

# ADAM SMITH AND THE SOCIAL FOUNDATION OF AGREEMENT:

## *WALFORD v MILES AS A RELATIONAL CONTRACT*

*David Campbell\**

That REASON, PASSION answer one great aim;  
That true SELF-LOVE and SOCIAL are the same;  
That VIRTUE only makes our BLISS below;  
And all our knowledge is: OURSELVES TO KNOW.

Pope, *Essay on Man*, IV, 395-398

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### A. INTRODUCTION: THE PROBLEM OF SELF-INTEREST

In his 2013 judgment in *Yam Seng Pte Ltd v International Trade Corporation Ltd*,<sup>1</sup> Leggatt J put forward the most substantial and interesting review of the English doctrine of agreement to be found in the modern case law. It claimed that contract law institutionalised a spectrum of other-regarding, moral duties which cluster around the concept of good faith, and that it therefore may be wise for the English law to explicitly recognise good faith. Not all of these

\* Professor of Law, Lancaster University Law School. This paper was presented to the Annual Conference of the Society of Legal Scholars, University of Oxford, September 2016; to the Edinburgh Centre for Private Law, Edinburgh Law School, November 2016 and to the Adam Smith Business School, University of Glasgow, February 2017. I am grateful for comments I received at those presentations and to Allan Beever, Sir George Leggatt, Jonathan Morgan and Dania Thomas for other comments.

<sup>1</sup> [2013] EWHC 111 (QB), [2013] 1 All ER (Comm) 1321.

duties will obtain in every contract, but some, notably the duty of honesty, should.<sup>2</sup> I have elsewhere analysed the detail of Leggatt J's judgment and in particular the alternative ways in which good faith might be recognised in the English law.<sup>3</sup> I wish to put this to one side in order to focus on the logically prior claim that the law of contractual agreement institutionalises other-regarding, moral duties. Even if this claim is allowed, it leaves entirely open the possible form of the legal recognition of good faith.

A decision of the High Court, such authority as *Yam Seng* might exercise could largely be only persuasive and, in brief, its treatment of good faith<sup>4</sup> has not been found very persuasive on the more or less score of occasions it has been at least mentioned in the higher courts of England and Wales.<sup>5</sup> The principal result<sup>6</sup> of its consideration by the Court of Appeal has been the drawing of a distinction between the interpretation and the implication of good faith. Whilst the parties may stipulate a duty of good faith which should be recognised as a matter of *interpretation*, in the absence of such stipulation a duty of good faith should not be *implied* into a contract.<sup>7</sup>

<sup>2</sup> Ibid [135]-[137]. Leggatt J's language seems to leave open the possibility of there being some cases in which the duty of honesty does not obtain but doing so, it is respectfully submitted, is inconsistent with his core claim. That empirically there are contracts which purport to exclude liability for dishonesty is of course the case.

<sup>3</sup> D Campbell, "Good faith and the ubiquity of the 'relational' contract" (2014) 77 MLR 475. See further text accompanying n 115.

<sup>4</sup> A reference to the "relational contract" in *Yam Seng* (n 1) [142] has been taken up in *Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch) and *D and G Cars Ltd v Essex Police Authority* [2015] EWHC 226 (QB). See further H Collins, "Is a relational contract a legal concept?" in S Degeling et al (eds), *Contract and Commercial Law* (forthcoming 2017).

<sup>5</sup> A judgment of the Supreme Court of Canada was pronouncedly sympathetic: *Bhasin v Hrynew* [2015] 4 LRC 85. See further Zhong Xing Tan, "Keeping faith with good faith? The evolving trajectory post-*Yam Seng* and *Bhasin*" [2015] JBL 420.

<sup>6</sup> In the third of these, *MSC Mediterranean Shipping SA v Cottonex Anstalt* [2016] EWCA Civ 789, [2017] 1 All ER (Comm) 483, Leggatt J's judgment at first instance ([2015] EWHC 283 (Comm), [2015] 2 All ER (Comm) 614), which sought to examine in terms of good faith the problem identified with *White and Carter (Councils) Ltd v McGregor* [1962] AC 413), was reversed. See further J Morgan, "Smuggling mitigation into *White and Carter v McGregor*: Time to come clean?" [2015] LMCLQ 575. On subsequent developments in the law of termination which "may mark a further limitation on the willingness of English judges to imply a term of good faith into contracts following Leggatt J's comments in *Yam Seng*" see L Richardson, "Exercising a contractual right to terminate: What's good faith got to do with it?" (2017) 21 ELR 88 at 92.

