

“Good faith in the Scots law of contract: an undisclosed principle?” in A.D.M. Forte (ed), *Good Faith in Contract and Property Law*, Hart Publishing, Oxford, (1999), 5-37

GOOD FAITH IN THE SCOTS LAW OF CONTRACT: AN UNDISCLOSED PRINCIPLE?

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There is also an underlying principle of good faith in the Scottish law of contract although it is difficult to find a clear and comprehensive statement of it.¹

This comment appeared in 1995 in the first published part of the *Principles of European Contract Law*, as one of the notes on national systems attached to the Article of the Principles providing that each party to a contract must act in accordance with good faith and fair dealing.² The comment can almost certainly be attributed to Professor W A Wilson, who was the Scottish representative on the European Contract Commission responsible for the 1995 publication. Wilson is perhaps an unlikely champion of a good faith principle in Scots contract law, an idea which prior to 1995 had been associated with the neo-Civilian work of Sir Thomas Smith,³ and had otherwise been passed over largely in silence in modern writings and judicial decisions.⁴ But in June 1997, when as Wilson’s successor on the Commission for European Contract Law I had begun to consider revision of and addition to the Scottish notes in preparation for the publication of the second version of the *Principles of European Contract Law*, the House of Lords pronounced on the case of *Smith v Bank of Scotland*.⁵ *Smith* extended to Scotland the previous decision of the House in the English case of *Barclays Bank v O’Brien*,⁶ and in the leading speech, Lord Clyde remarked at one point upon “the broad principle in the field of contract law of fair dealing in good faith”.⁷ The decision in *Smith* is focused upon the requirement of good faith as between creditor and debtor in a cautionary obligation, underpinning a duty of disclosure to the cautioner and also a duty to warn the cautioner

* Professor of Private Law, University of Edinburgh. I would like to thank Michael Bridge, Martin Hogg and Parker Hood for helpful comment on the initial draft of this paper. The conference discussion also proved invaluable in assisting me to collect my thoughts, as did an earlier presentation at a seminar on negotiations organised by the Royal Bank of Scotland in August 1997.

¹ O Lando and H Beale (eds), *The Principles of European Contract Law. Part I: Performance, Non-Performance and Remedies* (Dordrecht, Boston and London, 1995) p. 58. The second part, which will also contain a revision of Part I, should be published in 1999.

² Article 1.106 (Article 1:201 in the revised version). The duty may not be excluded or limited. Article 1.107 (to become Article 1:202) provides in addition that “each party owes to the other a duty to co-operate in order to give full effect to the contract”.

³ T B Smith, *A Short Commentary on the Law of Scotland* (Edinburgh, 1962), pp 297-8, asserts without much analysis or reference to authority that “in the Scottish law of contract bona fides is a general concept”, and is mainly concerned to deny that *uberrima fides* is anything other than a synonym for good faith. The implications are not pursued in his later treatment of voluntary obligations other than in a discussion of concealment, *mala fides* and insurance at *ibid*, pp 835-7.

⁴ W M Gloag, *The Law of Contract* 2nd edn, (Edinburgh, 1929) has “good faith” as an index heading, but there is no general discussion other than the observation (at p 400) that “it is a general rule that contracts are to be construed on the assumption of honest dealing”; but there is no relevant heading in the contents of or indices to W W McBryde, *The Law of Contract in Scotland* (Edinburgh, 1987); Walker, *The Law of Contracts and Related Obligations in Scotland* 3rd edn, (Edinburgh, 1995); S E Woolman, *Contract* 2nd edn, (Edinburgh, 1994); and *The Laws of Scotland: Stair Memorial Encyclopaedia* (SME), vol 15 (1996).

⁵ 1997 SC (HL) 111.

⁶ [1994] 1 AC 180.

⁷ 1997 SC (HL) at p. 121B-C.

of the consequences of the obligation and to urge upon him or her a need to take independent advice on the transaction. This requirement of good faith Lord Clyde saw as a better basis for the introduction of *O'Brien* in Scots law than the English Equity concept of constructive notice. Nearly all of Lord Clyde's remarks about good faith were therefore focused on the contract of cautionry, but it is apparent that he did not see the requirement as limited to that particular context.⁸

This paper is first an attempt to explain why, following this case and some further research, I decided to leave the note in the European Principles as it stood, adding only a reference to *Smith*. But it also seeks to pursue some of the implications of that conclusion in greater depth, in particular with regard to liability for pre-contractual negotiations.

What is good faith in contract law?

It is best to begin with some discussion of what is meant by good faith in contract law. This has been the subject of much debate in recent times. The background is that the existence or otherwise of such a principle in contract law is one of the major divisions between the Civilian and Common Law systems in Europe. Where the great Continental civil codes all contain some explicit provision to the effect that contracts must be performed and interpreted in accordance with the requirements of good faith,⁹ English and Irish law are almost equally explicitly opposed to such broad concepts. This is not to say that the Common Law is happy to countenance bad faith in contracts; but the approach is, to paraphrase some well-known remarks of Lord Bingham, to avoid any commitment to over-riding principle in favour of piecemeal solutions in response to demonstrated problems of unfairness.¹⁰

Martijn Hesselink has provided an invaluable general analysis of what good faith has been taken to mean in the Continental systems.¹¹ First a distinction is drawn between subjective and objective good faith. Subjective good faith is concerned with knowledge of facts or events, or absence of knowledge, and affects mainly property law and possession. In this sense good faith is perfectly familiar in English and indeed Scottish law, both of which offer substantial protection to the bona fide possessor and to the good faith purchaser of goods from a seller without title while denying it to the acquirer in bad faith.

It is objective good faith, however, which is chiefly relevant to contract law. Objective good faith is about external, or community, norms and standards imposed upon contracting parties. Over time these norms and standards have been distilled into particular rules, notably in Germany. But the content of good faith is not fixed or static, and the existence of the general principle in the Codes enables the Continental judge to innovate and develop the law in response to circumstances without infringing upon the territory of the legislator. (It may be noted parenthetically at this point that in *Smith v Bank of Scotland* Lord Clyde drew upon two property law cases to support the principle of

⁸ Further on good faith in cautionry see the contribution of A D M Forte to this volume, "Good faith and utmost good faith: insurance and caution".

⁹ French CC, art 1134; BGB, §§ 138, 242; NBW, arts 6:2, 6:248; Italian CC, arts 1175, 1337, 1366, 1375; Portuguese CC, art 762(2); Spanish CC, art 1258; Greek CC, arts 200, 281, 288, 388; Swiss CC, art 2.

¹⁰ *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433, 439 (per Bingham LJ). For documentation of this statement see J Cartwright, *Unequal Bargaining* (Oxford, 1993); J W Carter and M P Furmston, "Good faith and fairness in the negotiation of contracts", (1994-95) 8 *Journal of Contract Law* 1, 93 (2 parts).

¹¹ "Good faith", in A Hartkamp et al, *Towards a European Civil Code*, 2nd edn (Nijmegen, 1998).

good faith in Scots contract law;¹² if however the distinction between subjective and objective good faith is sound, then it would seem that good faith in property should be kept clearly apart from good faith in contract.¹³)

Three major functions of contractual good faith as interpreted on the Continent are identified by Hesselink:

- interpretation
- supplementation (i.e. the insertion in the contract of duties to be loyal, to protect, to cooperate, to inform)
- correction or limitation, to prevent abuse of right.

Hesselink goes on to show how these functions have operated in a number of areas of contract law on the Continent:

- in respect of pre-contractual negotiations, where there may be a duty to inform or disclose, and a liability for breaking off negotiations in bad faith;
- as a ground of invalidity, especially in relation to standard form contracts;
- as a basis for the interpretation of and gap-filling in contracts;
- as a way of dealing with unforeseen or changing circumstances and hardship;
- as a basis for contractual remedies such as the *exceptio non adimpleti contractus* under which a party who has not received the contractual performance to which it is entitled may withhold its own performance;
- as a control on the exercise of contractual remedies, in particular those of terminating the contract or of seeking implement.

The debate about good faith in the Common Law world has been triggered by various stimuli.¹⁴ In England and Ireland there has been the impact of European Community Directives touching upon contract law and deploying the concept of good

¹² i.e. *Rodger (Builders) Ltd v Fawdry* 1950 SC 483; *Trade Development Bank v David W Haig (Bellshill) Ltd* 1983 SLT 510 (1997 SC (HL) at p. 121B-C). On *Rodger (Builders)*, see K G C Reid, *The Law of Property in Scotland* (Edinburgh, 1996) paras 695-700.

¹³ See further Reid, *Property*, paras 131-137 (“Scots law makes no clear choice between subjectivity and objectivity but takes something from both. Thus, on the one hand, the law inquires into the actual state of mind of the possessor. ... objectivity is allowed to manifest itself in two ways. For first, actual knowledge is in certain circumstances supplemented by constructive knowledge; and secondly, knowledge, whether actual or constructive, is deemed to be interpreted by the possessor in a manner which is in all the circumstances reasonable. ... Absence of actual knowledge of lack of title is in almost every case an indispensable condition of bona fide possession.”) See also the contribution of D L Carey Miller to this volume, “Good faith in property law”, and D N MacCormick, “General Legal Concepts”, SME, vol 11, paras 1128-1131.

¹⁴ Notable contributions include J F O’Connor, *Good Faith in English Law* (Aldershot, 1990); the forum on good faith in contract published in (1994-1995) 7-9 *Journal of Contract Law*; J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford, 1995); and the proceedings of the Sheffield conference “Good Faith in Contract Law” held on 17 March 1997 (to be published by Dartmouth).

faith. By this means the lawyers and courts of both systems have been forced to confront directly the meaning of good faith against a background in which a harmonious Community approach is required. The most striking example is the Unfair Terms in Consumer Contracts Directive 1993,¹⁵ under which a term in a consumer contract which has not been individually negotiated may be struck down if, “contrary to the requirement of good faith”, it causes a significant imbalance in the rights and duties of the parties, to the detriment of the consumer. The Commercial Agents Directive 1986¹⁶ also makes a number of references to good faith.

