in s 1. As such the implication is that an ordinary court with jurisdiction would need to be approached to declare a provision in or a whole agreement unlawful.

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254 s 13(a).
255 s 15(a).
256 s 15(b).
257 s 89(5)(a).
258 Previously, in terms of the repealed s 89(5)(b) & (c) the credit provider had to refund all money and interest paid by the consumer in terms of the unlawful credit agreement, and the credit provider’s claim for unjustified enrichment against the consumer was cancelled or forfeited to the state. Both were repealed by Act 19 of 2014 following National Credit Regulator v Opperman and Others 2013 (2) SA 1 (CC).
260 Ibid.
261 ‘[M]eans a body of that name, or a consumer tribunal, established by provincial legislation.’
VIII. THE RENTAL HOUSING ACT

a) Provisions Relating to Fairness in the RHA

The preamble to the Rental Housing Act (RHA) recognises the ‘need to balance the rights of tenants and landlords and to create mechanisms to protect both tenants and landlords against unfair practices and exploitation’. What constitutes an ‘unfair practice’ is defined in s 1 as ‘any act or omission by a landlord or tenant in contravention of this Act; or a practice unreasonably prejudicing the rights or interests of a tenant or a landlord’. It is noteworthy that the protection is afforded to both tenants and landlords. The Minister, in consultation with the housing MEC, is empowered to make regulations pertaining to unfair practices in terms of s 15(1)(f). The items covered are extensive, yet it is not a closed list. Therefore, unforeseen gaps can be covered in the future if unforeseen unscrupulous practices arise in the lease space.

The unfortunate result is that Unfair Practice Regulations have been published by each province which means rather than having a uniform regulation applicable nationwide, slight differences exist. However, as an example, two provinces compared did contain a general provision prohibiting landlords from ‘[engaging] in oppressive or unconscionable conduct’. So, despite the slight differences between provinces, the general aim of overall protection is apparent.

Section 4(1) is a general provision protecting against unfair discrimination in relations between landlords and tenants. The Rental Housing Amendment Act 35 of 2014 will implement the requirement that a lease must be reduced to writing. Section 5(3) of the RHA contains certain terms deemed to be included in a lease. The RH Amendment Act sets out extensive rights and obligations of tenants to be included in the RHA as s 4A, and rights and obligations of landlords to be included as s 4B. Section 6 set out compulsory terms in a lease. In terms of amended s 6(g) it is not possible to waive s 3, s 4A, s 4B or the Unfair Practice Regulations. This generally serves to create a starting platform to protect both landlords and tenants as provided for in the preamble of the Act.

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262 50 of 1999.
263 As an example, the Gauteng Province Unfair Practice Regulations of 2001 impose upon the landlord a duty to maintain the common property (if any) and the outside of the dwelling, including the walls and roof in good order and repair in s 7(1)(f) & (g), while the Western Cape Unfair Practice Regulations of 2002 do not impose the same obligation.
264 In Western Cape Regulations: s 9(1)(d), in Gauteng Regulations: s 14(1)(d).
265 s 5(1). The proclamation date for the Act is not yet known.
b) Enforced of the Provisions Relating to Fairness in the RHA

A deemed term which will be added by the RH Amendment Act\(^{266}\) to s 5(3) of the RHA will be that ‘a lease will be enforceable in a Tribunal or a competent court’. This increases the scope of a tribunal’s powers from just unfair practices, which was the position previously. Either party can lodge a complaint with respect to an unfair practice with their Provincial Rental Housing Tribunal (RHT).\(^{267}\) Tribunals are given a wide scope to make ‘any other ruling that is just and fair to terminate an unfair practice’ in terms of s 13(4)(c).\(^{268}\)

There are normally various RHT offices in the different provinces, increasing accessibility for parties to settle a dispute. It is free to use. So, in theory, assuming an unequal economic relationship, tenants especially should be provided affordable, accessible recourse to unfair practices by landlords (and vice versa if that is the case).

IX. TREATING CUSTOMERS FAIRLY

a) Introduction

The National Treasury published a government policy paper in February 2011, entitled ‘A safer financial sector to serve South Africa better’.\(^{269}\) It confirmed the shift towards a Twin Peak model for financial regulation, with the dual aim of making the financial sector safer, and better protecting financial customers in South Africa and ‘[ensuring] that they are treated fairly by financial institutions, by creating a dedicated Financial Sector Conduct Authority.’\(^{270}\) As part of the new model the ‘FSB (Financial Services Board) would be transformed into a dedicated market conduct regulator [to be known as] the Financial Sector Conduct Authority.’ (FCA)\(^{271}\) The Financial Sector Regulation Act\(^{272}\) sets out the Twin Peaks model and its related aims.\(^{273}\)

\(^{266}\) By s 8(c).
\(^{267}\) s 13(1) read with s 1 and s 7.
\(^{268}\) The Tribunals do not have jurisdiction to hear eviction orders in terms of s 13(14) of the RHA.
\(^{270}\) Financial Sector Regulation Bill B34D-2015, Memorandum on the objects of the Financial Sector Regulation Bill, para 1.4.
\(^{271}\) What is Twin Peaks? available at https://www.fsb.co.za/Departments/twinpeaks/Pages/What-is-Twin-Peaks.aspx, accessed on 19 March 2017. As the FCA will be replacing the FSB, most of the literature currently available still refers to the FSB. This paper will refer to the FSB as stated on the understanding the FCA will replace it.
\(^{272}\) 9 of 2017 was assented to on 21 August 2017, but a proclamation date had not been announced at the time of writing.
\(^{273}\) s 56(1) establishes the FCA as a juristic person.
b) Application of TCF

As discussed above\textsuperscript{274} the application of the CPA was limited by the Financial Services Laws General Amendment Act. The sectors carved out\textsuperscript{275} of the scope of the CPA are instead subject to ‘an outcomes based regulatory and supervisory approach designed to ensure that specific, clearly articulated fairness outcomes for financial services consumers are delivered by regulated financial firms’\textsuperscript{276} known as Treating Customers Fairly (TCF). TCF was published initially on 31 March 2011\textsuperscript{277} by the FSB as part, or in anticipation of their new mandate of protecting financial customers. The ‘TCF approach seeks to ensure that specific, clearly articulated fairness outcomes for financial services customers are demonstrably delivered by regulated financial institutions, at all stages of the relationship between the institution and its customers’.\textsuperscript{278} To achieve its purpose, the six ‘fairness outcomes’ were adopted, which would apply throughout the product life cycle, from product design and promotion, to advice and servicing.\textsuperscript{279} This was necessary to address the unequal levels of information between consumers and financial institutions which leaves them particularly vulnerable to unfair treatment by financial institutions as consumers do not have access to as many resources and expertise as financial institutions do.\textsuperscript{280}

The outcomes seek to promote and ensure fairness for consumers across all sectors of application by targeting broad themes applicable throughout the product life cycle. Outcome 1 addresses the culture and governance of the firm the consumer is dealing with. Outcome 2 addresses product suitability. Outcome 3 promotes disclosure of information, so that a consumer can make an informed decision. Outcome 4 promotes suitable advice. Outcome 5 provides for performance in line with expectations. Finally, Outcome 6 deals with issues post-sale.

\textsuperscript{274} See notes 169 - 171 supra.
\textsuperscript{275} Listed in note 171 supra.
\textsuperscript{276} \url{https://www.fsb.co.za/feedback/Pages/tcfhome.aspx}, accessed on 19 March 2017.
\textsuperscript{279} The six outcomes are available at op cit note 276.
\textsuperscript{280} Op cit note 278.
It was acknowledged that there could be overlap with existing legislation and regulation of certain affected sectors.\textsuperscript{281} Therefore, there will be ‘an analysis of existing legislation, subordinate legislation and, where applicable, codes of conduct’\textsuperscript{282} to ‘identify any gaps and inconsistencies’\textsuperscript{283} between the TCF principles and the aforesaid with a view to providing ‘regulatory amendment recommendations’.\textsuperscript{284} The envisaged list of legislation to be analysed is set out.\textsuperscript{285} For the purposes of this dissertation it is interesting to note that the CPA would ‘serve as at least a minimum standard of consumer protection’.\textsuperscript{286}

c) Enforcement of TCF

Initially, it was envisaged that 1 January 2014 would be the effective date for TCF enforcement.\textsuperscript{287} However, as ‘existing legislative and regulatory frameworks already allow the application of TCF principles’\textsuperscript{288} there was not an actual launch date for TCF implementation.\textsuperscript{289}

The FSB aims to encourage adherence of regulated firms to the TCF outcomes by way of a combination of ‘positive and negative incentives’.\textsuperscript{290} The focus is on ‘credible deterrence measures’.\textsuperscript{291} The FSB’s intended approach is that ‘unfair treatment of customers will be detected and that those responsible for unfair treatment will face consequences.’\textsuperscript{292} This will be implemented through a combination of ‘[p]ublic disclosure of identified TCF performance measures’\textsuperscript{293} and ‘[n]on-public reporting as required by the FSB’.\textsuperscript{294}