<sup>7</sup> *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200, [2013] BLR 265 at [105] and *Globe Motors Inc v TRW Lucas Varsity Electric Steering Ltd* [2016] EWCA Civ 396, (2016) 168 Con LR 59 at [67]-[68].

As stated, this distinction is, with respect, not securely founded. Citing the already famous *dictum* of Lord Neuberger PSC (Lords Sumption and Hodge JJSC concurring) in *Marks and Spencer v BNP Paribas*, the Court of Appeal told us that:

whatever the broad similarities between them, [interpretation and implication] are ‘different processes governed by different rules’ ... because ‘the implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, *ex hypothesi*, the parties themselves have made no provision’.<sup>8</sup>

This is to claim that, if one is not implying good faith, one is not implying. This is not so. Instead of implying that the parties intentions were formed on the basis of (and therefore should be interpreted against) an attitude which Leggatt J sought to capture by reference to good faith, the distinction between interpretation and implication actually does imply, in the absence of a stipulation of good faith, that the parties’ intentions were formed on the basis of (and therefore should be interpreted against) an attitude of self-interest. In the House of Lords judgment in *Walford v Miles* which is regarded as the definitive modern statement of this attitude, Lord Ackner (with whom all their Lordships concurred) said that:

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.<sup>9</sup>

As it was from the self-interested attitude that Leggatt J sought to depart,<sup>10</sup> he seems, save in the cases of express stipulation of good faith, where perhaps his labours were not so imperatively required, to have laboured (so far at least) largely in vain.

I am of the opinion that no real progress will be made until this opposition of the attitudes towards contracting thought to be captured by good faith and self-interest is shown

<sup>8</sup> *Globe Motors*, ibid [68], citing *Marks and Spencer plc v BNP Paribas Security Services Trust Co Ltd* [2015] UKSC 72, [2016] AC 742 at [26], [29]. Lord Neuberger’s statement itself quoted a *dictum* of Sir Thomas Bingham MR in *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 at 481.

<sup>9</sup> *Walford v Miles* [1992] 2 AC 128 at 138E (HL).

<sup>10</sup> *Walford v Miles* was swiftly distinguished in *Yam Seng* on the ground that it concerned good faith in negotiation rather than, as in *Yam Seng*, good faith in performance: *Yam Seng* (n 1) [122]. See further n 88.

to be the false dichotomy it is. I have long believed that the English law in fact contains the doctrinal resources to do this,<sup>11</sup> but I do not wish again to go over ground now so well covered by Leggatt J.<sup>12</sup> I want, initially at least, to step away from the distinction between interpretation and implication, indeed from the law which Leggatt J sought to organise around good faith, and turn to the social philosophical roots of the understanding of self-interest in the law of contract; which means, of course, turning to Adam Smith.<sup>13</sup>

In what may be the most influential passage in all of modern European social thought, Smith unforgettably wrote that:

In civilised society [man] stands at all times in need of the co-operation and assistance of great multitudes [and] has almost constant occasion for the help of his brethren, and it is in vain for him to expect it from their benevolence only. He will be more likely to prevail if he can interest their self-love in his favour ... and it is in this manner that we obtain from one another the far greater part of those good offices which we stand in need of. It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.<sup>14</sup>

What does this description of exchange in terms of self-interest mean for a law of contract which attempts to provide the legal framework for economic action? As it has been taken up in neo-classical economics and in the classical law of contract, Smith's concept of self-interest has been regarded as emptying exchange of other-regarding moral content, Lord Ackner's views in *Walford v Miles* being a paradigmatic expression of this.

<sup>11</sup> D Campbell, "The relational constitution of the discrete contract", in D Campbell and P Vincent-Jones (eds), *Contract and Economic Organisation* (1996) 40.