This leads on to the possible European harmonisation of contract law at a much more general level, one of the underlying but more long-term objectives of the European Contract Commission. It seems almost certain that a general principle of good faith would be part of such harmonisation.¹⁷ I have already quoted the relevant Article of the *Principles of European Contract Law*, and a virtually identical provision can be found in Article 1.7 of the other great recent restatement of contract rules, the UNIDROIT *Principles of International Commercial Contracts*. Both sets of Principles find their roots in the Vienna Convention on the International Sale of Goods 1980 (CISG), which the United Kingdom appears to be on the verge of ratifying and thereby at last moving into line with its European and other international trading partners. CISG avoids an outright commitment to a principle of good faith, but Article 7(1), the product of a compromise between the Civilian and the Common Law traditions represented in its creation, does say that, in the interpretation of the Convention, “regard is to be had to ... the observance of good faith in international trade”.¹⁸

The question for the Common Lawyers is therefore whether to develop an indigenous principle of good faith from the existing specific rules appearing to be based upon it, or to await the harmonisation process as and when it comes, or to resist within that harmonisation process the establishment of a general good faith concept.¹⁹ The forces lined up against explicit recognition of a principle of good faith have an impressive roll-call. They include Professor Roy Goode,²⁰ Lord Steyn,²¹ Professor Hugh Collins,²²

¹⁵ Council Directive 93/13/EEC, OJ 1993, L95/29; implemented in the UK by the Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994 No 3159).

¹⁶ Council Directive 86/653/EEC, OJ 1986 L382/17; implemented in the UK by the Commercial Agents (Council Directive) Regulations 1993 (SI 1993, No 3053).

¹⁷ Note however that H Kötz and A Flessner, *European Contract Law* (Oxford, 1997) has no general treatment of good faith. But cf H Kötz, “Towards a European Civil Code: the duty of good faith”, in P Cane and J Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Oxford, 1998), 243. H McGregor, “The codification of contracts in England and Scotland (equity and good faith)”, in A M Rabello (ed), *Aequitas and Equity: Equity in Civil Law and Mixed Jurisdictions* (Jerusalem, 1997), argues that the Contract Code which he drafted as a basis for unifying Scots and English law in the 1960s (published as *Contract Code drawn up on behalf of the English Law Commission* [Milan, 1993]) accepts the concept of good faith in general but is explicit only in respect of performance, even then expressing the matter in terms of “fair dealing” (section 201).

¹⁸ For recent comment see P Schlechtriem, *Good Faith in German Law and in International Uniform Laws*, Centro di studi e ricerche di diritto comparato e straniero, Saggi, conferenze e seminari 10, (Rome, 1997).

¹⁹ For discussion see H Collins, “Good faith in European contract law”, (1994) 14 *Oxford Journal of Legal Studies* 229; G Teubner, “Legal irritants: good faith in British [sic] law or how unifying law ends up in new divergences”, (1998) 61 *Modern Law Review* 11.

²⁰ See his *Commercial Law in the Next Millennium* (London, 1998), pp. 19-20; also *The concept of “good faith” in English law*, Centro di Studi e Ricerche di Diritto Comparato e Straniero, Saggi, Conferenze e Seminari 2 (Rome, 1992).

²¹ See his “The role of good faith and fair dealing in contract law: a hair-shirt philosophy?”, [1991] *Denning Law Journal* 131; “Contract law: fulfilling the reasonable expectations of honest men”, (1997) 113 *Law Quarterly Review* 433.

and, most strongly and fully, Professor Michael Bridge.²³ A common concern is the uncertainty which would result from the introduction of a standard of uncertain content with strong moral overtones, and the damage which would be done to the commercial contracting practices which have provided the bedrock of English contract law. Traditionally its approach has been founded on the perceived bases of a market economy, emphasising the right of each party to pursue its own interests, whether in the creation or the exercise of contractual entitlements, and to leave the other to do likewise; not at all consistent with a positive requirement of good faith, with its stress upon the need to take account of the other party's position and the regulation of abuse of right.

Most recently, Bridge has focused upon the problem of termination of contract, and has argued strongly that the heterogeneity of commercial activity means that the law cannot make use of broad general standards like good faith as a guide to whether or not termination should be allowed. In his view,

what is needed is an informed treatment of different areas of commercial contract and market activity. A general standard of good faith would deflect attention from the need to deal with problem areas ... in a critical and detailed way.

Equally, however, there are eloquent voices in England calling for recognition of a principle of good faith,²⁴ who can pray in aid not only supporters from Canada²⁵ and Australia,²⁶ but also the adoption of the principle in the law of the greatest market economy in the world, the United States of America. Thus § 1-203 of the Uniform Commercial Code provides that "every contract or duty within this Act imposes an obligation of good faith and fair dealing in its performance or enforcement", and the Code elsewhere defines good faith as "honesty in fact in the conduct or transaction concerned" (§ 1-201(19)) and "the observance of reasonable standards of fair dealing in the trade" (§ 2-103(1)(b)). This has been reinforced by a provision in the Restatement (2d) of Contracts 1981 that "every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement" (§ 205).²⁷

²² H Collins, *The Law of Contract*, 3rd edn (London, 1997) chs 10 and 15 (prefers to speak of duty to negotiate with care, and of implied terms about co-operation).

²³ See his "Does Anglo-Canadian contract law need a doctrine of good faith?", (1984) 9 *Canadian Business Law Journal* 385; "Good faith in commercial contracts", in *Good Faith in Contract Law* (Aldershot, forthcoming).

²⁴ An early proponent was R Powell, "Good faith in contracts", (1956) 9 *Current Legal Problems* 16. More recently, see O'Connor, *Good Faith*, ch 3; J N Adams and R Brownsword, *Key Issues in Contract* (London, 1995), pp. 198-254. Brownsword has taken his arguments further in " 'Good faith in contracts' revisited", (1996) 49(2) *Current Legal Problems* 111, and "Contract law, co-operation and good faith: the movement from static to dynamic market-individualism", in S Deakin and J Michie (eds), *Contracts, Co-operation and Competition* (Oxford, 1997).

²⁵ B J Reiter, "Good faith in contracts", (1983) 17 *Valparaiso University Law Review* 705. More cautious is S M Waddams: see his "Good faith, unconscionability and reasonable expectations", (1995) 9 *Journal of Contract Law* 55.

²⁶ See H N Lücke, "Good faith and contractual performance", in P D Finn (ed), *Essays in Contract* (Sydney, 1987); P D Finn, "Commerce, the common law and morality", (1989) 17 *Melbourne University Law Review* 87; idem, "Australian developments in common and commercial law", (1990) *Journal of Business Law* 265. Priestly JA of the New South Wales Court of Appeal has argued in favour of a good faith standard judicially and extra-judicially: see his "A guide to a comparison of Australian and United States contract law", (1989) 4 *University of New South Wales Law Journal* 4; *Renard Construction v Minister of Public Works* (1992) 26 NSWLR 234.

²⁷ The limitations to "performance and enforcement" however make this significantly narrower than the good faith of Continental Europe: see H O Hunter, "The duty of good faith and security of performance", (1995) 8 *Journal of Contract Law* 19. On the debate about good faith in US contract law see the surveys of E A Farnsworth, *The Concept of Good Faith in American Law*, Centro di studi e ricerche di diritto comparato e

A distinguished protagonist for recognition of a good faith principle is the Australian judge, Paul Finn. While accepting that contracts are about the pursuit of self-interest, he argues that the law also requires a contracting party to take the other party's interests into account in varying degrees. In this, good faith occupies the middle ground between the principle of unconscionability and fiduciary obligations:

“Unconscionability” accepts that one party is entitled as of course to act self-interestedly in his actions towards the other. Yet in deference to that other's interests, it then proscribes excessively self-interested or exploitative conduct. “Good faith”, while permitting a party to act self-interestedly, nonetheless qualifies this by positively requiring that party, in his decision and action, to have regard to the legitimate interests therein of the other. The “fiduciary” standard for its part enjoins one party to act in the interests of the other—to act selflessly and with undivided loyalty. There is, in other words, a progression from the first to the third: from selfish behaviour to selfless behaviour.²⁸

Finn is thus able to see good faith as operative in the commercial context, since it does not deny, but only confines, the legitimacy of the pursuit of self-interest. Nevertheless it is probably fair to say that many other proponents of a good faith principle have seen it as an instrument of social welfare in contract law as against the market and commercial orientation of its critics.²⁹ It is striking that in the United Kingdom good faith has emerged most strongly in the interventionist and paternalist contexts of consumer protection and (in the guise of the obligations of “mutual trust and confidence” between employer and employee) labour law.³⁰

Scots law

What then of Scots law? Whatever may have been the position before the middle of the nineteenth century (a question into which I have deliberately conducted no substantial research for this paper³¹), there can be no doubt that, if there is a general principle of

straniero, Saggi, conferenze e seminari 10, (Rome, 1993), and in Beatson and Friedmann (eds), *Good Faith and Fault*, pp. 153-70.

²⁸ P D Finn, “The fiduciary principle”, in T G Youdan (ed), *Equity, Fiduciaries and Trusts* (Toronto, Calgary, Vancouver, 1989) 1, at p. 4.