\textsuperscript{282} Ibid at 15.
\textsuperscript{283} Ibid.
\textsuperscript{284} Ibid at 18.
\textsuperscript{285} Ibid at 17.
\textsuperscript{286} Ibid footnote 18: ‘The principles set out in the Consumer Protection Act will, wherever relevant, be a key input into developing the TCF regulatory framework. However, as noted in the NT Policy Document, it must be stressed that financial services in fact require higher “standards of conduct that are more stringent than those generally applied to other non-financial goods and services” in view of the particular risks they pose.’
\textsuperscript{287} Ibid op cit note 277 at 5.
\textsuperscript{288} ‘Instead, the FSB is in the process of introducing TCF into both its regulatory and supervisory frameworks on a gradual, incremental basis’ See note 277 supra.
\textsuperscript{289} TCF: The Roadmap at 25 op cit note 281.
\textsuperscript{290} Ibid.
\textsuperscript{291} Ibid.
\textsuperscript{292} Ibid.
\textsuperscript{293} Ibid.
\textsuperscript{294} Ibid.
In addition, the FSB has recognised that by also seeking to pro-actively identify industry conduct risks it could assist to mitigate risks to consumers, in some instances before harmful conduct may arise. It seeks to spend time on pre-emptive intervention.\textsuperscript{295}

Formal enforcement for TCF failures are within the power of the FSB’s Enforcement Committee.\textsuperscript{296} Arguably, an effective deterrent for firms would be the reputational damage suffered from publicising failure to adhere to the TCF principles. Current legislation\textsuperscript{297} allows for ‘a determination of the enforcement committee [to be] made public’.\textsuperscript{298} The Roadmap document states that the ‘name and shame’ approach will be considered not only with respect to cases where settlement is reached, but also as a tool to identify conduct concerns.\textsuperscript{299}

By adopting a principle based approach to regulation, the FSB attempted to allow for a flexible approach. This echoes the approach in the UK, which the TCF is modelled on. A comparison of the South African and UK TCF outcomes show they are substantively virtually identical, except for the UK’s use of the word ‘consumer’ instead of ‘customer’ in South Africa.\textsuperscript{300}

The efforts of the FSB were ambitious. What is particularly applaudable, is that the TCF framework seeks to promote a culture where the fair treatment of customers is central to a firm’s culture.\textsuperscript{301} If consumers can truly be assured they will receive fair treatment at each stage of their transaction lifecycle, then potentially, the need for complaints after the fact will be reduced.

When a proclamation date is given for the Financial Services Sector Act, there will hopefully be more clarity for affected bodies who have been operating in a holding pattern. The intended approach of the FCA will need to be established to ascertain whether it may differ from the FSB with respect to the implementation of existing principles and the monitoring thereof, and also by the other different industry bodies applying the TCF outcomes. The FSB’s Enforcement Committee\textsuperscript{302} is given the power to continue to deal with what it was dealing with immediately before Part 6 of the Act comes into effect.\textsuperscript{303}

\begin{footnotesize}
\textsuperscript{295} Ibid at 28.
\textsuperscript{296} Established by the Financial Services Board Act 97 of 1990.
\textsuperscript{297} Financial Institutions (Protection of Funds) Act 28 of 2001 s 6G.
\textsuperscript{298} Ibid.
\textsuperscript{299} TCF: The Roadmap at 29 op cit note 281.
\textsuperscript{301} Ibid p21.
\textsuperscript{302} As defined in s 289 of the Financial Services Board Act.
\textsuperscript{303} s 298(1)(a).
\end{footnotesize}
The creation of the Ombud Council will undoubtedly go a long way to ensuring uniform application of the TCF outcomes in the different ombud schemes currently (meant to be) applying them. For consumers to benefit effectively, one of the most important functions of the FSB / FCA will be the pre-emptive prevention of unfair treatment of consumers and to the extent that that fails, ‘name-and-shaming’ offenders. Reputational damage to firms can be a far more effective punishment than a fine.

X. CONCLUSION PART B

Unfortunately, one of the disadvantages of being so many years behind other countries in consumer protection legislation is that South Africa’s focus is still on protection remedies. Other countries have evolved to preventative measures where regulators or consumer organisations are empowered to attempt to stop the use of unfair terms without involving a consumer. That should be what South Africa strives towards. As more protection measures arise across sectors, that is being recognised. One of the aims of the FSB in the application of the TCF outcomes is to pro-actively identify risks and spend time on pre-emptive intervention. Whether that aim will be achieved, is not yet certain. But that is the goal to strive toward in all areas of consumer legislation - to ultimately provide real consumer protection.

Until that goal is reached, it is vital that accessibility for consumers to enforce their rights is maintained, and made effective and easy. It is certainly possible that more can be done to streamline access and efficiency of consumer bodies. The lack of effective information sharing is also hindering effectiveness as the court of public opinion will prove a very effective deterrent and it is currently being under-utilised.

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304 s 175.
PART C: MIND THE GAP: GUIDANCE FROM FOREIGN JURISDICTIONS TO ADDRESS GAPS NOT COVERED BY CURRENT LEGISLATION AND TO SHOW TREATMENT OF GOOD FAITH BY FOREIGN COURTS

XI. UNITED KINGDOM

a) Introduction

Despite Lord Mansfield’s famous reference to good faith as ‘the governing principle…applicable to all contracts and dealings,’ English law does not impose a general obligation of good faith to contracting parties. Bingham LJ explained the role of good faith:

‘English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness. Many examples could be given. Thus, equity has intervened to strike down unconscionable bargains. Parliament has stepped in to regulate the imposition of exemption clauses and the form of certain hire-purchase agreements.’

The UK began taking steps to introduce legislative protection for consumers in the 1970s. The legislation in the UK has also been affected by EU law by way of directives and regulations. An in-depth discussion of all applicable legislation affecting the development of fairness in English contract law will not be possible. For the sake of brevity, I will be concentrating on certain aspects of consumer contracts and the role of good faith and fairness and what has been done by the UK parliament to offer legislative protection in this regard. Although the UK has already given notice in terms of Article 50 of the Treaty on European Union their intention to leave the EU, the future position with respect to the applicability of EU law is uncertain. However, from a commercial point of view, for UK companies to trade in the EU they would likely still have to comply. As such this paper will assume ongoing compliance by the UK with EU law.

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306 Carter v Boehm (1766) 3 Burr 1905.
307 Simon Whittaker ‘Introductory’ in HG Beale (ed) Chitty on Contract – Volume 1 General Principles 32nd ed (2015), 1-039. Although utmost good faith is recognised in insurance contracts, and the role of good faith is also recognised in employment, partnership and fiduciary contracts, it is not considered a general obligation.
b) Recent notable decisions by English courts relating to commercial contracts

‘English law has traditionally been hostile to the imposition of any general principle of good faith in the performance of contracts.’

311 In *Yam Seng Pte Ltd v International Trade Corp Ltd*312 (the *Yam Seng* case) an implied duty to act in good faith in the performance of contracts was recognised (obiter) by Leggatt J.313 Briefly, the facts were that the claimant had entered into a distribution agreement with the defendant for fragrance products which would be acquired by the defendant and sold on by the claimant pursuant to the contract. Several disputes arose and one of the issues before the court was whether the defendant had an obligation to perform the contract in good faith. Leggatt J appeared to be in favour of the implied term of good faith in commercial contracts in general, rather than just in ‘relational contracts’.314 It was stated that honesty was already required between parties as a matter of construct,315 and the content of the good faith obligation was described as ‘fidelity to the parties’ bargain’316 and ‘fair dealing’.317 To the extent that the decision was used as authority for a general implied duty of good faith in commercial contracts, it has been criticised.318

In *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)*319 (the *Medirest* case) the Court of Appeal cited the *Yam Seng* case when it confirmed that:

‘[T]here is no general doctrine of “good faith” in English contract law, although a duty of good faith is implied by law as an incident of certain categories of contract…..If the parties wish to impose such a duty they must do so expressly.’320

Although the Court of Appeal did not overrule the *Yam Seng* case as such, it confirmed good faith was limited to ‘certain categories of contract’. Together with their case references, they have indicated good faith will continue to play a role in insurance,

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311 EG McKendrick ‘Implied Terms’ op cit note 307, 14-031.
313 Supra note 312 at para 146.
Examples of ‘relational contracts’ from para 143 are joint venture agreements, franchise agreements, and long-term distributorship agreements.
315 Ibid note 312 at para 139. Although it was recognised as part of good faith in para 142.
316 Ibid at para 140.
317 Ibid at para 151.
318 Simon Whittaker ‘Introductory’ op cit note 307, 1-053: ‘With respect, the implication of such an implied term applicable generally (or even widely) to commercial contracts would undermine to an unjustified extent English law’s general position rejecting a general legal requirement of good faith’
320 Supra note 319 para 105.
employment, partnership and fiduciary contracts, but that there is no room for an implied
duty to act in good faith in general.

Despite the precedent system and the Medirest case being the authority on the matter,
it was held that an implied duty of good faith was present in the parties’ agreement in Bristol
Groundschool Ltd v Intelligent Data Capture Ltd321 (the Bristol case). The court accepted
the defendant’s argument that the agreement between the parties was a ‘hybrid between a
joint venture and product distribution agreement, that it was sufficient to import an implied
duty of good faith.’322 The judge reasoned that the parties had a ‘relational contract’ as
referred to in the Yam Seng case, and as the Medirest case had not disapproved of the Yam
Seng case, and the judge was in respectful agreement with Leggatt J’s analysis, he found
there was an implied duty of good faith.