<sup>12</sup> In addition to certain doctrines mentioned in the paper I have just cited which should be added to Leggatt J's list, much greater emphasis should be placed on implied terms as the principal constituents of all but very exceptional contracts: H Collins, "Implied terms: The foundation in good faith and fair dealing" (2014) 67 CLP 297.

<sup>13</sup> Any attempt to assess the importance of Smith for the law of contract is now, of course, indebted to PS Atiyah, *The Rise and Fall of Freedom of Contract* (1979) at 294-304. However, the account of self-interest advanced here implicitly criticises Atiyah, who accepted the (to use a term to be developed later) solipsistic view of self-interest, exchange and *laissez faire*, and, stressing that view's shortcomings, described the necessity of curtailing self-interest, a process in which welfarist legislation played a major role. It is argued here that the *laissez faire* view was not self-conscious of the other-regarding quality implicit in exchange motivated by self-interest, and the point is not to curtail self-interest but to make it, in Hegel's terms, actual.

<sup>14</sup> A Smith, *The Wealth of Nations*, in *The Glasgow Edition of the Works and Correspondence*, vol 2 (1976) at 26-27. Here, as in discussion of Smith throughout, I treat his usage "self-love" as synonymous with "self-interest". When I have thought it helpful, I have silently brought Smith's spelling and punctuation into conformity with modern usage.

But I will argue that Lord Ackner did not grasp the essential, other-regarding dimension of Smith's concept of economic self-interest, and therefore the essential, other-regarding moral content of the doctrine of agreement in the law of contract. Our understanding of Lord Ackner's famous *dictum*, and indeed of *Walford v Miles* itself, is seriously undermined by our defective concept of self-interest.

#### B. SMITH ON SELF-INTEREST AND THE FUNCTIONS OF GOVERNMENT

It is very arguable that Smith's most important achievement was, with others of whom Mandeville was the most important other than Smith himself, to give self-interest a central and, more importantly, a positive, role in modern moral and political philosophy and, as part of this, in what is now "economics". As will be seen,<sup>15</sup> it is ultimately impossible to separate Smith's views of the exercise of self-interest specifically in the economic sphere from his views of its exercise generally, and adequate discussion of the relationship of the specific and the general would require Smith's views of the overall range of human motivations to be taken into account. But, so far as it is possible, I shall avoid discussion of Smith's general moral philosophy and will broaden out discussion of his understanding of the self-interest which motivates economic exchange only in so far as this is needed for the analysis of the exercise of self-interest through contract.

Smith regarded it as a very positive feature of self-interest as the motivation of economic exchange that it was quite distinct from a direct concern with the public interest. Smith believed the impulse to "bettering our condition" to be universal amongst humankind,<sup>16</sup> but that the material and hence cultural improvement of modern European society arose from a particular means of betterment. In the "Age of Commerce", the highest

<sup>15</sup> See text accompanying n 79.

<sup>16</sup> Smith (n 14) 341.

of the four stages of the development of European society,<sup>17</sup> the general liberation of “a certain propensity in human nature … to … exchange one thing for another”<sup>18</sup> had brought about the general division of labour which is the source of the historically unprecedented wealth of that Age.<sup>19</sup> The division of labour, however, was “not originally the effect of any human wisdom, which foresees and intends that general opulence to which it gives occasion”.<sup>20</sup> It rather was an unintended consequence of the degree of specialisation permitted by the generalisation of exchange.

It is impossible even to be remotely fully cognisant of, much less to supervise, the tantamount to infinite complexity of economic action under a developed division of labour.<sup>21</sup> Economic order in commercial society is established, not by a conscious attempt to establish that order, but as an emergent property of economic actors’ pursuit of their self-interest:

Every individual is continually exerting himself to find out the most advantageous employment for whatever capital he can command. It is his own advantage indeed, and not that of society which he has in view. But the study of his own advantage naturally, or rather necessarily, leads him to prefer that employment which is most advantageous to society … every individual necessarily labours to render the annual revenue as great as he can. He generally indeed neither intends to promote the public interest, nor knows how much he is promoting it … he intends only his own gain and he is … led by an invisible hand to promote an end which was no part of his intention.<sup>22</sup>

Smith himself saw the invisible hand, by the working of which “the obvious and simple system of natural liberty establishes itself of its own accord”,<sup>23</sup> as the hand of Providence.<sup>24</sup> This is, of course, not acceptable to the preponderance of contemporary opinion, though rejection of Smith’s views does not mean that we therefore now have an adequate understanding of how the pursuit of self-interest leads, not to chaos, but to economic order.