²⁹ See in particular R Brownsword, G Howells and T Wilhelmsson, *Welfarism in Contract Law* (Aldershot, 1994); C Willett (ed), *Aspects of Fairness in Contracts* (London, 1997).

³⁰ The Unfair Terms Directive is plainly a measure of consumer protection. The Commercial Agents Directive protects the self-employed commercial agent. For labour law generally see two articles by J D Brodie: “The heart of the matter: mutual trust and confidence”, (1996) 25 *Industrial Law Journal* 121; “Beyond exchange: the new contract of employment”, (1998) 27 *Industrial Law Journal* 79. The leading case on mutual trust and confidence is now *Malik v BCCI* [1998] AC 20. For explicit recognition in Scotland of mutual trust and confidence as good faith see e.g. *Taylor v Confederation Management Ltd*, Perth Sheriff Court, 2 December 1997; *Hill v General Accident Fire and Life Assurance Corporation plc* 1998 GWD 31-1622 (Lord Hamilton).

³¹ It does however appear to me that the only “institutional” writer to deal with the subject in anything like the way we are now discussing it is Kames, *Principles of Equity*, 3rd edn (Edinburgh, 1778) pp. 194-338: see in particular his reference to “contracts *bonae fidei*, that is, contracts in which equity may interpose to correct inequalities and to adjust all matters according to the plain intention of the parties” (pp. 199-200). Under this rubric he discusses the following nine topics:

- where will is imperfectly expressed in the writing;
- implied will;
- whether an omission in a deed or covenant can be supplied;
- a deed or covenant that tends not to bring about the end for which it was made;
- equity with respect to a deed providing for an event that now can never happen;
- errors in deeds and covenants;

good faith in Scots contract law, it has been mostly latent and inarticulate until now. Indeed, as Professor Thomson's contribution to this volume shows, there are judicial dicta against such a principle, at least insofar as it might connote a duty to take another's interests into account, or a power to strike down a bargain as unfair.³² Interestingly, more or less the same can be said of the world's principal other uncodified mixed jurisdiction, South Africa.³³ It would seem that in both systems the way in which the principle has been expressed is through particular rules, and that the influence of the Common Law approach has here greatly outweighed anything that might have come from Roman or Civilian roots.

Nonetheless, and even setting aside the recent Directives which apply as much in Scotland as in England and Ireland,³⁴ rules and cases from Scots contract law which could be said to stem from or relate to good faith can be identified without too much difficulty. In our forthcoming text on contract law, Professor Thomson and I will argue that much of our law can be characterised by the high value which it places upon compelling performance. This can readily be seen as reflecting the requirements of good faith. As Professor MacCormick has commented,

Conventional obligations can themselves be considered as exigible simply on grounds of the requirements of good faith. Each party to a contract necessarily engages the trust of the other, hence no action by each other which defeats the expectations in good faith formed by the other is a fair or reasonable action.³⁵

This is not just a matter of the availability of the remedy of specific implement as of right,³⁶ but can also be seen in the importance of the Scottish version of the *exceptio non adimpleti contractus*, the principle of mutuality and the right of retention, as a means of pressuring a contract-breaker into proper performance.³⁷ Even when damages are awarded for breach of contract rather than an order for implement, the amount is

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- relief in relation to deeds or covenants void at common law as *ultra vires*;
 - failure in performance; and
 - indirect means employed to evade performance.

None of Stair, Erskine or Hume discuss *bona fides* in their accounts of conventional obligations. Bankton does have the following, slightly ambiguous, passage: "Contracts, among the Romans, and the actions thereon, were either *bonae fidei*, or *stricti juris*; the first are these in which the judge had a liberty, upon the mutual obligations of parties, from the nature of the contract, according to their presumed will, as in Sale, Mandate, Location and others enumerated by the Emperor: the other, were these wherein the judge was tied down to the express covenant or words of the parties, as in Stipulation, and Loan of Money. We have little use for this distinction; only Loan and Promises are strictly interpreted" (*Institutes*, I.11.65). Cf Stair, *Institutions*, I.11.6. Bell, *Principles*, § 474, talks of insurance as a "contract of good faith".

³² J M Thomson, "Good faith in contracting: a sceptical view", in this volume.

³³ See R Zimmermann, "Good faith and equity", in R Zimmermann and D Visser (eds), *Southern Cross: Civil Law and Common Law in South Africa* (Cape Town, 1996), pp. 217-60, especially at pp. 239-55.

³⁴ See for further comment on the Unfair Terms Directive and good faith in Scotland I Macneil, "Good faith and the control of contract terms: the EC directive on unfair terms in consumer contracts", 1995 *Juridical Review* 147.

³⁵ SME, vol 11, para 1129.

³⁶ As to which see W W McBryde, "Remedies for breach of contract", (1996) 1 *Edinburgh Law Review* 43 at pp 48-54, and, most recently, *Retail Parks Investment v Bank of Scotland (No 2)* 1996 SC 227.

³⁷ See McBryde, "Remedies", at pp 64-69; H L MacQueen, "Remedies for breach of contract: the future development of Scots law in its European and international context", (1997) 1 *Edinburgh Law Review* 200 at pp. 207-9; and, most recently, *Bank of East Asia v Scottish Enterprise* 1997 SLT 1213 (HL), commented upon by W W McBryde, "Mutuality retained", (1996) 1 *Edinburgh Law Review* 135.

commonly based on the expectation or, as it is perhaps better expressed, the performance interest.³⁸

The argument that good faith underpins the requirement that contracts be performed may seem startling at first sight: surely at this point the principle is being used to explain too much to be useful? The answer to this, however, lies in the history of the law rather than in current application. Whereas in the modern law agreements giving rise to reasonable expectations of performance will generally be contracts, it has not always been so. The rise of the consensual (or formless) contract to become the typical contract, so that “every paction produceth action”, was one of the achievements of the principle of good faith as identified and elaborated by the canon lawyers of the middle ages.³⁹ Scots law has gone even further, in upholding not just bilateral agreements but also unilateral promises.⁴⁰ The rules by which the few contracts requiring formal writing in Scots law may nonetheless come into existence as a result of informal agreement plus conduct by the parties also seem to hold them to expectations and reliance engendered in good faith.⁴¹

If we now group some other rules of Scottish contract law under the headings of the three major functions of good faith in contract identified by Martijn Hesselink—interpretation, supplementation and correction⁴²—the extent to which these rules are imbued, or at least are consistent, with the requirements of good faith becomes even more apparent.

(a) Interpretation

The fundamental doctrine of contract interpretation, namely the objective approach of determining, not the actual intentions of the parties, but rather what each was reasonably entitled to conclude from the attitude of the other, reflects the requirements of good faith inasmuch as contracting parties are thereby protected from unfair surprise. Until a statutory remedy of rectification was introduced in 1985,⁴³ these principles also allowed the court to correct obvious errors of expression in contractual documents.⁴⁴ If the proposals of the Scottish Law Commission about contractual interpretation are implemented, however, the law will move a little further along the good faith route, because the courts will then be able to give effect to the particular sense in which one party used an expression if the other party knew or could not have been unaware of that intention.⁴⁵

(b) Supplementation

Although there is no general duty of disclosure in the Scots law of contract, there are at least some cases where a party who knows of and takes advantage of another party's

³⁸ See L. J. Macgregor, “The expectation, reliance and restitution interests in contract damages”, 1996 *Juridical Review* 227.

³⁹ See e.g. F. Wieacker, *A History of Private Law in Europe*, trans. T. Weir, (Oxford, 1995), p. 52; H. J. Berman, *Law and Revolution: the Formation of the Western Legal Tradition* (Cambridge, Mass., 1983), pp. 245-50; O. F. Robinson, T. D. Fergus and W. M. Gordon, *European Legal History*, 2nd edn (London, 1994), pp. 88-9. The quotation, from Stair, *Institutions*, I.10.7, is the institutist's version of the canonist *pacta servanda sunt*.

⁴⁰ W. W. McBryde, “Promises in Scots law”, (1993) 42 *International and Comparative Law Quarterly* 48.

⁴¹ For the current rule see Requirements of Writing (Scotland) Act 1995 s 1(3); for the previous law, see McBryde, *Contract*, pp. 647-54.

⁴² See above, pp. 00-00.

⁴³ Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 ss 8 and 9.

⁴⁴ For the previous common law see McBryde, *Contract*, pp. 434-5.

⁴⁵ Report on Interpretation in Private Law (Scot Law Com No 160, October 1997).

error in forming a contract with that party has not been allowed to enforce the contract even when there has been no misrepresentation.⁴⁶

The doctrine of terms implied in law includes some which may be implied in contracts generally and which look very like expressions of good faith:⁴⁷ thus parties may be compelled to co-operate to ensure that the contract is carried out,⁴⁸ to perform within a reasonable time,⁴⁹ to exercise discretionary powers under the contract reasonably,⁵⁰ and not to prevent another party from performing or to do anything else to derogate from the contract.⁵¹

(c) *Correction*

The nineteenth-century development of doctrines such as undue influence and facility and circumvention alongside the classical grounds of invalidity (error, fraud and force) can also be seen as essentially based on good faith.⁵² But, despite a hint once thrown out by Lord President Cooper,⁵³ modern Scots contract law has never developed a general doctrine permitting the challenge of “leonine”, extortionate or unfair bargains as such;⁵⁴ statutory intervention has been required to achieve that, at least in part.⁵⁵ At common law, however, penalty clauses and the oppressive use of irritancies in leases are subject to judicial control.⁵⁶

Remedies are also subject to controls which may be seen as brakes upon the abuse of rights. Thus specific implement, although a right, is nonetheless subject to the discretion of the court, which has been shaped to some extent into a set of rules as to when the remedy will not be granted.⁵⁷ Again, in the absence of specific contractual provision, termination is only available on *material* breach; that is to say, the response must be commensurate with the wrong.⁵⁸ The recent suggestions that in at least some circumstances a party should give a contract-breaker a second chance to perform before terminating might also be consistent with an approach based fundamentally on good

⁴⁶ *Stenarts Trs v Hart* (1875) 3 R 192; *Angus v Bryden* 1992 SLT 884; *Security Pacific Finance Ltd v T & I Filshie's Tr* 1994 SCLR 1100; 1995 SCLR 1171; SME, vol 15, para 694.