Unfortunately, the Court of Appeal has not pronounced definitively on the role of good
faith in commercial contracts. In Globe Motors Inc v TRW LucasVarity Electric Steering
Ltd323 it stated that ‘in certain categories of long-term contract, the court may be more
willing to imply a duty to co-operate’,324 however it was ‘not the occasion to consider the
potential for implied duties of good faith in English law’.325 Three months later in MSC
Mediterranean Shipping Company S.A. v. Cottonex Anstalt326 while it did not affect the
outcome of the case before them, the Court of Appeal did state that ‘[the] recognition of a
general duty of good faith would be a significant step in the development of our law of
contract327 and their preference would be the ‘piecemeal solutions’ to unfairness as
proposed by the Interfoto case.328

c) The Unfair Contract Terms Act 1977
The Unfair Contract Terms Act (UCTA) was put in place to limit the extent to which ‘civil
liability for breach of contract, or for negligence or other breach of duty, can be avoided by
means of contract terms and otherwise’.329 The UCTA used to regulate exclusion and
limitation clauses in contract terms and non-contractual notices in both consumer and non-
consumer contracts. Its scope has been restricted to non-consumer contracts terms and

321 [2014] EWCH 2145 (Ch) para 196.
322 Supra note 321 para 172.
323 [2016] EWCA Civ 396
324 Supra note 323 para 67 referring to Leggatt J in the Yam Seng case.
325 Ibid para 68.
327 Supra note 326 at para 45.
328 Ibid. See note 308 supra.
329 Preamble to the UCTA.
notices by the Consumer Rights Act 2015 (CRA). For exclusion clauses in consumer contracts, Schedule 4, para 5(3) of the CRA directs that they will be governed by s 62 of the CRA.

The current scope of the Act set out in s 1(3), is for restrictions of ‘business liability’. Subject to s 6, the Act therefore generally does not prevent a non-business contracting party from excluding or restricting liability. The scope of section 2 (negligence liability) and section 3 (liability arising in contract) is limited by para 1 of Sch 1 read with s 1(2) of the UCTA. Paragraphs 3 – 5 of schedule 1 list additional application restrictions relating to the application of UCTA in the marine industry and in relation to the carriage of goods by sea. Contracts of employment are specifically excluded from UCTA, except to the extent that they benefit the employee.

Whether or not the exclusion clause will be allowed depends largely on ‘reasonableness’ and the type of liability to which the clause refers. Section 2(1) contains a general prohibition excluding liability in the event of death or personal injury due to negligence, but other types of loss or damage may be excluded depending on the ‘reasonableness’ of the term or notice. With respect to ‘written standard terms of business’, s 3(2) sets out that liability for breach can only be excluded if it satisfies the ‘reasonableness’ requirement. There is an outright prohibition excluding liability relating to the title of goods implied by s 12 of the Sale of Goods Act 1979, and the of hire purchase goods implied by s 8 of the Supply of Goods (Implied Terms) Act 1973, but terms dealing with exclusion of liability relating to conformity, quality and fitness of goods (legislated by those Acts) are again subject to the ‘reasonableness’ requirement. Section

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330 By the deletion of the phrase ‘dealing as a consumer’ from UCTA by CRA Schedule 4, paragraph 5(2). The UCTA will continue to apply only in the business-to-business context.
331 Which sets out the ‘[r]equirements for contract terms and notices to be fair’.
332 Which is further defined in s 1(3) as ‘liability for breach of obligations or duties arising—(a) from things done or to be done by a person in the course of a business (whether his own business or another’s); or (b) from the occupation of premises used for business purposes of the occupier.’
334 UCTA does not apply to contracts of insurance; contracts relating to the creation or transfer of interest in land; contracts relating to intellectual property; contracts relating to the formation or dissolution of a company or its constitution; contracts relating to the creation or transfer of securities; anything concerning the rights of passengers in bus and coach transport that is governed by Article 6 of Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 and amending Regulation (EC) No 2006/2004.
335 See s 1(2) and item 1(4) of Schedule 1 read with s 2(1) and (2).
336 See s 2(2) relating to negligence liability.
337 s 6(1)(a).
338 s 6(1)(b).
7 of the UCTA provides similar protections to ‘contracts under which possession or ownership of goods passes, but which are not contracts of sales or hire purchase.’

Reasonableness is then defined in s 11(1):

‘[T]he term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made’

Section 24 sets out factors which will apply when the ‘reasonableness test’ is applied. There are also guidelines for the operation of the reasonableness test in Schedule 2, which are only meant to apply with respect to the sale of supply of goods in s 6 and s 7, but have ‘been treated by the courts as containing generally applicable guidelines.’ The factors listed in the guidelines look to establish both substantive and procedural fairness. The factors to consider include: the strength of the relative bargaining positions of the parties; if there was an inducement to agree to the term; whether the customer knew or ought reasonably to have known of the existence and extent of the term; where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable, and whether the goods were manufactured, processed or adapted to the special order of the customer. The list is not exhaustive, and further guidelines have been identified by courts. The party seeking to rely on the clause will have to prove it is reasonable. If they fail to convince the court, the whole clause fails, the court cannot rewrite the clause so that it would amount to a reasonable exclusion. The reasonableness test has to be applied in each particular case, on the particular facts. An exemption clause in a standard form contract previously assessed to be fair, could have be assessed differently depending on the facts. It has been pointed out that the large body of reported cases illustrating the judicial application of the reasonableness test now has limited value since the change effected by the CRA, as many of the decisions were decided based on the consumer, ‘dealing as a consumer’ which is no longer applicable.

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341 Cartwright op cit note 333 at 229.
342 Ibid p228.
343 Simon Whitaker ‘Exemption Clauses’ op cit note 307, 15-098.
344 s 11(5)
345 Cartwright op cit note 333 at 229.
d) **Unfair Terms in Consumer Contracts Regulations 1999**

The CRA revoked the Unfair Terms in Consumer Contracts Regulations (UTCCR),\(^{348}\) as such the UTCCR will only apply to contracts concluded before 1 October 2015. Due to the limited application of the UTCCR, this discussion will be limited.

The UTCCR created a general requirement of fairness in consumer contracts, for terms not individually negotiated,\(^{349}\) including exemption clauses.\(^{350}\) The overlap between the UTCCR and the UCTA was because the UTCCR was hastily enacted largely to implement the EU Unfair Consumer Contract Terms Directive\(^ {351}\) as the UCTA did not provide sufficient protection to comply with the Directive.

The Regulations generally required terms in consumer contracts to be ‘fair’ and, if the contract was in writing, it had to be written in ‘plain, intelligible language’.\(^{352}\) The UTCCR considered a contractual term (not individually negotiated) as unfair if ‘contrary to the requirement of good faith, it [caused] a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.’\(^ {353}\) Good faith is however undefined in the UTCCR. The EU Directive\(^ {354}\) provides the following guidance with respect to good faith:

> ‘[I]n making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account…..’

The assessment of good faith set out in the Directive therefore considers some of the same factors as set out in Schedule 2 of the UCTA used to determine reasonableness.\(^ {355}\) Though there is significant overlap between the concepts of ‘good faith’ and ‘reasonableness’,\(^ {356}\) it must be borne in mind that the ambit of the two pieces of legislation cover different types

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\(^{348}\) para 34, Sch 4.

\(^{349}\) By implication this would be a standard term contract. Reg 5(2) describes is as a term drafted in advance, the substance of which the consumer would not have been able to have influence.

\(^{350}\) Simon Whitaker ‘Exemption Clauses’ op cit note 307, 15-142.


\(^{353}\) Reg 5(1).

\(^{354}\) Op cit note 351.

\(^{355}\) Including the bargaining position of the parties, whether there was an inducement, and if the goods were special order or customised.

\(^{356}\) Philip N Stoop *The concept ‘fairness’ in the regulation of contracts under the Consumer Protection Act 68 of 2008* University of South Africa (LLD Thesis) at 197, available at [http://uir.unisa.ac.za/bitstream/handle/10500/8507/thesis_stoop pn.pdf?sequence=1, accessed 14 June 2017.}
of terms. The UCTA deals almost exclusively with exemption clauses, while the requirement for fairness in UTCCR relates to terms not individually negotiated which do not relate to core provisions. As the Regulations used to apply to non-negotiated contracts, the emphasis was largely on transparency and openness between the parties. The Regulations attempted to provide procedural tools to prevent against the unfair operation of a consumer contract. Further guidance was given by Reg 6(1) which set out circumstances which need to be considered in the application of the unfairness test. Schedule 2 of the UTCCR provided further assistance in this regard by providing an ‘indicative and non-exhaustive list of terms which may be regarded as unfair’.

e) The Consumer Rights Act 2015

Part 2 of the CRA relates to unfair terms. Section 61 states that the CRA applies to all consumer contracts and notices, except employment or apprenticeship contracts. Financial services and insurance contracts with consumers are not carved out of Part 2, the provisions on unfair terms will therefore apply to them.

Exclusion clauses are specifically brought into scope by s 61(4)(b). ‘Trader’ is defined in section 1 as ‘a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader’s name or on the trader's behalf’ while a ‘consumer’ means ‘an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession’.