<sup>17</sup> A Smith, *Lectures on Jurisprudence*, in *The Glasgow Edition of the Works and Correspondence*, vol 5 (1978) at 14.

<sup>18</sup> Smith (n 14) 25.

<sup>19</sup> Ibid 23-24.

<sup>20</sup> Ibid 25.

<sup>21</sup> Ibid 22-23.

<sup>22</sup> Ibid 454, 456.

<sup>23</sup> Ibid 687.

<sup>24</sup> A Smith, *The Theory of Moral Sentiments*, in *The Glasgow Edition of the Works and Correspondence*, vol 1 (1976) at 236.

This presumably is why the invisible hand, a mere metaphor if divorced from Smith's views, remains the principal way we describe the mechanism at work. We fortunately can here merely accept the existence of that mechanism and note only that Smith saw *laissez faire* as a necessary corollary of belief in the invisible hand:

it requires no more than to leave [Nature] alone and give her fair play in the pursuit of her own ends that she may establish her own designs ... Little else is required to carry a state to the highest degree of affluence ... brought about by the natural course of things.<sup>25</sup>

It is implicit in the idea of *laissez faire*, and indeed it is the core of Smith's views, that government cannot possibly generally direct economic action, and that any attempt to do so will have extremely unwelcome results even if it is well intended.<sup>26</sup> Smith was also, however, extremely conscious that a government which, in its "folly and presumption", aggregated to itself the power to purport to undertake such general direction, would be bound to be despotic<sup>27</sup> and to invite corruption and waste.<sup>28</sup> Nevertheless, it has long been incontestable within Smith scholarship that Smith's commitment to *laissez faire* is limited in numerous important ways, two of which are of significance here.

First, Smith had a strong perception of some of what would now be called the social costs of capitalism, and in this he was a characteristic figure of the Scottish Enlightenment, which regarded certain alienating effects of commercial society on its working class with great concern.<sup>29</sup> Smith clearly anticipated what would now be called the positive externality argument for the provision of public goods in order to alleviate social costs when he identified "the duty of erecting and maintaining certain public works and public institutions"

<sup>25</sup> D Stewart, "Account of the life and writings of Adam Smith LLD", in A Smith, *Essays on Philosophical Subjects*, in *The Glasgow Edition of the Works and Correspondence*, vol 3 (1980) 263 at 322.

<sup>26</sup> Smith (n 14) 687. That *The Wealth of Nations* is a polemic against Mercantilist policies which Smith believed to be profoundly mistaken is a subsidiary aspect of this general point. No policy of general direction could possibly be correct.

<sup>27</sup> Ibid 456.

<sup>28</sup> Ibid 356.

<sup>29</sup> Smith (n 14) 781-782.

as the third of the three proper functions of government.<sup>30</sup> Whilst his view of the legitimate range of public services was highly restricted by comparison to the predominant contemporary one,<sup>31</sup> he saw it as one of the two tasks of political economy to advise “the state or commonwealth [how to obtain] a revenue sufficient for [such] services”.<sup>32</sup> In sum, whilst he was generally sceptical of the competence<sup>33</sup> or sincerity<sup>34</sup> of those who claimed to act directly in the public interest, Smith certainly allowed of the necessity of what would now be called intervention.

Secondly, it is equally incontestable in Smith scholarship that Smith did not conceive of the economic pursuit of self-interest in an, as it were, untrammelled way. When Smith speaks of self-interest, it is of self-interest bounded within a system of what he called “justice”. In some of the quotations from famous texts I have already given, I have omitted important sentences or clauses which significantly shift what he meant by self-interest and *laissez faire*. When, for example, Smith claimed that “Little else is required to carry a state to the highest degree of affluence” in addition to giving Nature “her fair play in the pursuit of her own ends”, in an omitted clause he specified that the “Little else” was the not inconsiderable task of maintaining “peace, easy taxes, and a tolerable administration of justice”.<sup>35</sup> And the effect of leaving the invisible hand to establish the system of natural liberty was that:

Every man, *as long as he does not violate the laws of justice*, is left perfectly free to pursue his own interest in his own way.<sup>36</sup>

Economic self-interest is not untrammelled self-interest. It is self-interest pursued consistently with justice. The exercise of self-interest in pursuit of economic goods can, of

<sup>30</sup> Ibid 687-688.