⁴⁷ The difference may be that as implied terms these obligations can be excluded by express provision, whereas the legal obligation of good faith will usually over-ride the contract.

⁴⁸ *Mackay v Dick and Stevenson* (1881) 8 R (HL) 37 per Lord Blackburn at p. 40.

⁴⁹ McBryde, *Contract*, para 6-21.

⁵⁰ SME, vol 15, para 861 note 2; cf Gloag, *Contract*, pp. 302-8. The decision of the First Division in *Glasgow West Housing Association Ltd v Siddique* 1998 SLT 1081 that an absolute discretion conferred contractually could not be qualified by an implied term of reasonableness was not based upon a review of any relevant authority, and it is anyway stated that an action might have been brought if the holder of a discretion failed to exercise it or acted in a wholly unreasonable way. See further *Bradford & Bingley Building Society v Thorntons plc* 1998 GWD 40-2071.

⁵¹ *Barr v Lions Ltd* 1956 SC 59.

⁵² On these doctrines see McBryde, *Contract*, chs 9-12; SME, vol 11, paras 701-742; vol 15, paras 670-94.

⁵³ *McKay v Scottish Airways* 1948 SC 254 at p. 263.

⁵⁴ McBryde, *Contract*, pp. 255-8; SME, vol 15, para 677.

⁵⁵ e.g. Consumer Credit Act 1974, s 137; Unfair Contract Terms Act 1977, Part II; Unfair Terms in Consumer Contracts Regulations 1994.

⁵⁶ The rules on irritancies were so little used, however, that statutory intervention was deemed necessary in 1985 (Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 ss. 4 and 5). The law of both penalties and irritancies is now under review once more: see Scottish Law Commission Discussion Paper No 103 on Penalty Clauses (December 1997).

⁵⁷ McBryde, *Contract*, pp. 511-13.

⁵⁸ McBryde, “Remedies”, at pp. 58-64.

faith.⁵⁹ In the law of damages, the rule that the claimant should act to mitigate or minimise loss looks very much like a good faith requirement, as might any rules which may exist on contributory negligence.⁶⁰

The utility of recognising a good faith principle

As Michael Bridge has remarked, however, it is relatively easy to proceed through a system of rules like Scots contract law, as we have just done, and to pick out those parts of it which seem to reflect the requirements and values of good faith as it has been understood in Europe in modern times. It would be surprising to find rules which encouraged or allowed bad faith; but not so for rules embodying requirements of good faith. The real question is, what difference does it make to the system to declare now that there is a general principle of good faith holding it all together? Given that the rules are expressions of good faith, why do they need to be reinforced by a generalisation? What function that is not currently performed by the system would such a generalisation bring about?

The answer would seem to be that the articulation of the general principle enables the identification and solution of problems which the existing rules do not, or seem unable to reach. The history of the good faith doctrine in Germany illustrates this very well. The celebrated § 242 of the BGB enabled the German courts to develop its doctrines of *culpa in contrahendo*, change in circumstances, contracts with protective effects *vis-a-vis* third parties, positive breach of contract, abuse of contractual rights and termination of long-term contracts without any other support from the code. Problems arose for which no direct codal provision appeared to exist, or which existed as the result of what the code said; § 242 enabled the court to overcome these obstacles without incurring the reproach of pure judicial law-making.⁶¹

Smith v Bank of Scotland may be a domestic example of the same phenomenon. The general principle of good faith enabled the House of Lords to deal with a problem for which there was thought to be no satisfactory answer in the existing specific rules of Scots law. An apparent gap was filled, and a new rule came into being.⁶² It is exactly the same as recognising a general duty of care in negligence,⁶³ or a principle against unjustified enrichment;⁶⁴ the law can move on, and new rules develop. As a result, the principle may remain relatively latent, or continue to be stated in extremely general terms,

⁵⁹ *Lindley Catering Investments v Hibernian FC* 1975 SLT (Notes) 56; *Strathclyde Regional Council v Border Engineering Contractors Ltd* 1998 SLT 175; McBryde, *Contract*, p. 329. For discussion of the utility of this approach in the context of software contracts, see H L MacQueen, M Hogg and P Hood, "Muddling through? Legal responses to E-commerce from the perspective of a mixed system", *Molengrafica*, forthcoming, 1999.

⁶⁰ SME, vol 15, paras 925-9; see also on contributory negligence *Concrete Products (Kirkcaldy) Ltd v Menzies and Anderson* 1996 SLT 587.

⁶¹ See W F Ebke and B M Steinhauer, "The doctrine of good faith in German contract law", in Beatson and Friedmann (eds), *Good Faith and Fault*, pp. 171-90; B S Markesinis et al, *The German Law of Obligations Volume I: The Law of Contracts and Restitution: a comparative introduction* (Oxford, 1997), ch 7.

⁶² Commentators are at one in seeing *Smith* as judicial innovation: G L Gretton, "Sexually transmitted debt", 1997 SLT (News) 195; J M Thomson, "Misplaced concern?", (1997) 65 *Scottish Law Gazette* 124; R Dunlop, "Spouses, caution and the banks", (1997) 42 *Journal of the Law Society of Scotland* 446; L J Macgregor, "The House of Lords 'applies' O'Brien north of the border", (1998) 2 *Edinburgh Law Review* 90; S F Dickson, "Good faith in contract, spousal guarantees and *Smith v Bank of Scotland*", 1998 SLT (News) 39.

⁶³ As in *Donoghue v Stevenson* 1932 SC (HL) 31.

⁶⁴ As may have happened in *Shilliday v Smith* 1998 SC 725 and *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1998 SLT 992 (HL).

without doing too much damage to the important values of certainty and predictability in the law, since it is constantly in the process of being refined by the formulation of more concrete rules in particular cases.⁶⁵ The principle also provides a basis upon which existing rules inconsistent with it can be criticised and reformed, whether judicially or by legislation.⁶⁶

The following sections of this paper seek to elucidate another area of Scots law in which the recognition of the underlying principle of good faith might assist in the development from a rather incoherent and difficult body of cases of a set of rules dealing with a hitherto unrecognised problem, namely the legal effect of pre-contractual negotiations not involving any of the traditional bases of invalidity and liability such as misrepresentation, fraud or force. In other words, can Scots law, like German law before it, use the doctrine of good faith to develop rules on *culpa in contrahendo*?

That there is a problem in this field needing to be addressed is suggested by stories in the Scottish press concerned with failed negotiations in the domestic housing market. Under Scots law, contracts for the sale of heritable property must be in formal writing, a requirement which in normal practice is met by the prospective purchaser submitting a written offer and receiving the seller's written acceptance. Usually the seller has several offers from which to choose. The seller's formal acceptance of the preferred bid is often preceded by a verbal intimation of success to the selected bidder. However, this may be followed by a game of "missives tennis", in which the buyer's offer is formally met, not with a full, but by a qualified acceptance, thereby initiating what can be a protracted exchange of counter-offers between the parties, during which there is no concluded contract unless one or other side gives an unqualified acceptance of an offer open for the purpose.⁶⁷ In the recently reported stories, a seller who had made a verbal intimation of acceptance to one buyer then received another, higher offer from a third party, with whom a formal contract was subsequently concluded. The general understanding was that in these circumstances the disappointed offeror had no legal remedy, since no contract had been concluded by the purely verbal statement of the seller; but the Law Society of Scotland declared that the seller's advisers had acted unprofessionally in countenancing his behaviour, and adverse comment was also made in the media.⁶⁸

Is it really the case that Scots law tolerates conduct of this kind in the name of freedom to negotiate and freedom to withdraw from negotiations which have not yet reached the stage of contract? Can an obligation to negotiate in good faith provide a solution to the problem?

Culpa in contrahendo

In the English House of Lords decision *Walford v Miles*,⁶⁹ Lord Ackner remarked:⁷⁰

⁶⁵ See also Hesselink's conclusion that "if the role of the judge as a creator of rules is fully recognised, there is no need for a general good faith clause in a code or restatement of European private law. It may even do harm because it gives the courts an excuse for not formulating the rule that they apply. If however there is still some doubt as to the power of the courts, a good faith clause could be useful in order to assure that the judge may create new rules." (*Towards a European Civil Code*, p. 309).

⁶⁶ An example here might be *White & Carter (Councils) v McGregor* 1962 SC (HL) 1.

⁶⁷ See e.g. *Rutterford v Allied Breweries* 1990 SLT 249; *Findlater v Mann* 1990 SC 150.

⁶⁸ *The Scotsman*, 27 August 1998 ("Couple threaten to sue over gazumping").

⁶⁹ [1992] 2 AC 128.

⁷⁰ At p. 138.

The concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms. ... [H]ow is a vendor ever to know that he is entitled to withdraw from further negotiations? How is the court to police such an “agreement”? A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. ... In my judgment, while negotiations are in existence either party is entitled to withdraw from these negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a “proper reason” to withdraw.