The CRA considers a term or a contract unfair if, ‘contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising from the

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358 Ibid. See also note 359 infra and Reg 6(2) regarding the application to core provisions.
359 Fairness was determined considering the nature of the subject matter of the contract, and the prevailing circumstances at the time agreement was reached. Importantly, according to Reg 6(2) if core terms were in plain and intelligible language, they were not subject to the fairness test. (Core Terms refer to the ‘main subject matter’, or ‘the adequacy of the price or remuneration’.) Plain language is a general requirement for written contracts in terms of Reg 7(1).
360 Application is not limited to standard form contracts, it therefore applies to negotiated and non-negotiated terms.
361 Application to financial services varies in the CRA.
362 Any existing sector specific legislation or regulations are intended to apply alongside the CRA. The UK Financial Conduct Authority (FCA) has powers as a regulator and enforcer of unfair contract terms in terms of the CRA Sch. 3 Part 8(1)(d). The UK outcomes based TCF principles will continue to apply.
363 The definition of ‘consumer’ in the CRA is wider than in the 1993 EU Directive as implemented in the UTCCR (see note 353 supra), due to use of the phrase ‘wholly or mainly’. This was because of a recommendation by the Law Commission and Scottish Law Commission, Consumer Redress for Misleading and Aggressive Practices Law Com No. 332, Scot. Law Com No. 226 (2012) para 6.10 – 6.13 to accommodate the accepted practice of for example cell phones, cars and laptops being used both privately and for work.
[term or contract] to the detriment of the consumer.'\textsuperscript{364} This is the same test as applied by the UTCCR.\textsuperscript{365} The Competition and Markets Authority (CMA) explains in its Unfair contract terms guidance\textsuperscript{366} that “good faith” embodies a general principle of “fair and open dealing” [and relates to how] contracts are drafted and presented, as well as the way in which they are negotiated and carried out'.\textsuperscript{367} The additional fairness considerations in s 62(5) and 62(7) are the same as in UTCCR Reg 6(1).\textsuperscript{368}

Transparency is highlighted in s 68 of the CRA which requires plain and intelligible language. However, if a term relates to the main subject matter of the contract or the setting of the price, then s 64(1) excludes them from the fairness assessment if they are both transparent and prominent.\textsuperscript{369} By contract the UTCCR only required transparency for the core terms to be excluded.\textsuperscript{370} As pointed out, the tests for unfairness in UTCCR and the CRA are very similar, one difference being the application of the UTCCR which was limited to non-negotiated terms, which is not the case with the CRA. As very few consumer contracts contain individually negotiated terms due to the limited bargaining power of consumers, the distinction will likely not cause a big impact.

Schedule 2 of the CRA sets out the 20 ‘grey-list’ terms for consumer contracts which are ‘substantively identical to the 17 found in these earlier [UTCCR] instruments, differing only in minor points of drafting’\textsuperscript{371} which read with s 63(1) ‘may be regarded as unfair’. It has been observed that in practice, the grey-list functions virtually like a [black] list.\textsuperscript{372} Any term or notice found to be unfair is not binding on a consumer.\textsuperscript{373}

A notable difference between the CRA and UTCCR is that s 71 of the CRA creates a duty for courts to consider the fairness of a term, ‘even if none of the parties to the proceedings has raised that issue or indicated that it intends to raise it.’\textsuperscript{374} There must however, be before the court ‘sufficient legal and factual material to enable it to consider

\begin{itemize}
\item \textsuperscript{364} s 62(4) and s 62(6).
\item \textsuperscript{365} See note 353 supra.
\item \textsuperscript{367} Ibid at 24.
\item \textsuperscript{368} See note 359 supra.
\item \textsuperscript{369} s 64(2). Section 64(3) – (5): Transparent means ‘expressed in plain and intelligible language’ while prominent means being brought to the ‘consumer’s attention in such a way that an average consumer [who is reasonably well-informed, observant and circumspect] would be aware of the term.’ See note 359.
\item \textsuperscript{371} Simon Whitaker ‘Consumer Contracts’ op cit note 352, 38-360.
\item \textsuperscript{372} Naudé op cit note 183 at 142.
\item \textsuperscript{373} s 62 (1) and (2).
\item \textsuperscript{374} s 71(2).
\end{itemize}
the fairness of the term.\textsuperscript{375} This duty is intended to give effect to the position as set out by the Court of Justice of the European Union (CJEU). However, it has been suggested\textsuperscript{376} that the wording in the legislation creates a narrower scope for English courts than was intended by the CJEU, as it implies scrutiny only where the proceedings before the court ‘relate to the term which is to be so considered for its fairness’\textsuperscript{377} instead of the wider intended duty of terms on which the trader may ‘rely’.\textsuperscript{378}

The CRA also introduces four categories of blacklisted terms and notices which are prohibited, without needing to apply the unfairness test. Section 65(1) prohibits terms or notices that exclude or restrict liability for death or personal injury resulting from negligence. All contracts which attempt to exclude any liabilities created by Part 1 of the CRA are prohibited.\textsuperscript{379} The other two blacklisted categories relate to distance contracts\textsuperscript{380} and arbitration proceedings.\textsuperscript{381}

The enforcement mechanisms for unfair terms are set out in Sch. 3 of the CRA. Although the CMA has the power to apply for an injunction to prevent the use of unfair contract terms\textsuperscript{382} ‘[n]ormally…cases are resolved by the CMA accepting informal undertakings to amend the offending terms in lieu of Court proceedings.’\textsuperscript{383} Sch. 5 provides for investigative powers for ‘enforcers’ thus providing for a pro-active approach to consumer protection legislation, rather than a merely reactionary one in the form of enforcement once legislation has been breached. The Competition and Markets Authority (CMA) is one such ‘enforcer’ and has issued guidance surrounding its powers of investigation.\textsuperscript{384}

The general duty to consider the unfairness of a term on a court’s own initiative created in s 71 of the CRA is a protection that is not currently found in South African or Australian

\textsuperscript{375} s 71(3).
\textsuperscript{376} Simon Whitaker ‘Consumer Contracts’ op cit note 352, 38-361.
\textsuperscript{377} Ibid.
\textsuperscript{378} Ibid.
\textsuperscript{379} See s 31 (contracts to supply goods), s 47 (contracts to supply digital content) and s 57 (contracts to supply services). As examples, traders cannot restrict their duty to provide goods (or digital content) of satisfactory quality, fit for their purpose. Nor can traders restrict their duty to perform services with reasonable care and skill.
\textsuperscript{380} s 63(6) and (7).
\textsuperscript{381} s 75 read with Sch. 4 para 30-32.
\textsuperscript{382} Sch. 3 para 3.
consumer legislation. This overarching duty is one that all consumer legislation could benefit from in my view, and should be considered as an addition to the CPA.

f) Conclusion

The limitations imposed on consumer contracts in English law through legislative intervention in the form of the UCTA and the CRA are accepted. ‘The principle of freedom of contract can no longer be said to justify using standard terms to take away protection consumers would otherwise enjoy.’ Any unease of common law practitioners’ due to civil law influence and the use of ‘good faith’ in the test to determine fairness, is tolerated. However, to the extent that a general principle of good faith may be imposed upon English law, other than in relational contracts or fiduciary relationships, that appears to be one step too far. It will therefore be interesting to see how the UK courts deal with the legislated duty to consider fairness in consumer contracts imposed by the CRA.

While EU legislation still is binding in the UK, the influence of civil law principles, including good faith and the actual use of the term, will continue to be felt. It may be possible to find a bench which takes a more liberal stance when faced with a commercial contract dispute. But, it appears for now the position is still to enforce the traditional common law approach and not impose a general duty of good faith to commercial contracts. The recognition of the implied duty of good faith in the Bristol case, despite binding precedent from the Court of Appeal in Medirest confirming the common law approach, demonstrates a slight softening towards the concept. The softening in approach could be in part due to the introduction of the good faith concept in prevailing UK legislation. As such it removes a degree of uncertainty from the unknown concept for an UK lawyer. However, for now, there does still seem to be a reluctance to extend the duty of good faith beyond relational or fiduciary contracts despite the level of comfort with the content of the obligation easing.

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386 As the CMA usually resolves cases relating to unfair contract terms (see note 383 supra) before the matter gets to court, it is unlikely this will be tested soon.
XII. AUSTRALIA

a) Introduction

Australia is at a similar point of development with respect to good faith as England. The position has traditionally been that there is no overarching requirement of good faith in the performance of contracts. However, in recent years good faith made its way into the performance of contracts through the adjudication by certain Australian courts. The duty has been imposed in one of three ways: as a term implied by law; or as a term implied by fact; or due to purposive interpretation (construction of the contract). If courts did choose to take up the cause - as some declined to do - the method typically chosen would depend on territorial precedent. The confusion surrounding good faith in the performance of contracts has been aptly described by an Australian commentator as

‘one of those annoying areas of law that keeps appearing in cases, and yet even with decisions from appeal courts, we seem no closer to a resolution of exactly when an obligation of good faith in the performance of contracts will be incorporated, and what exactly that obligation will impose.’

In the field of consumer protection legislation, over time, ‘17 pieces of Commonwealth, State and Territory Legislation….had developed over time with many small variations’. It was therefore essential for purposes of simplicity and sake of ease of consumers to have some clarity regarding their rights and remedies, and correspondingly for business to know the content of their obligations without having to make allowances for local variations.

The reform process culminated in the Australian Consumer Law (ACL).

Before the ACL is discussed, some notable decisions on good faith in a commercial contract setting will be considered.

b) Recent notable decisions by Australian courts relating to commercial contracts

Priestly JA’s decision in Renard Constructions (ME) Pty Ltd v Minister for Public Works, (the Renard case) is generally accepted as the starting point surrounding the

387 Except for limited categories like partnership, and fiduciary relationships such as insurance contracts. In addition, some Australian courts also implied the obligation into franchise contracts. (Stephen Corones & Philip H Clarke Australian Consumer Law – Commentary and Materials 5ed (2015) para 15.50)
390 Corones & Clarke op cit note 387 para 1.05.
391 Ibid.
question of good faith in contractual performance in Australia. Although it has been cited as authority for introducing an implied duty of good faith (and reasonableness) in contractual performance into Australia, the discussion around good faith in the judgement was obiter, and to the extent that subsequent cases have traced their authority back to Renard they have been criticised. Priestley JA stated that:

‘reasonableness…seems to have much in common with the notions of good faith which are regarded in many of the civil law systems of Europe and in all States in the United States as necessarily implied in many kinds of contract.’

Priestly JA’s requirement that the contract in the Renard case be subject to reasonableness is the reason ‘the subsequent cases [have been] been rationalised by reference to good faith that Australian courts have come to regard reasonableness as a key ingredient of good faith.’

In GSA Group Pty Ltd v Siebe PLC, (the GSA Group case) it had to be determined whether there was a term in a distributorship contract requiring the parties to negotiate a price in good faith. It was held that courts should not imply obligations of good faith, fairness and reasonableness into contractual relationships between commercial parties of equal bargaining power. However despite the GSA Group case, the New South Wales Court of Appeal has been described as ‘generally speaking’ recognising the obligation of good faith as a term implied in law in commercial contracts. That view is borne out by many cases. The Victorian Court of Appeal has preferred the approach of an implication in fact ‘where one party’s vulnerability to exploitation by another’s conduct exists’ rather than applying the obligation indiscriminately to all commercial contracts. While

395 Supra note 392 at 263G. Priestly JA looked at how the USA dealt with good faith, including in the Uniform Commercial Code.
398 Ibid at 570.
399 Warren op cit note 388 at 348 and note 25.
401 Warren op cit note 388 at 349.
402 Ibid footnote 26, referring to Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL [2005] VSCA 228.
403 Ibid. That there was no general implication of good faith in commercial contracts was confirmed in Arhanghelschi v Ussher (2013) 94 ACSR 86.
Tasmania appears to be taking the approach of Victoria; Queensland, South Australia and Western Australia appear to be taking the approach of New South Wales.\footnote{Alicia Hill ‘The Meaning of “Good Faith” in Commercial Contracts in Australia’ (July 2014) McInnes Wilson Lawyers available at http://www.lexology.com/library/document.ashx?g=0b5d0756-ef14-4a57-9072-ffe65a1a5e19, accessed on 6 July 2017.} Unfortunately the High Court declined to decide on the existence of an implied obligation of good faith in *Royal Botanic Gardens and Domain Trust v South Sydney City Council*.\footnote{(2002) 186 ALR 289.} Without further exploring the question, ‘Kirby J indicated he did not think such an obligation sat well with *caveat emptor*.’\footnote{Peden op cit note 393 at 186 & note 1.} So the matter has not been settled by the High Court and as such the uncertainty and differing approaches between states is expected to persist.

The approach of implying good faith as a matter of law has been heavily criticised, particularly by JW Carter and Elisabeth Peden. The basis of their criticism is that terms implied in law apply to particular types of relationships such as rental or employment relationships and not all contracts generally.\footnote{Ibid 205.} In addition, if courts wanted good faith to be an obligation to apply to all contracts, ‘then by using a term implied in law, the parties are free to expressly exclude the term, thus thwarting the intention of the courts.’\footnote{Ibid 205.} Their view is that good faith applies by way of the construction of the contract as good faith is inherent in contract doctrines, rules and principles and therefore already incorporated.\footnote{JW Carter, Elisabeth Peden & G.J. Tolhurst *Cases and Materials on Contract Law in Australia* 5 ed (2007) para 2.10.} This approach was rejected in favour of implication by law in *Vodafone Pacific Ltd v Mobile Innovations Ltd*.\footnote{Supra note 400 para 201 – 206.}

Included in the uncertainty is also the content of the duty of good faith. It appears that the classically accepted definition of good faith in Australian law is from Sir Anthony Mason, namely:

‘(1) An obligation on the parties to co-operate in achieving the contractual objects (loyalty to the promise itself).
(2) Compliance with honest standards of conduct.
(3) Compliance with standards of conduct that are reasonable having regard to the interests of the parties.’\footnote{AF Mason ‘Contract, good faith and equitable standards in fair dealing’ (2000) 116 (Jan) *L.Q.R.* 66 at 69.}

However there appears to be some debate surrounding the exact meaning of his third point. It has been submitted that if what is meant by ‘reasonable’ is that contracts ‘[would] be
construed reasonably, considering the position of the parties',\textsuperscript{412} that would be accepted. Also, ‘if what is meant by “reasonable behaviour” is subjective reasonableness’\textsuperscript{413} then it merely means honesty. It is therefore submitted that ‘reasonableness must be seen as an element of honesty and not as an additional requirement.’\textsuperscript{414} The origin of the criticism is that since the \textit{Renard} case ‘many seem to be confusing an obligation of objective “reasonable” behaviour with “good faith”, or imposing both obligations at once.’\textsuperscript{415} The standard imposed by objectively reasonable behaviour is far more onerous that the standard required by good faith.\textsuperscript{416} It is therefore conceivable that ‘[a] party may have behaved in good faith, yet still have behaved unreasonably.’\textsuperscript{417} While the commentators accept that legislation exists to force corporations to act in a ‘reasonable’ or ‘fair’ manner towards consumers, they are critical of courts imposing such an obligation to commercial parties contracting at arm’s length.\textsuperscript{418}

The objections raised by Peden to the objective interpretation of the ‘reasonableness’ element of good faith were considered and dismissed by Allsop P\textsuperscript{419} because ‘an objective element of reasonableness in fair dealing is appropriate, taking its place with honesty and fidelity to the bargain in the furtherance of the contractual objects and purposes of the parties, objectively ascertained.’\textsuperscript{420} He continued:

‘The standard of fair dealing or reasonableness is to be applied recognising the different interests of the parties and the lack of necessity for parties to subordinate their own interests to those of the counterparty. That a normative standard is introduced is clear. That is what the commercial parties chose by their words. The normative standard of good faith will not call for the same acts from all contracting parties in all cases.’\textsuperscript{421}

c) \textit{Fair Trading Act}

In Victoria, unfair terms in contracts were first regulated by the inclusion of Pt 2B of the \textit{Fair Trading Act 1999} (Vic) (FTA (Vic)) in 2003\textsuperscript{422} which rendered an unfair term in a consumer or standard form contract void.\textsuperscript{423} It is interesting to note that the test to determine

\textsuperscript{412} Peden op cit note 393 at 193.
\textsuperscript{413} Ibid 194.
\textsuperscript{414} Carter, Peden, & Tolhurst op cit note 409 para 2.11.
\textsuperscript{415} Peden op cit note 393 at 194.
\textsuperscript{416} Ibid 195.
\textsuperscript{417} Ibid.
\textsuperscript{418} Ibid 196.
\textsuperscript{419} Macquarie International Health Clinic Pty Ltd \textit{v} Sydney South West Area Health Service [2010] NSWCA 268 para 15.
\textsuperscript{420} Ibid.
\textsuperscript{421} Ibid para 17.
\textsuperscript{422} SG Corones, \textit{The Australian Consumer Law} 3ed (2016) para 5.15.
\textsuperscript{423} s 32Y.
unfairness, set out in s 32W initially required consideration of ‘good faith’, but the ‘good faith’ element of the test was deleted in 2009. This was ‘due to continuing uncertainty over the function and meaning of the duty of good faith under the UTCCR. In the UK, the CRA did retain the ‘good faith’ requirement in its unfair terms test.

\[d\) Australian Consumer Law\]

\[i\) Introduction\]
The ACL is incorporated in Schedule 2 of the Competition and Consumer Act 2010 (Cth) (CCA) and commenced on 1 January 2011. It is the uniform consumer protection law that applies across all Australian jurisdictions. Section 131A of the CCA provides that the ACL does not apply to the supply of financial goods, services or products. However, the protections in the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act) regarding unfair terms in relation to the supply of financial services or products are materially identical to the equivalent ACL provisions.

\[ii\) Unfair terms\]
The ACL is based on the repealed Pt 2B of the FTA (Vic), and the (now repealed) UTCCCR in the UK. The ACL ‘is a comprehensive regulatory scheme rendering void unfair terms in standard form consumer contracts’ and small business contracts entered into or renewed after 12 November 2016. Parts 2-3 and 3-1 of the ACL set out the provisions relating to unfair contract terms and practices.

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424 By s 5 Fair Trading and Other Acts Amendment Act 2009 (Vic).
426 See notes 364 and 365 supra.
427 The new name for what was previously known as the Trade Practices Act 1974 (Cth) (TPA).
428 The Insurance Contracts Act 1984 (Cth) (ICA) provides that a contract of insurance is excluded from relief provided by any other Commonwealth Act. However, s 9 (exceptions to the application of the [Insurance Contracts] Act) means that standard form consumer insurance contracts in private health insurance, State and Commonwealth government insurance and re-insurance contracts are subject to ACL. It is important to know that all insurance contracts not covered by the s 9 exception, fall within the definition of financial products and services in the ASIC Act. Therefore, the conduct leading up to the conclusion of the insurance contract is governed by the ASIC Act, thereafter it is regulated by the ICA.
429 Corones & Clarke op cit note 387 para 1.05. For the sake of brevity reference will be made to the ACL on the understanding that similar protections are afforded in financial services.
430 See note 348 supra.
431 Patterson op cit note 425 at para 1.10.
432 Ibid.
433 Corones op cit note 422 Preface. The Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015 (Cth) extended the general protection against unfair terms to small business contracts. Section 8 states that a contract will be a ‘small business contract’ if at least one contracting party is a business employing less than 20 people; and either: the upfront contract price payable does not exceed
Section 23(1) and (2) of the ACL provides that ‘a term in a consumer contract or small business contract [will be] void if the term is unfair and the contract is a standard form contract’. However, s 26 limits the scope of the unfair terms application, stating that a term cannot be tested to the extent the term defines the main subject matter of the contract, or sets the upfront price of the contract, or is expressly permitted by law.