These remarks were greeted with horror on the Continent, as a classic example of how irreconcilably different English law is from the codal systems.⁷¹ Continental lawyers, especially those in the Germanic tradition, regard the obligation to negotiate in good faith as a fundamental instance of the general principle of good faith.⁷² In Germany the concept of *culpa in contrahendo* first developed by Rudolf von Ihering in the nineteenth century⁷³ now means that “a party who negligently nourishes in the other party the hope that a contract will come about, although this is unfounded from an objective viewpoint, must make compensation for any outlay which the opposite party could have regarded as necessary under the circumstances”.⁷⁴ The liability thus protects the “negative interest” - broadly what in this country would be known as the “reliance interest” - of the injured party. In French law, following the development of Ihering’s theory by the jurist Raymond Saleilles,⁷⁵ withholding crucial information and breaking off pre-contractual negotiations in an “arbitrary” or “brutal and unilateral” way has been held by the courts to lead to delictual liability for the expenditure of the party which was wasted in consequence.⁷⁶ The Dutch Hoge Raad has gone further, distinguishing three stages in negotiations: (1) initial, where there is freedom to withdraw; (2) intermediate, where withdrawal involves payment of the other side’s reliance losses; and (3) ultimate, determined by gauging the extent of the non-withdrawing party’s reliance on ultimate success, when the other’s withdrawal leads to payment of expectation (i.e. the profit that would have been made had the contract been concluded) rather than reliance losses.⁷⁷ In all three countries this pre-contractual liability developed on the basis of the codal principle of good faith. But in the Greek, Italian and Yugoslavian codifications of this century there are specific rules on the subject.⁷⁸

⁷¹ See in particular the comparative commentaries in (1994) 2 *European Review of Private Law* 267-327.

⁷² See generally F Kessler and E Fine, “Culpa in contrahendo, bargaining in good faith, and freedom of contract: a comparative study”, (1964) 77 *Harvard Law Review* 401; E H Hondius (ed), *Precontractual Liability: Reports to the XIIIth Congress International Academy of Comparative Law* (Deventer/Boston, 1991); N Cohen, “Pre-contractual duties: two freedoms and the contract to negotiate”, in Beatson and Friedmann (eds), *Good Faith and Fault*, pp. 25-56; Kötz, *European Contract Law*, pp 34-41; S van Erp, “The pre-contractual stage”, in Hartkamp et al, *Towards a European Civil Code*, pp 201-218.

⁷³ In a famous article entitled “Culpa in contrahendo oder Schadensersatz bei nichtigen oder nicht zu Perfectionen gelangten Verträgen”, *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* iv (1861), pp. 1-113. So far as I know this article has never been translated into English.

⁷⁴ Markesinis et al, *German Law of Obligations*, vol. 1, p. 69.

⁷⁵ See in particular his “De la responsabilité précontractuelle”, (1907) 6 *Revue Trimestrielle de Droit Civil* 697.

⁷⁶ B Nicholas, *The French Law of Contract* 2nd edn (Oxford, 1992), pp 69-71.

⁷⁷ J M van Dunné, “Netherlands”, in Hondius (ed), *Precontractual Liability*, pp 230-34; Van Erp, “The pre-contractual stage”, p. 212.

⁷⁸ Codice civile art 1337, 1338; Greek Civil Code, art 197; Yugoslavian Law of Contract 1978, art 30. Section 12 of the Israeli General Contracts Law 1973 provides that “in negotiating a contract, a person

It is thus not surprising to find the following in the forthcoming text of the Principles of European Contract Law:⁷⁹

Article 2:301: Negotiations Contrary to Good Faith

- (1) A party is free to negotiate and is not liable for failure to reach an agreement.
- (2) However, a party who has negotiated or broken off negotiations contrary to good faith is liable for the losses caused to the other party.
- (3) It is contrary to good faith, in particular, for a party to enter into or continue negotiations with no real intention of reaching an agreement with the other party.

This represents a significant departure from the Common Law tradition embodied in *Walford v Miles*. While in England, the USA and other Common Law jurisdictions a negotiating party may be liable for making contractual promises, or misrepresentations, or to make restitution of benefits received in the course of unsuccessful negotiations, it seems clear that there is no residual category of *culpa in contrahendo*.⁸⁰

Scots law on pre-contractual liability

A Scots law student asked about liability for pre-contractual negotiations would most likely agree with Lord Ackner and say that, some basic points apart, there is none.⁸¹ The general rules are that parties negotiating a contract are at arms' length in the sense that each has to look after its own interests, and there are no obligations to the other party short of not telling lies (misrepresentation), practising deception (fraud), coercing the other party into entering the contract (force and fear), or exploiting a special relationship one has with the other party quite separately from the contract under negotiation (undue influence). If any of these factors is present in negotiations which lead to an apparent contract, then that contract may be either void or voidable, with obligations of unjustified enrichment or restitution arising in respect of any performance which may have been rendered prior to the discovery of the flaw in the lead-up to the contract.⁸² Insofar as the perpetration of the flaw in the negotiations may also have been a civil wrong, there can be delictual liability, of which the most important examples in practice are negligent misrepresentation under section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 and fraud at common law.⁸³ Again, where negotiations break down, but there has been some preceding transfer of value between the parties, then an obligation to restore any benefits received may arise under the rules of unjustified enrichment.

shall act in customary manner and in good faith"; breach gives rise to an obligation "to pay compensation to the other party for the damage caused to him in consequence of the negotiations".

⁷⁹ The wording here is virtually identical to that of the Unidroit *Principles of International Commercial Contracts* (1994), art 2.15.

⁸⁰ See G Jones, "Claims arising out of anticipated contracts which do not materialize", (1980) 18 *University of Western Ontario Law Review* 447; E A Farnsworth, "Precontractual liability and preliminary agreements: fair dealing and failed negotiations", (1987) 87 *Columbia Law Review* 217; reports on Australia, Canada, England, New Zealand and USA in Hondius (ed), *Precontractual Liability*; E McKendrick, "Work done in anticipation of a contract which does not materialise", in W R Cornish et al (eds), *Restitution Past, Present and Future* (Oxford, 1998).

⁸¹ Note however T B Smith's undeveloped suggestion (*Short Commentary*, p 863) that although "this doctrine of *culpa in contrahendo* ... has yet to be considered fully by the Scottish courts .. there are, however, straws to be clutched at".

⁸² See McBryde, *Contract*, chs 9-12; SME, vol 15, paras 670-694.

⁸³ On which see SME, vol 11, paras 701-789.

Although these rules may seem quite a substantial qualification on the general statement that there is no liability for pre-contractual negotiations, closer examination suggests that they are in fact quite limited.

- First, the issue of liability tends to arise only if a contract apparently results from the negotiations. For example, if there is no apparent contract, then usually there is no relevant loss upon which to base a delictual claim for any misrepresentation, fraud or force which may have been used.⁸⁴ It seems of the essence of the whole idea of contract that prior to the moment of formation and legal commitment to a set of obligations parties are free, and that freedom includes the right to withdraw from negotiations, the freedom not to contract. Thus, for example, if I invite tenders for the construction of a building on my land, I am not liable to the unsuccessful tenderers for the often quite substantial expenditure which they may have incurred in preparing their tenders, while the successful tenderer must look to the contract to recoup whatever he may have spent in order to obtain it.
- Second, for most of the vitiating factors a positive action is required—a misstatement, innocent, negligent or fraudulent; an act of force; or giving advice or acting in a way which takes advantage of the trust and confidence reposed in one by another person. It is much harder to persuade a court to strike down an apparent contract or grant a delictual remedy in damages for inaction. Thus, the authorities, while by no means uniform, are on the whole against the idea of liability arising if I know that the other party is labouring under some misapprehension of which I take advantage although without misrepresentation, the classic example being my purchase of a painting which through superior information I know is much more valuable than the price the seller is putting upon it.⁸⁵ There is no general duty in Scots contract law to disclose material information to the other party, although there are specific instances in insurance, caution and fiduciary relationships such as trustee/beneficiary, principal/agent and company/director.⁸⁶
- Third, claims on the basis of these rules are rare, and successful claims even rarer, suggesting that the courts are suspicious of attempts to undermine contracts by attaching significance to the preceding negotiations.

These basic rules, and the way in which they operate in practice, seem consistent with the ideals and values of a market economy in which each participant looks after the advancement of its own interests and does not have to be concerned with the position and interests of the other party. Yet what I have found over the years is that these basic rules are not necessarily consistent with how the players in the market place actually conduct the game of negotiating and concluding contracts.

To take a simple example: I teach a course on contracts in the construction industry, in which I give the course members a problem in which a tenderer omits to price for one of the items of work to be done on the job. The question is concerned with what happens if that tender is accepted, and the answer in my opinion is that the

⁸⁴ See *Clelland v Morton Fraser Milligan WS* 1997 SLT (Sh Ct) 57, where a claim under the 1985 Act made against a third party in respect of a representation which had induced a contract between two others was held irrelevant.

⁸⁵ Gloag, *Contract*, p. 438; *Spook Erection (Northern) Ltd v Kaye* 1990 SLT 676; but cf above, 000, and *Angus v Bryden* 1992 SLT 884.

⁸⁶ McBryde, *Contract*, paras 10-28 - 10-37.

price for that item is nil. The discussion of the problem invariably reveals, however, that in practice the employer receiving such a tender would before accepting it go back to the tenderer to check whether there had been a mistake. Almost equally invariably the tenderer would answer that there had been no mistake (even if there had been), because the employer's inquiry shows that the tender is in with a chance of success. But the employer will always inquire, because with a clear answer ground for potentially costly later dispute is removed. Often too the employer deals constantly with the tenderers, and the overall relationship will be soured if one party seeks to take advantage of the other's mistakes. It may indeed be in the overall best interests of each side to have some awareness of the interests of the other and to take them into account; self-interest can include the interests of others on whom one depends in some way.