A consumer contract is defined as:

‘a contract for (a) supply of goods or services; or (b) a sale or grant of an interest in land; to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption’

Therefore, for the purposes of the ACL, the definition of a ‘consumer contract’ is determined by considering the actual purpose for which the goods or services were acquired. The subjective approach required to ascertain the purpose does pose some difficulty, as the supplier cannot be expected to know the other parties’ intention, and some goods and services can be acquired for dual purposes.

Standard form contracts are the ones protected by ACL due to the recognised need for regulation when parties are not able to negotiate their own terms. ‘Standard form contracts’ are however undefined in the ACL, instead the ACL creates a rebuttable presumption that a contract is a standard form contract where a consumer alleges it is. Section 27(2) states that when a court is determining whether a contract is a standard form contract, it ‘may take into account such matters as it thinks relevant’, but then lists factors that ‘must be taken into account’. They can generally be described as contracts prepared by the

A$300,000, or the upfront contract price payable does not exceed A$1,000,000 and the duration is more than 12 months.

The following contracts are expressly excluded from ACL by s 28: marine salvage or towage; chartering of a ship; carriage of goods by ship; constitutions of a corporation, managed investment scheme or other kind of body. See note 428 supra.

s 23(3). The Acts Interpretation Act 1901 (Cth) defines ‘individual’ to mean a natural person. Corones points out that this is different to the provisions relating to unconscionable conduct in Chapter 4, and bodies corporate cannot rely on general protection for unfair terms. Section 3(1) and (3) provide that a person acquires goods or services as a ‘consumer’ provided the amount paid was less than AUD$ 40,000 (or the prescribed amount); or the goods or services were of a kind ordinarily acquired for personal, domestic or household use or consumption.

Patterson op cit note 425 para 5.100.

Supplier is defined in s 2 of the ACL and can be anyone in the supply chain but must be a corporation as of 1 July 2010 in accordance with the Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2009 (Cth).

Corones op cit note 422 para 5.60.

The factors listed range from the bargaining power of the parties; if the contract was prepared prior to discussion between the parties; if either party was in effect required to accept or reject the terms as presented; whether there was an effective opportunity to negotiate terms; if specific characteristics of the transaction or party were taken into account in the contract; any other legislation.
supplier and routinely used in all transactions on a ‘take it or leave it’ basis.\textsuperscript{441} The emphasis is on the lack of negotiation between the parties. If a consumer can negotiate part of the terms in a contract otherwise prepared in advance, it has been submitted that that does not necessarily mean that the ACL will not apply, it would be an additional consideration for the court\textsuperscript{442} on an individual contract-by-contract basis assessment.

The test for determining whether a term is unfair in s 24(1) considers the term itself, stating it would be unfair if:

‘(a) if it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
(b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
(c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.’\textsuperscript{443}

When making its determination of a term’s fairness, a court ‘may take into account such matters as it thinks relevant’\textsuperscript{444} but it must take into account the transparency\textsuperscript{445} of the term and the contract as a whole.

The examples of terms that ‘may presumed to be unfair’, the so called grey-list are contained in section 25 of the ACL. Their qualification is ‘without limiting section 24’, therefore they do not create a presumption that the terms are unfair. Rather, the unfairness test would need to be applied to the grey list term. The examples listed in s 25 commonly ‘give unilateral rights to one party and no rights to the other party in relation to matters such as varying terminating and assigning to the contract.’\textsuperscript{446} Section 23(1) confirms that a term found to be unfair will be void, but the rest of the contract will continue to operate without the unfair term, if it is possible.\textsuperscript{447}

It has been submitted that the test for unfairness focuses on substantive fairness rather than procedural fairness.\textsuperscript{448} The ACL test builds on the CRA test\textsuperscript{449} by requiring two additional factors, s24(1)(b) and (c), and it does not refer to good faith like the CRA test. The test for unfairness in the South African CPA\textsuperscript{450} considers if the term is ‘excessively

\textsuperscript{441} Patterson op cit note 425 para 5.50.
\textsuperscript{442} Ibid para 5.60.
\textsuperscript{443} Section 24(4) contains a rebuttable presumption against s 24(1)(b), therefore a trader would have to prove the term is reasonably necessary to protect their interests.
\textsuperscript{444} s 24(2)
\textsuperscript{445} Section 24(3) states that a term will be transparent if it is expressed in reasonably plain language, is legible, presented clearly and readily available to any party affected by the term.
\textsuperscript{446} Corones op cit note 422 para 5.160.
\textsuperscript{447} s 23(2).
\textsuperscript{448} Patterson op cit note 425 para 1.40.
\textsuperscript{449} See notes 364 - 365 supra.
\textsuperscript{450} s 48(2) read with s 52(2).
one-sided’, but there has been criticism that there is a lot of focus on procedural fairness in the CPA unfairness test.\textsuperscript{451} When comparing the three tests for unfairness, the criticism for use of the word ‘inequitable’ in the CPA test\textsuperscript{452} as a circular reference for ‘unfair’ is particularly understandable. Although the ACL test does not refer to ‘good faith’, the additional factors in the test appear to indicate that is has developed to the extent that it is able to serve its purpose very effectively. The CPA unfairness test would benefit from listing factors set out in the ACL test and adding the good faith consideration from the CRA.

\textit{(iii) Unconscionable conduct} 

Contained in Pt 2-2 of the ACL is a general protection for consumers which prohibits unconscionable conduct towards consumers and businesses.\textsuperscript{453} Section 20 sets out a general prohibition of unconscionable conduct ‘within the meaning of the unwritten law from time to time’. Section 21 contains a broad prohibition of unconscionable conduct relating to the supply (or possible supply) or acquisition of goods or services. (Section 20 will not apply where s 21 applies to prevent overlap).\textsuperscript{454} Listed in s 22 is a non-exhaustive list of factors a court may consider in determining if s 21 has been breached. The unconscionable prohibition is directed at conduct whereas the test for fairness is directed at the \textit{actual purpose} of the term. The practical effect is that the fairness test in the ACL does not apply to business-to-business transactions but the unconscionable conduct prohibitions do.\textsuperscript{455}

‘Unconscionable conduct’ is not directly defined in the ACL. Section 20(1) refers to ‘within the meaning of the unwritten law from time to time.’ As such the meaning refers to ‘the array of common law and equitable principles that have developed in the Australian courts over many years’.\textsuperscript{456} The ACCC has provided the explanation that it is ‘conduct which is so harsh that it goes against good conscience [as judged against the norms of

\textsuperscript{451} See notes 177 - 178 supra.

\textsuperscript{452} Tjakie Naudé ‘Section 48’ op cit note 170, 48-18 para 12.

\textsuperscript{453} They are based on the replaced TPA prohibitions: s 51AA, s 51AB, S 51AC (Corones, op cit note 422 para 4.05). Note that the only exclusion for business transactions is for a ‘listed public company’ as per s 22(2) and (3).

\textsuperscript{454} s 20(2).

\textsuperscript{455} The unconscionable conduct prohibitions would therefore be the avenue to use to contest an unfair term in a b2b transaction, except by public listed companies which are specifically excluded from protection see note 453 supra.

\textsuperscript{456} Explanatory Memorandum, Competition and Consumer Legislation Amendment Bill 2010, para 2.13.
society]’ and ‘the conduct must be particularly harsh or oppressive, more than simply unfair’.

It has been submitted that the prohibitions on unconscionable conduct seek to protect parties from ‘conduct [while] making, performing, or enforcing a contract.’ They are therefore usually classified as measures used to create procedural fairness rather than substantive fairness which is what Part 2-3 of the ACL seeks to achieve. However, s 21(4) of the ACL contains three interpretive principles, drawn from existing case law, which are intended to clarify the meaning of statutory unconscionability. The third principle grants courts the power to consider the terms of the contract and the manner and extent to which it is carried out. The Explanatory Memorandum confirmed ‘this provision clarifies that unconscionable conduct can extend beyond the formation of the contract to both its terms and the way in which it is carried out.’ Therefore it appears that statutory unconscionability under the ACL does seek to protect against both substantive and procedural conduct. This is further evidenced by the factors listed in s 22 which ‘direct attention to both procedural and substantive unconscionability, and involve a combination of subjective and objective inquiries.’ This is in contrast with the s 40 CPA prohibition on unconscionable conduct which it has been submitted focusses on procedural conduct.

Considering that the direct reference to good faith in the test to determine fairness was omitted from the ACL due to the uncertainty regarding its function and meaning, it is interesting to note that one of the factors listed for consideration by courts in determining unconscionability is ‘the extent to which the acquirer and the supplier acted in good faith.’ Although the list is not exhaustive, and it is just one of the factors listed, it is interesting that it was considered a necessary consideration for courts, but removed from the fairness test. In *Paciocco v Australia and New Zealand Banking Group Ltd* the

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458 Patterson op cit note 425 para 10.10.
459 Ibid.
460 Set out in the Explanatory Memorandum op cit note 449, para 2.18.
461 Corones, op cit note 422 para 4.55.
462 s 21(4)(c).
463 Op cit note 456 para 2.24.
464 Corones, op cit note 422 para 4.95.
465 See note 199 supra.
466 See notes 423 and 424 supra.
467 s 22(2)(1).
meaning to be given to ‘good faith’ in the equivalent ASIC Act provision\textsuperscript{469} was under consideration. It was held to mean:

‘[A]n obligation to act honestly and with a fidelity to the bargain; an obligation not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for; and an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained.’\textsuperscript{470}

This has been interpreted as not requiring the stronger party to act selflessly, ‘but they must not take actions which would prevent the performance of the contract or withhold the benefits of the contract from the weaker party.’\textsuperscript{471}

(iv) \textit{Consumer Guarantees Law}

The Consumer Guarantees Law (CGL) set out in Pt 3-2 Div 1 of the ACL provides mandatory minimum standards applicable to the supply of goods and services to consumers. ‘Liability arising under the CGL cannot be excluded or limited by contract.’\textsuperscript{472} Section 64(1) essentially states that exclusion clauses and limitation of liability clauses are void to the extent that they ‘exclude, restrict or modify liability for failure to comply with the consumer guarantees.’\textsuperscript{473} Exclusion clauses could also qualify under the so-called grey-list items of potentially unfair terms.\textsuperscript{474} As such they can be challenged under the fairness test or the CGL. Although there are two methods available to challenge the exclusion clauses, the easier burden of proof for the consumer would be a challenge based on a breach of a consumer guarantee. Also, as will be seen below, Australia’s rules on unfair terms and practices are subject to limitations on damages, so it appears advisable for a consumer to proceed down the breach of consumer guarantee route.

(v) \textit{Limitations on damages and compensation}

A cap is placed on certain damages that can be recovered due to personal injury.\textsuperscript{475} Relevant to this discussion is that it is not possible to bring an action for damages under s 236 or an

\textsuperscript{469} s 12CC(1)(l) and s 12CC(2)(l).
\textsuperscript{470} Supra note 468 para 288.
\textsuperscript{471} Corones op cit note 422 para 4.185.
\textsuperscript{472} Patterson op cit note 425 para 11.10.Ibid.
\textsuperscript{473} Corones op cit note 422 para 15.255. There is an exception, see note 477 infra. Both South Africa and the UK prohibit clauses that exclude or limit liability of suppliers or traders under consumer legislation, see note 192 for the CPA and note 379 for CRA supra.
\textsuperscript{474} s 24(1)(a): as the terms would cause significant imbalance between the rights of the parties.
\textsuperscript{475} Due to dramatic increases in insurance premiums the Federal Government initiated a review of personal injury laws.
action for a compensation order under s 237(1) and s 238(1) of the ACL relating to personal injury and death to the extent that they relate to unfair terms and practices, where they do not relate to smoking or the use of tobacco products.\textsuperscript{476} Also, if the claim is personal injury or death based on unconscionable conduct, it is subject to the threshold limits for non-economic loss and loss of earnings set out in s 87 of the CCA. Section 139A of the CCA enables suppliers of recreational services to exclude, limit or modify the application of their liability in the event of death or personal injury of a consumer, and such a limitation will not be void in terms of s 64.\textsuperscript{477}

These limitations to compensation and damages claims do not apply in South Africa and the UK. To the extent that they become necessary if insurance premiums spike, they should be a consideration for the CPA.

\textit{(vi) Industry Codes}

Industry codes of conduct are contained in Pt IVB of the CCA and are therefore not part of the ACL. Their purpose is to protect small business owners rather than consumers, however, the ACL does refer to them as factors a court may consider in certain instances.\textsuperscript{478} Relevant for the purposes of this discussion is the Franchising Code of Conduct contained in Sch 1 of the Competition and Consumer (Industry Codes – Franchising) Regulation 2014 (Cth) which is mandatory and applies from 1 January 2015.\textsuperscript{479} It imposes on both parties the express obligation to act in good faith towards each other\textsuperscript{480} which cannot be excluded.\textsuperscript{481} The reasoning behind the change was that due to imbalance of bargaining power in a franchise relationship, there was not always full information disclosure between parties and as such the franchisee was often at a disadvantage. ‘Good faith’ is not actually defined in the code, the meaning is the same as at common law,\textsuperscript{482} and there are non-exhaustive factors listed for a court to consider when determining if a breach has occurred.\textsuperscript{483} What is worth mentioning is that acting in good faith according to the Code does not prevent a party from acting in their legitimate commercial interests.\textsuperscript{484}

\begin{itemize}
\item \textsuperscript{476} s 137C(1) of CCA.
\item \textsuperscript{477} Corones op cit note 422 para 15.280. One of the instances mentioned is s 21 unconscionable conduct.
\item \textsuperscript{478} Corones & Clarke op cit note 387 para 15.05.
\item \textsuperscript{479} Ibid 15.10.
\item \textsuperscript{480} Contained in clause 6(1).
\item \textsuperscript{481} Clause 6(4).
\item \textsuperscript{482} Clause 6(1) ‘within the meaning of the unwritten law from time to time.’
\item \textsuperscript{483} cl 6(3), (5) and (6).
\item \textsuperscript{484} cl 6(6).
\end{itemize}
The Franchising Code of Conduct applies to all franchise agreements. The Franchising Code (and other Industry Codes)\(^{485}\) that the CCA sets out are demonstrative of the development that Australian consumer protection has undergone in the time South Africa has not provided its consumers (and small business owners) legislative protection. In South Africa, there are two industry codes currently applicable\(^ {486}\) and three further codes which have been published for public comment.\(^ {487}\) However, when compared, the South African codes tend to focus on procedure relating to accreditation of ADR agents such as ombuds in each sector, the procedure regarding dispute resolution, and the jurisdiction of the ADR. The codes unfortunately do not provide specific industry insight into unfair contract terms for the sector in which they apply. What South African consumer protection legislation could benefit from is sector specific guidelines to promote fair transacting between parties which address sector specific nuances.

(vii) **Australian Consumer Law Review**

The Consumer Affairs of New Zealand and Australia (CAANZ) conducted a review of the ACL and released a report on the Australian Consumer Law on 19 April 2017.\(^ {488}\) Some of their proposals touch on what has been discussed above.

CAANZ proposed extending the unconscionable conduct protections to publicly-listed companies\(^ {489}\) because a public listing is ‘not necessarily a reflection of a trader’s ability to withstand unconscionable conduct.’\(^ {490}\) They also considered and dismissed the idea of a general prohibition on ‘unfair trading’.\(^ {491}\) CAANZ did however commit to additional (further) investigation in this area. Another proposal\(^ {492}\) was to apply the unfair terms protections to standard form insurance contracts currently regulated by the Insurance Contracts Act 1984 (Cth).\(^ {493}\) As the ACL does not prohibit the use of unfair contract terms,

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\(^{485}\) Other mandatory codes: Unit Pricing Code; Oil Code of Conduct; Wheat Port Code of Conduct; Horticulture Code of Conduct. The Food and Grocery Code of Conduct is voluntary.

\(^{486}\) Automotive Industry Code of Conduct (GG No 38107 on 17 October 2014); Consumer Goods and Services Industry Code of Conduct (GG No 38637 on 30 March 2015).

\(^{487}\) Industry Code for the Franchise Industry (GG No 39631 on 29 January 2016); The Advertising and Marketing Industry Code of Practice (GG No 40159 on 26 July 2016); Funeral Industry Code of Conduct (GG 40243 on 2 September 2016).


\(^{489}\) Proposal 9.

\(^{490}\) Op cit note 488 para 2.3.

\(^{491}\) Op cit note 488 para 2.3.3.

\(^{492}\) Proposal 10.

\(^{493}\) See note 428 supra for the current position. In the UK, the CRA applies to consumer insurance contracts, the FCA TCF principles set out best practice for insurance contracts in general. Australia did not adopt a principle based system of oversight for its financial, banking and insurance sectors like the UK and South
but instead allows for them to be declared void if challenged, it means that the use of an unfair term is not strictly speaking a contravention of the ACL. As such it was noted that wording in some jurisdictions meant that investigative powers and therefore enforcement action with respect to unfair contract terms were at times only triggered once an actual contravention or possible contraventions has occurred.494 This meant that existing investigative powers may not be triggered in certain instances.495 CAANZ therefore also proposed496 that the existing investigative powers of regulators be amended ‘to obtain information and evidence to determine whether a standard form contract term is unfair.’497 This is a welcome development which closes what is assumed to be an unintended small gap and takes Australia another step closer to pro-active enforcement of consumer rights rather than reactive.

e) Conclusion

Australia’s consumer protection legislation demonstrates that they have been providing necessary protections for many years and have developed and adapted as necessary. Good faith as a concept has made its way into, and out of,498 and back into499 Australian legislation. This in my view, is indicative of the historical discomfort still felt towards the concept in common law jurisdictions. There was objection to the proposal to include ‘good faith’ in the Franchising Code, which was addressed by the Australian government in 2009 before the code could be drafted.500 It was in the same year that the good faith element of the test for unfairness was deleted from the FTA.501

The treatment by the courts of good faith in commercial contracts is not consistent throughout Australia. Although there certainly appears to be a softening of the traditional common law stance, and a duty of good faith will probably be implied by the courts into commercial contracts, the manner of implication varies according to jurisdiction, and the content of the obligation also varies. On the common law scale, Australia seems to be moving away from the UK, closer to the American approach to good faith despite strenuous

Africa. If this recommendation is adopted, the ACL will apply to the whole insurance sector, which is currently carved out by the ICA.

494 Op cit note 488 at 54.
495 Ibid.
496 Proposal 11.
497 Op cit note 488 at 54.
498 See notes 424,425 supra.
499 See notes 466,467, 480 supra.
500 Commonwealth Government Response to the report of the Parliamentary Joint Committee on Corporations and Financial Services Opportunity not opportunism: improving conduct in Australian franchising
501 See note 424 supra.
criticism by academics of such a move. Until the High Court pronounces definitively on the matter, the uncertainty will unfortunately persist.