What is also clear from not only my personal experience, but also the reported cases, is that the real world does not quite fit into a legal model in which negotiations take place, a contract is formed, and then and only then do the parties commence the performances which the contract requires. In many commercial situations time does not allow for such dalliance: negotiations and performance go together, perhaps with an expectation that the formal contract to be concluded in due course will have retrospective effect. It may be that the parties never make use of formal written contracts, and pursue an entirely informal relationship, in which negotiations, performance and contract are almost indistinguishable. Cases of these kinds have often come before the Scottish courts and in at least some the outcome has not been consistent with the legal model so far discussed of parties at arms' length, entitled to look after their own interests only and to ignore those of the other party without incurring liability as a result. In some the court has found that a contract has come into existence despite the continuation of negotiations.⁸⁷ Equally where there has been a transfer of value between the parties but there is no contract, the party suffering loss in the transfer—for example, through payment or performance ahead of conclusion of the contract—may well have a claim in unjustified enrichment.⁸⁸

But some other cases, involving successful claims for wasted pre-contractual expenditure without either delictual wrong by or enrichment of the other party, have caused great difficulties of analysis for commentators, since they do not fit easily into the traditional categories of the law of obligations.⁸⁹ However, an analysis of these difficult

⁸⁷ A recent example is *Avintair Ltd v Ryder Airline Services Ltd* 1994 SC 270, commented upon in my "Contract, unjustified enrichment and concurrent liability", 1997 *Acta Juridica* 176, at pp. 188-9.

⁸⁸ For two modern examples of (unsuccessful) enrichment claims in respect of pre-contractual activity, see *Microwave Systems (Scotland) Ltd v Electro-Physiological Instruments Ltd* 1971 SC 140 (OH); *Site Preparations Ltd v Secretary of State for Scotland* 1975 SLT (Notes) 41 (OH).

⁸⁹ See Gloag, *Contract*, pp. 19-20, 176-7 (favouring a basically contractual explanation); D I Ashton-Cross, "The Scots law regarding actions of reparation based on false statements", (1951) 63 *Juridical Review* 199 (favouring a reparation explanation); and W J Stewart, *The Law of Restitution in Scotland* (Edinburgh, 1992), paras 10.1 - 10.9 (Melville Monument liability: "doubtfully restitutionary but sufficiently 'quasi-contractual' to appear in any examination of restitutionary obligations" [para 10.1]). Stewart also suggests that these cases may be examples of restitution for wrongs (para 10.8) but with respect it is difficult in many of them to see either restitution or wrongs. I myself have discussed the cases as a possible application of a concept of "unjust sacrifice" or "unjustified impoverishment" in an unpublished section of a paper on unjustified enrichment and contract delivered at a seminar mounted jointly by the Scottish Law Commission and the Universities of Edinburgh and Strathclyde on 23 October 1993. For "unjust sacrifice" see S J Stoljar, "Unjust enrichment and unjust sacrifice", (1987) 50 *Modern Law Review* 603; G Muir, "Unjust sacrifice and the officious intervener", in P Finn (ed), *Essays in Restitution* (Sydney, 1990). For criticism see P Birks, *Restitution: The Future* (Sydney, 1992) pp. 100-105; and A Burrows, *The Law of Restitution* (London, 1993) pp. 4-6, 299.

cases as the application of the concept of good faith to pre-contractual negotiations yields interesting results.

The foundation authority is the Melville Monument case, *Walker v Milne*.⁹⁰ Walker owned the estate of Coates and he and his father developed the New Town in the West End of Edinburgh in the area which now embraces St Mary's Cathedral, Coates Crescent, Walker Street and Melville Street (the last two having a particularly striking intersection designed by Gillespie Graham). In this intersection (I suspect) there was to be located a monument to Viscount Melville, paid for by subscribers led by Milne. With Walker's permission, the subscribers entered the lands of Coates, broke it up and carried out operations which disrupted Walker's feuing plans on his estate. The subscribers then took their monument off to St Andrews Square, where it stands to this day. Walker sued for breach of contract. Milne defended on the basis that, as the alleged agreement related to heritage and was not in writing, he had had *locus poenitentiae* and could not be liable. The Lord Ordinary upheld this argument.

But the Court, while they agreed with his Lordship, that no effectual contract had been concluded, altered the interlocutor so far as it assoilzied the defenders and found that the pursuer is entitled to indemnification for any loss and damage he may have sustained, and for the expenses incurred in consequence of the alteration of the site of the monument.

The court plainly did not see this as either a contractual or an enrichment case; but it is also not clear that it was one of reparation for wrongdoing. It seems rather to fit quite nicely into the concept of *culpa in contrahendo*, inasmuch as the subscribers took their decision unilaterally rather than as a result of disagreement about terms; the bargain being substantially settled, their abandonment of Coates in favour of St Andrews Square was contrary to good faith. Moreover the court's award of damages was based upon what in Continental systems is known as the "negative interest", that is to say, what the pursuer had expended upon the faith of the bargain, rather than upon his "positive interest", namely the position he would have been in had the arrangement been carried through to contractual completion.

There is of course a link with contract in *Walker*, inasmuch as the reason why the contract "failed to materialise" was a result of the rules about writing in contracts relating to land, rather than because the parties were not agreed in substance. These rules have played an important part in the development of the Scots law relating to anticipated but non-materialising contracts, because, as will be seen below, in many of the cases where recovery has been allowed, all that has stood between the facts and the conclusion that a contract exists is the requirement of writing. The key point in *Walker*, thinking about when it is contrary to good faith to break off a pre-contractual relationship, is that negotiations were essentially complete, making it reasonable to assume that the formalities would be carried through.⁹¹

Walker v Milne was used in a number of subsequent cases in the nineteenth century. In *Bell v Bell*⁹² a son erected a house on his father's land on the faith of the latter's verbal promise to convey the land to him. The father broke the promise and conveyed to his

⁹⁰ (1823) 2 S 379.

⁹¹ See further on *Walker* the contribution of J W G Blackie to this volume, "Good faith and the doctrine of personal bar".

⁹² (1841) 3 D 1201.

daughter. The son recovered his expenditure, two judges apparently finding for him on the basis of fraud, and a third on the basis of *Walker v Milne*. In *Heddle v Baikie*⁹³ H possessed B's farm for six years without any formal lease (although it was understood that one was to be executed) and made improvements. He was then ejected. A claim for loss and expenditure was allowed.⁹⁴ In *Dobie v Lauder's Trs*⁹⁵ D undertook the care of certain children in return for an annual payment from the Trustees. Because it was envisaged that this arrangement would last some years, D entered a seven-year lease of a house in Frederick Street, Edinburgh, and incurred other expenses. After a dispute about the amount of the annual payment, the children were withdrawn from D's charge. She claimed successfully against the trustees for reimbursement of her expenses. The Second Division was clear that there was no contract in this case but only a family arrangement.⁹⁶ But, said Lord Justice-Clerk Moncreiff, "the arrangement necessarily included the condition that if the arrangement was terminated it should not be to the loss of one party".⁹⁷ Lord Neaves took a slightly different view:⁹⁸

I think that the legal principle applicable to the case is this: that when parties are engaged mutually in promoting an object of common interest, and the expenses entailed in furthering that object are thrown on one of the parties, then when that expenditure fails of obtaining the end aimed at the party-disburser must be recompensed, as being the disburser for a common object.

This reference to recompense makes it possible to see *Dobie* as an enrichment case. While it is thought that in Scots law services of the type being offered by D in this case are capable of giving rise to enrichment of the recipient, determining its extent for the purposes of recovery can be problematic. The losing party's expenditure is one convenient, although perhaps not precise, way of measuring the enrichment. But the approach of Lord Justice-Clerk Moncreiff is much more redolent of good faith, and that approach avoids the inherent inconsistency and difficulties of measuring one party's enrichment through another's loss. The protection of the "negative" or "reliance" interest stands in its own right, quite independently of any benefit to the defender.

The last case in which recovery was allowed is *Hamilton v Lochrane*⁹⁹ where a party made alterations to his villa in reliance on a verbal agreement for its sale. When the buyer withdrew, the selling party made a claim for reimbursement of his expenses. He was allowed a proof. Here it could not be said on any view that the defender had been enriched; the claim was purely one of reimbursement for the pursuer's reliance expenditure. Again, we have unilateral withdrawal from an arrangement the terms of which were substantially settled.

⁹³ (1846) 8 D 376. See the comments on this case in *Allan v Gilchrist* (1875) 2 R 587, at p. 590 per Lord Deas.

⁹⁴ In both cases there might have been an enrichment claim in respect of the improvements, but recovery under such claims would probably have been less than the amount expended. See also for similar cases in which claims were refused *Gowan's Trs v Carstairs* (1862) 24 D 1382 and *Fowlie v McLean* (1868) 6 M 254.

⁹⁵ (1873) 11 M 749.

⁹⁶ There is perhaps here some idea of there being no intention to create legal relations.

⁹⁷ (1873) 11 M at 755.

⁹⁸ *Ibid* at p. 755.

⁹⁹ (1899) 1 F 478.

To summarise the principles to be drawn from these cases is far from easy. In most of them it could be said that the parties had reached (or at least averred) an agreement, which was not contractual only because some other legal rule about the constitution and proof of contracts stood in the way.¹⁰⁰ At one level, then, these cases are not about anticipated contracts so much as about agreements which are only non-contractual for technical reasons. Further, the cases are not about the recovery of enrichment (although in some there was undoubtedly an enrichment element). Instead the pursuer is reimbursed or indemnified against expenditure incurred on the faith of the non-contractual agreement, although in none of the cases had this expenditure been made to the defender. In some of them—*Walker v Milne* is the prime example—a claim for other loss is also allowed. The injustice of the situation of the pursuer seems to arise from the other side’s unilateral withdrawal from arrangements which could reasonably have been regarded as settled.