XIII. CONCLUSION

If South Africa does continue to develop the common law in the spirit, purport and object of the Bill of Rights, the role of good faith, fairness and other similarly important principles like ubuntu will ultimately be elevated. At that point, they will join other common law countries like the USA and Australia in increased recognition of good faith, moving closer to the civil law jurisdictions’ treatment of the obligation. While the English courts appear to be clinging on to the classic common law approach to good faith, from a legislative point of view the United Kingdom has had to comply with the infusion of civil law principles like good faith as imposed by the EU. Good faith has already found its way into UK legislation, and in the interests of commercial certainty, it is expected the UK will likely remain largely complaint with EU legislation following Brexit. As such, good faith as a civil law principle will probably continue to apply and remain relevant. If that is the case, in time it is likely increased demands will be made for recognition of good faith in commercial contracting space in the UK. At some point, the courts will likely have to make such allowances.

The warning by two US authors who said ‘[we] caution anyone who is confident about the meaning of good faith to reconsider’ was very wise advice. How good faith is determined and the content of the duty does vary between countries. It is not a static concept, as such it will (and should) continue to evolve. That will not necessarily create uncertainty. The variable nature of the concept requires each jurisdiction to determine and flesh out the content of the concept according to the prevailing convictions of the community within the framework of the law. It does not appear that countries that impose the obligation have suffered due to the ‘uncertain’ nature thereof.

For South Africa’s consumer protection legislation to attempt to stay current, it is vital that it continues to adapt to changing market behaviours, and take guidance from countries that have been legislating in this area for many more years than us. As legislative changes can be slow, useful binding industry codes should be a consideration to keep legislation current. They are a much quicker way to adapt to necessary changes in marketplace

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behaviour. The ultimate goal for consumer protection must be to move towards pro-active investigative, preventative measures rather than remedial after the fact enforcement. That will only come in time, with further growth in the area.
XIV. BIBLIOGRAPHY

Primary Sources

Statutes

South African
Financial Services Board Act 97 of 1990.
Financial Services Laws General Amendment Act 45 of 2013.
Financial Sector Regulation Bill B34D-2015.
Memorandum on the Financial Sector Regulation Bill B34D-2015.
National Credit Act 34 of 2005.
Rental Housing Act 50 of 1999.
Rental Housing Amendment Act 35 of 2014.

Australian
Acts Interpretation Act 1901 (Cth).
Australian Securities and Investments Commission Act 2001 (Cth).
Competition and Consumer Act 2010 (Cth).
Competition and Consumer (Industry Codes – Franchising) Regulation 2014 (Cth).
Fair Trading Act 1999 (Vic).
Insurance Contracts Act 1984 (Cth).
Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2009 (Cth).
Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015 (Cth).

European Union
Unfair Consumer Contract Terms Directive 93/13/EEC.

United Kingdom
Consumer Rights Act 2015.

Cases
South African
Bank of Lisbon & South Africa v Ornelas and Another 1988 (3) SA 580 (A).
Barkhuizen v Napier 2007 (5) SA 323 (CC).
Botha v Rich 2014 (4) SA 124 (CC).
Brisley v Drotsky 2002 (4) SA 1 (SCA).
Cool Ideas 1186 CC v Hubbard 2013 (5) SA 112 (SCA).
Cool Ideas 1186 CC v Hubbard 2014 (4) SA 474 (CC).
De Beer v Keyser And Others 2002 (1) SA 827 (SCA).
Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC).
Fourways Haulage SA (Pty) Ltd v SA National Roads Agency Ltd 2009 (2) SA 150 (SCA).

Four Wheel Drive Accessory Distribution CC v Rattan NO (6916/13) [2017] ZAKZDHC 26.
Magna Alloys & Research (S.A.) (Pty) Ltd. v Ellis 1984 (4) SA 874 (A).
Maphango v Aengus Lifestyle Properties (Pty) Ltd 2012 3 SA 531(CC).
Napier v Barkhuizen 2006 (4) SA 1 (SCA).
National Credit Regulator v Opperman and Others 2013 (2) SA 1 (CC).
Nyandeni Local Municipality v Hlazo 2010 (4) SA 261.
SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren 1964 (4) SA 760 (A).
Sasfin (Pty) Ltd v Beukes 1989 (1) All SA 1 (A).


Australian
Alcatel Australia Ltd v Scarcella (1998) 44 NSWLR 349.
Arhanghelschi v Ussher (2013) 94 ACSR 86.
Burger King Corporation v Hungry Jack’s Pty Ltd [2001] NSWCA 187.
Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL [2005] VSCA 228.
GSA Group Pty Ltd v Siebe PLC (1993) 30 NSWLR 573.
Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church for the Archdiocese of Sydney (1993) 31 NSWLR 91.
Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service [2010] NSWCA 268.
Paciocco v Australia and New Zealand Banking Group Ltd [2015] FCAFC 50.
Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234.
Royal Botanic Gardens and Domain Trust v South Sydney City Council (2002) 186 ALR 289.
Vodafone Pacific Ltd v Mobile Innovations Ltd [2004] NSWCA 15.

United Kingdom
Carter v Boehm (1766) 3 Burr 1905.
Bristol Groundschool Ltd v Intelligent Data Capture Ltd [2014] EWCH 2145 (Ch).
Dymocks Franchise Systems (NSW) Pty Ltd v Todd [2002] 2 All E.R (Comm) 849 PC.
Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest) [2013] EWCA Civ 200.

Secondary Sources

Books and Chapters in Books


Journal Articles


Journal of Contract Law 155.

Du Plessis, P ‘Good faith and equity in the law of contract in the civilian tradition’ (2002)
65 THRHR 397.

Groves, Kelda ‘The doctrine of good faith in four legal systems’ (1999) 15(4)
Construction Law Journal 265.

Gordon, Marcel ‘Discreet Digression: The Recent Evolution of the Implied Duty of Good

Hawthorne, L ‘The “New Learning” and Transformation of Contract Law: Reconciling
the Rule of Law with the Constitutional Imperative to Social Transformation’
2008 SAPR/PL 77.

Hawthorne, Luanda ‘Responsive Governance: Consumer Protection Legislation and its
Effect on Mandatory and Default Rules in the Contract of Sale’ 2011 SAPL 432.

Hawthorne, L ‘Public Governance: Unpacking the Consumer Protection Act’ 2012
THRHR 345.

Henraj Mohammed B ‘Lender’s duty to act in good faith in South Africa’ (2003) 14(8)

Hutchison, Andrew ‘Relational theory, context and commercial common sense: views on

Hutchison, Dale ‘Non-variation clauses in contract: any escape from the Shifren


Kohn, L ‘Escaping the “Shifren shackles” through the application of public policy: An
analysis of three recent cases shows Shifren is not so immutable after all’ (2014) 1
Speculum Juris 74

Kruger, Matthew ‘The role of public policy in the law of contract revisited’ (2011) 128
SALJ 712.

Lewis, C ‘The uneven journey to uncertainty in contract’ (2013) 76 THRHR 80

Louw, AM ‘Yet another call for a greater role for good faith in the South African law of
contract: can we banish the law of the jungle, while avoiding the elephant in the
room?’ (2013) 16 (5) PER/PLJ.


Naudé, Tjakie ‘Enforcement procedures in respect of the consumer’s right to fair, reasonable, and just contract terms under the Consumer Protection Act in comparative perspective’ (2010) 127 SALJ 515.

Naudé, Tjakie ‘The consumer’s right to fair, reasonable and just terms under the new Consumer Protection Act in comparative perspective’ (2009) 126 SALJ 505.


Naudé, Tjakie & Koep, Charlotte ‘Factors relevant to the assessment of the unfairness or unreasonableness of contract terms: some guidance from the German law on standard contract terms’ (2015) 26 Stellenbosch Law Review 85.


Peden, Elisabeth ‘Implicit Good or Do We Still Need an Implied Term of Good Faith?’ (2009) 25 JCL 50.


Siliquini-Cinelli, Luca & Andrew Hutchison ‘Constitutionalism, good faith and the doctrine of specific performance: Rights, duties and equitable discretion’ (2016) 133 SALJ 73.


van Dunné, Jan ‘On a clear day you can see the continent – the shrouded acceptance of good faith as a general rule of contract law on the British Isles’ (2015) 31(1) Construction Law Journal 3.

Wallis, Judge Malcom ‘Commercial certainty and constitutionalism: Are they compatible? (2015) Inaugural lecture as Professor Extraordinary of the Department of Mercantile Law, presented at the University of the Free State.


Woker, Tanya ‘Evaluation the role of the national consumer commission in ensuring that consumers have access to redress’ (2017) 29 SA Merc LJ 1.

**Law Commission Reports**


**Theses & Research Papers**

Layton-McCann, Keryn *The evolution of the tension between the Supreme Court of Appeal and the Constitutional Court regarding good faith and fairness in Contract Law, where do we stand?* (unpublished LLM Research Paper, University of Cape Town 2016)


**Delegated Legislation**

**South African**

Automotive Industry Code of Conduct GN 817 in GG No 38107 on 17 October 2014.


Determination of Threshold in terms of Consumer Protection Act, 2008 (Act No. 68 of 2008) in GN 294 GG No 34181 of 1 April 2011.


Western Cape Unfair Practice Regulations of 2002.

**Australian**

Internet References


Financial Services Board TCF: The Roadmap at 15 – 19, available at 

Financial Services Board What is Twin Peaks? available at 

Good Faith in English Law – what does it mean? (Eversheds 2014) available at 

Juta Law, Consumer Law Review Newsletter, available at 


Unpacking the Rental Housing Amendment Act 35 of 2014 (De Rebus 24 February 2016) available at 

United Kingdom Competition and Markets Authority Unfair contract terms guidance published 31 July 2015, available at 