Restriction of the scope of *Walker v Milne* began in 1875, with the decision of *Allan v Gilchrist*¹⁰¹ in which the court declared that it did not give rise to a principle of general application. Lord Deas held that a claim for reimbursement only arose if “substantial loss [was] occasioned to the one party by the representations and inducements *recklessly and unwarrantably* held out to him by the other party”.¹⁰² As already indicated, the cases are more about agreements than representations, and this case marks the first appearance of misrepresentation as well as of recklessness and unwarrantability as substantive requirements of the claim.¹⁰³ In *Hamilton v Lochrane*, although the claim was successful, it was again said that *Walker* did not give rise to a principle of general application.¹⁰⁴

The idea of misrepresentation as the basis of the action was also important in *Gilchrist v Whyte*,¹⁰⁵ a case which arose following the breakdown of negotiations for a contract of loan. The lender had sought to impose a condition about the fulfilment of which the borrower's agent (wrongly, as it turned out) anticipated no difficulty. It was held that this was only a statement of opinion, not a representation. The lender's claim was to damages or, alternatively, to recompense for his loss and expense incurred in reliance on the borrower's representations, relying on *Walker v Milne*. Lord Ardwall commented that there could be damages only for wrongdoing, and recompense only where one was enriched at another's expense. Neither was present in this case of abortive contract negotiations.

Gloag regarded *Gilchrist v Whyte* as the leading case on the whole subject, and commented that it had disapproved earlier decisions, as well as noting that “it is not easy to see any legal principle on which liability can be imposed when nothing is averred beyond an

¹⁰⁰ See also Gloag, *Contract*, p 19.

¹⁰¹ (1875) 2 R 587.

¹⁰² (1875) 2 R 587 at p. 590.

¹⁰³ Admittedly Lord Shand talked about representations and an “unwarrantable” refusal to go with the arrangement in *Dobie* [(1873) 11 M at p. 753].

¹⁰⁴ Per Lord Moncreiff at p. 483.

¹⁰⁵ 1907 SC 984.

expression of intention”.¹⁰⁶ He explained *Bell v Bell* on the ground of fraud and recompense.¹⁰⁷ He accepted that, starting with *Walker v Milne*,

there is a good deal of authority for the contention that [where A, in circumstances where it is impossible to suggest fraud, has resiled from a verbal agreement after B has been led to incur expenditure, but expenditure in no wise beneficial to A], A is bound to meet the expenditure B has incurred.¹⁰⁸

Gloag went on to note, however, that this was not a general principle.

The latest cases confirm the narrow approach to *Walker v Milne*. In *Dawson International plc v Coats Paton plc*¹⁰⁹ two companies were negotiating a merger whereby Dawson would purchase Coats Paton's shares. This also included a “lock-out” arrangement under which Coats Paton would not encourage third party bids.¹¹⁰ Dawson incurred expense in preparing offer documentation. A third party bid materialised, with which Coats Paton co-operated, and which was ultimately successful. Dawson claimed unwarrantable and reckless misrepresentations by Coats and sought reimbursement of their expenditure. The claim failed. In an impressive opinion later approved by the First Division, Lord Cullen gave detailed consideration to all the authorities from *Walker v Milne* onward.¹¹¹ He held that this was an exceptional branch of the law and that any tendency to expand its scope should be discouraged. It was equitable in nature and not dependent upon contract, recompense or delict for its concepts. He continued (emphasis supplied):¹¹²

Having reviewed the cases in this field to which I was referred I am not satisfied that they provide authority for reimbursement of expenditure by one party occasioned by the representations of another beyond *the case where the former acted in reliance on the implied assurance by the latter that there was a binding contract between them when in fact there was no more than an agreement which fell short of being a binding contract ...* I should add that I consider that there are sound reasons for not extending the remedy to the case where the parties did not reach an agreement. It is clear that *the law does not favour the recovery of expenditure made merely in the hope or expectation of agreement being entered into or of a stated intention being fulfilled.*

A key concept here is that of the “implied assurance” of the binding contract when there was no more than an agreement falling short of being a contract. In other words, claims did not depend upon misrepresentation, at least in the conventional sense of a positive statement.

¹⁰⁶ *Contract*, p. 19.

¹⁰⁷ *Ibid*, pp. 176-7.

¹⁰⁸ *Ibid*, p. 177.

¹⁰⁹ 1988 SLT 854 (OH). Lord Cullen's opinion was affirmed in the Inner House (1989 SLT 655). At a later stage it was held by Lord Prosser that the negotiations had not given rise to a contract between the parties (1993 SLT 80).

¹¹⁰ Compare *Walford v Miles*.

¹¹¹ See pp. 862K ff.

¹¹² 1988 SLT at p. 866.

Lord Cullen's analysis was applied in *Bank of Scotland v 3i plc*.¹¹³ The bank made a loan to a company which subsequently went into receivership. The bank sued 3i in respect of a representation that it had provided financial accommodation to the company. The claims were for (1) damages for negligent misrepresentation and (2) reimbursement of expenditure. Both claims failed. Lord Cameron of Lochbroom said of the reimbursement claim:¹¹⁴

There is no suggestion that the pursuers acted in reliance on an implied assurance by the defenders that there was a binding contract between them when, in fact, there was no more than an agreement which fell short of being a binding agreement ... In addition, there is a second and, in my opinion, equally conclusive answer to the pursuers' case on this head. The remedy given by the court is an equitable one and is only available in limited circumstances ... I agree with Lord Cullen where he says, 1988 SLT at p 865K-L:- "I should also add that in the present state of the law I see no need for a court to resort to an equitable remedy to deal with a case in which one party has by means of a representation which is in *mala fides* or fraudulent misled another into incurring expenditure or suffering other loss. The law of delict provides a remedy for fraudulent misrepresentation. It also covers negligent misrepresentation, including where the latter has given rise to the making of a contract. See s 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985".

The claim for reimbursement proceeding upon exactly the same facts as that for delictual misrepresentation, it should be rejected.

With the opinions of both Lord Cullen and Lord Cameron of Lochbroom, therefore, quite clear limits are drawn upon the remedy of reimbursement in Scots law, including the notion that it is excluded by facts (i.e. fraudulent or negligent misrepresentation) giving rise to the alternative of a delictual remedy. However, while each opinion is in the negative for the *application* of the remedy in the particular circumstances, neither denies its *existence*, and the analysis by Lord Cullen in particular clearly shows its separation from the established concepts of contract, delict and enrichment. The idea of an expenditure-based liability arising from an "implied assurance" that an agreement was a binding contract seems perfectly consistent with an overall basis in good faith, while at the same time manifesting the tendency of Scots law to concretise that concept in carefully defined rules. In this connection, however, the emphasis on the "equitable" nature of the liability carries with it the risk of a perception, perhaps not wholly avoided in Lord Cameron's opinion, that it can be used only when there is no other remedy "at law"; i.e., instead of understanding that the principles of the law are suffused with, and based upon, equity; the position, it is submitted, of Stair and of Scots law in general.¹¹⁵

These authorities nevertheless support an argument that, in the type of case which provided our point of departure for a discussion of *culpa in contrabendo* in Scots law, the seller of heritable property who verbally accepts a formal offer and then withdraws from the arrangement could at least be liable for the wasted expenditure of the disappointed offeror.

¹¹³ 1990 SC 215.

¹¹⁴ 1990 SC at p. 225.

¹¹⁵ I find attractive and helpful the recent analysis of this subject in E Özücü, "Equity in the Scottish legal system", in Rabello (ed), *Aequitas and Equity*, pp. 383-94. For other recent views, see J M Thomson, "The role of equity in Scots law", in S Goldstein (ed), *Equity and Contemporary Legal Development* (Jerusalem, 1992); SME, vol 22 (1987), paras 394-432.

There is an agreement which however falls short of a binding contract, and an assurance that there is a contract can surely be readily implied in the circumstances, given most people's ignorance of the law's requirements for contracts for the sale of land. The only question is, how much of the offeror's wasted expenditure might be recoverable? Would it extend to the surveyor's fees, for example? Or would it cover only expenditure incurred after the conclusion of the informal agreement? Would there be an element for foregone opportunities to purchase another property?

On the basis stated by Lord Cullen, however, a Scottish court would probably have reached the same result as Rattee J in the recent English case, *Regalian Properties plc v London Dockland Development Corporation*.¹¹⁶ An agreement to build a residential development in London Docklands was "subject to contract" while the parties negotiated about details for over two years between 1986 and 1988. Regalian, who were the contractors, spent £3 million on the project, although none of this went directly to LDDC. By the end of the period the housing market had collapsed and LDDC, realising that the original arrangement had ceased to be commercially viable, withdrew after attempts to re-negotiate. Rattee J held that parties making arrangements "subject to contract" took the risk that if no contract was ultimately concluded any losses would lie where they fell. Regalian had undertaken the expenditure for their own benefit and LDDC had not been enriched thereby. The failure of the negotiations was due to genuine disagreement about price. Now the phrase "subject to contract" has no special magic in Scots law, unlike English law, but where, as here, its use manifests an intention of the parties that their agreement should not have contractual force, the Scottish courts will give effect to that intention.¹¹⁷ Thus there is no question on *Regalian*-type facts of any implied assurance that the agreement was a binding contract, and so no possibility that the expenditure of the contractors could be recouped by way of *Walker v Milne*.¹¹⁸

Conclusion

This paper has argued that good faith does play a substantial role in the Scottish law of contract, but that on the whole this has been expressed by way of particular rules rather than through broad general statements of the principle. As a result its role in the law has been submerged, or subterranean, and the effects have not been so far-reaching as in the Continental systems. The overall result is rather typical of the mixed system that is Scots law. A particularly good example is provided by the authorities on pre-contractual liability discussed in the final section of the paper. These authorities do recognise a form of such liability which appears to go beyond anything established in the Anglo-American Common Law but which is not nearly as extensive as those recognised in Germany, France or the Netherlands.

The comparison of Scots law with the Principles of European Contract Law is also of interest. The Principles begin with the proposition that parties are free to negotiate and are in general not liable for failure to conclude a contract. This is the Scottish position too. For over a hundred years courts and text writers have said that *Walker v Milne* does not give rise to a general principle but is rather an equitable exception to the general rule; by implication, that general rule is one of no pre-contractual liability. This is perhaps most explicit in Lord Cullen's observation in *Danson v Coats Paton*, that "the law does not favour

¹¹⁶ [1995] 1 All ER 1005 (Rattee J). The result but not the reasoning is approved by E McKendrick, "Negotiations subject to contract and the law of restitution", [1995] 3 *Restitution Law Review* 100.

¹¹⁷ *Erskine v Glendinning* (1871) 9 M 656; *Stobo Ltd v Morrisons (Gowus) Ltd* 1949 SC 184.

¹¹⁸ A similar conclusion would probably arise in *Walford v Miles*, where the agreement to sell the business was likewise "subject to contract".

the recovery of expenditure made merely in the hope or expectation of agreement being entered into or of a stated intention being fulfilled".¹¹⁹ Such a starting point seems entirely consistent with the values and policies which underlie a market economy: each person must look after its own interests and if risks are taken on the basis of hopes or expectations not resting upon a contractual base, then the loss must lie where it falls in the absence of wrongdoing by the other party.

Having freedom to negotiate and to break off negotiations unless there is some special factor explains why, for example, a party inviting bids or tenders from a number of other parties is not liable for the expenses of the unsuccessful tenderers or bidders. Unless the invitor's conduct has reasonably induced other expectations, the competing offerors assume the risk of failure and there is no breach of good faith in leaving the losses where they fall. It is important to remember Finn's point that good faith does not involve the complete protection of the other party's interests at the expense of one's own, and that in this it is to be distinguished from a fiduciary obligation.

However, Article 2:301 of the European Principles states the exception to the general rule of freedom to give up negotiations in much wider terms than have so far emerged in Scots law. The exception rests squarely on the principle of good faith and is exemplified (although not exhausted) by entry into or continuation of negotiations without any real intention of concluding a contract thereby. In contrast, Lord Cullen's theory of pre-contractual liability depends upon there being an "implied assurance" that an *agreement* already reached is a binding contract. If we recognise, as it is submitted we must, that this rests upon the principle of good faith in contracting, is it possible to take that principle as a basis for further extensions of Scots law in this field?

We may begin with the specific example of bad faith given in Article 2:301 of the European Principles, the problem of negotiations which amount to no more than "stringing along"; that is, unknown to one of the negotiating parties (A), the other (B) has no intention of ever forming a contract. B's reason for appearing to enter into negotiations is an effort to force a third party (C) with whom B does intend to contract to make a better offer than he (C) would otherwise have been prepared to do. When an acceptable offer is made to B by C, negotiations with A are dropped. In a number of jurisdictions, A will have a claim against B in such circumstances by which at least reliance losses will be recoverable,¹²⁰ but in Scotland, under the current understanding of *Walker v Milne*, A would have no recovery, since there is no implied assurance that there is a binding agreement.

A variety of cases from around the world raise further questions about the limitations which have so far been placed upon the Scots law of pre-contractual liability. The denial of recovery in the *Regalian* case may be contrasted with the Australian decision, *Sabemo Pty Ltd v North Sydney Municipal Council*.¹²¹ Sabemo tendered to carry out a commercial development of land owned by the Council. The parties negotiated for three years and Sabemo spent large sums on preparatory works before the Council finally decided to abandon the development. The Supreme Court of New South Wales held that Sabemo could recover their wasted expenditure, on the basis that the termination was a unilateral

¹¹⁹ 1988 SLT at p. 866D-E.

¹²⁰ See for example the French decision of 1972 discussed in Nicholas, *French Law of Contract*, pp. 70-1; *Hoffmann v Red Owl Stores* (1965) 133 NW (2d) 267 (USA); *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 (Australia).

¹²¹ [1977] NSWLR 880, NSW SC.

decision of the Council rather than the result of an inability to agree upon terms, and that the Council's decision took account only of its own interests, not those of Sabemo. The court spoke of "fault" in relation to the Council's behaviour, and certainly there is much in the judgment to conjure up thoughts of *culpa in contrahendo*. However, the case was both distinguished and doubted by Rattee J in *Regalian*. The distinction lay first in the use of the "subject to contract" formula in *Regalian*, and in the fact that there was also genuine dissensus about price in that case; the doubt concerned the existence in English law of any principle that unilateral termination of negotiations without taking into account the interests of the other party inferred liability for that other's consequently wasted expenditure. What of Scots law? Do the facts of *Sabemo* suggest that there was an agreement between the parties and that there was also an implied assurance that this agreement was a binding contract? If not, is this another case where nevertheless there ought to be liability?

There are other cases where it is reasonably clear that there was no agreement and no implied assurance that there was a contract, yet there was enough to suggest that there would be a contractual agreement in the reasonably near future after some further negotiation. The best example is the "letter of intent" by which a party will signal to one of a group of tenderers or bidders for a contract that he now intends to enter a contract with that party although the tender/bid is not to be accepted without further negotiation. The purpose of the letter of intent is to allow the chosen party to commence preparation for the contract, and it is not unusual for preparation to pass on to performance before the contract is concluded. Typically the letter of intent will provide that such work will be paid for at the contract prices once agreed.¹²² But suppose the contract never to be concluded because the negotiations are unsuccessful. What if any claims may be made by the recipient of the letter of intent? Now where the performance involves a transfer of value to the party who has issued the letter of intent, the solution may well lie in unjustified enrichment.¹²³ If however there is no transfer of value but only reliance expenditure by the recipient of the letter, enrichment solutions may not be available or appropriate to cover the loss. As I have argued elsewhere, Scots law could here call upon its doctrine of unilateral promise, giving the letter obligatory effect and implying some sort of reasonable payment for the recipient's wasted work.¹²⁴ But given that letters of intent are often expressly not intended to have obligatory effect, the promise analysis may be rather forced. An approach based on good faith, allowing recovery of justified reliance or the "negative interest", is perhaps more attractive and avoids the need for strained construction and the implication of terms based, however artificially, upon the intention of the party issuing the letter of intent.

Another interesting situation can be illustrated from the English case of *Blackpool & Fylde Aero Club v Blackpool Borough Council*.¹²⁵ The Council invited tenders for a contract in a document which set out the procedure which it would follow in considering the tenders received. The Court of Appeal held that the Council was liable in damages to an unsuccessful tenderer for having failed to follow this procedure, but left unclear whether this was a matter of tort or of contract. The decision seems unquestionably right, but the

¹²² On letters of intent and the legal difficulties to which they give rise see S N Ball, "Work carried out in pursuance of letters of intent—contract or restitution?", (1983) 99 *Law Quarterly Review* 572; also M P Furmston et al, *Contract Formation and Letters of Intent* (Chichester, 1998).

¹²³ As in *British Steel Corporation v Cleveland Bridge* [1984] 1 All ER 504; see further E McKendrick, "The battle of the forms and the law of restitution", (1988) 8 *Oxford Journal of Legal Studies* 197.

¹²⁴ "Constitution and proof of gratuitous obligations", 1986 SLT (News) 1 at pp. 3-4.

¹²⁵ [1990] 1 WLR 1995. The case has recently been followed by Finn J of the Federal Court of Australia in *Hughes Aircraft Systems International v Air Services Australia* (1997) 146 ALR 1 (noted by M P Furmston, (1998) 114 *Law Quarterly Review* 362).

judgments reveal the relative conceptual limitations of the English law of obligations. A Scots lawyer might approach this case, not through a contractual or delictual, but rather through a promissory route.¹²⁶ But if this is thought artificial or to involve strained construction of the invitation to tender, then a wider concept of good faith might provide a better solution. This would undoubtedly go further than anything found in Lord Cullen's opinion in *Dawson v Coats Paton*. Again there is no real question of agreements and implied assurances that a binding contract exists. The contract, if it is going to come into existence at all, is not assured to any particular party.¹²⁷

In the final analysis, therefore, Scots law appears to have a number of specific tools or concepts with which to address liability issues in pre-contractual negotiations—that is, not just contract, misrepresentation and enrichment, but also promise and *Walker v Milne* reimbursement of expenditure. While these tools can be turned to a good number of different jobs, not all the potential issues of pre-contractual liability have yet been addressed or could be handled with them alone. Good faith appears to permeate the existing law in this area. If this principle is allowed the role suggested for it earlier in this paper—that is, the identification and solution through the creation of new rules of problems which the existing rules do not, or seem unable to reach—Scots law can still respond creatively, yet consistently with what has already been decided, when these as yet unanswered questions arise for decision in the future. If so, equity, in its proper Scottish sense as the basis of the whole law, will not after all turn out to be past the age of child-bearing.

¹²⁶ The concept of promise might also be the way in which Scots law would solve such famous “difficult” cases as *Hoffman v Red Owl Stores* and *Walton Stores (Interstate) Ltd v Maher*.

¹²⁷ Note that it is common for invitations to tender of the kind under consideration here to provide that the invitor is not bound to accept the highest/lowest (as the case may be) or indeed any offer that may be made.