<sup>31</sup> Ibid 723. Smith was by no means so inflexible as to fail to allow even the most blatant peacetime “sacrifice [of] the ordinary laws of justice to an idea of public utility” were it justified by “the most urgent necessity”: ibid 539.

<sup>32</sup> Ibid 428.

<sup>33</sup> Ibid 687.

<sup>34</sup> Ibid 456.

<sup>35</sup> Stewart (n 25) 322.

<sup>36</sup> Smith (n 14) 687 (emphasis added).

course, take the form of mere appropriation, especially, Smith believed, in commercial society, where the very accumulation of property provides a degree of incentive to mere appropriation not found in rude societies.<sup>37</sup> He therefore argued that, after ensuring a political society's protection "from the violence and invasion of other independent societies" and so securing the "external peace" essential to the society's very existence,<sup>38</sup> "the duty of establishing an exact administration of justice" was the second proper function of government,<sup>39</sup> coming before what we have seen was the third, "erecting and maintaining certain public works and public institutions". Self-interest is the driving force of improvement – "The uniform, constant, and uninterrupted effort of every man to better his condition" – only because, when exercised consistently with justice, it takes the beneficent form of exchange, and so becomes "the principle from which public and national, as well as private, opulence is originally derived".<sup>40</sup> In sum, Smith saw that what I will call regulation is necessary for a market to exist because it is necessary to channel self-interest and ultimately that channelling must be enforced by the monopoly of violence.<sup>41</sup>

I believe it is helpful to use a wide definition of regulation, derived from the late Ronald Coase, as the establishment and maintenance of a legal framework within which legitimate economic activity may be carried out",<sup>42</sup> and to adopt Coase's corollary recognition that "The term 'regulation' ... is often confined to the work of the [executive], but regulation is also the result of legislative and judicial actions, and it seems ill-advised not to take these into consideration". On this definition of regulation, intervention may itself be defined as a specific form of regulation which, unlike the general regulation which makes choice in a market possible, attempts to alter market outcomes. On these definitions, Smith

<sup>37</sup> Ibid 709-710.

<sup>38</sup> Ibid 689.

<sup>39</sup> Ibid 687.

<sup>40</sup> Ibid 343.

<sup>41</sup> Ibid 710.

<sup>42</sup> R H Coase, "Advertising and Free Speech" (1977) 6 JLS 1 at 5.

allowed intervention a subsidiary (and very minor by contemporary standards) role in the economy of commercial society, but recognised that non-interventionist, framework setting regulation is indispensable to the very existence of that economy. The issue is not whether Smith thought regulation indispensable but how extensive he saw the regulation necessary to fulfil its indispensable role.

Smith's thought on this issue has the following implication for our understanding of the role of the law of contract in economic regulation. What specifically does the tolerable administration of justice entail? In commercial society, exchange begins with economic actors in private ownership of initial endowments of resources. The seller has the resources (which constitute the capacity) to deliver goods. The buyer has the resources (which constitute the capacity) to make payment. Exchange is possible, then, only if economic actors initially acknowledge each other's private property, and so:

The first and chief design of every system of government is to maintain justice; to prevent the members of a society from encroaching on one another's property, or seizing what is not their own. The design here is to give each one the secure and peaceable possession of his own property ... we may call [this end] internal peace.<sup>43</sup>

Having established private property in goods by regulation, we must now turn to the establishment and promotion of exchange of those goods. It is not going too far to claim that, obviously initially most surprisingly, Smith says almost nothing about this. The concept by which he addresses the issues is that of "police". Having secured ownership:

the government will next be desirous of promoting the opulence of the state. This produces what we will call police. Whatever regulations are made with respect to the trade, commerce, agriculture, manufactures of the country are considered as belonging to the police.<sup>44</sup>

It is entirely possible that, understood with this purpose, Smith's concept of police could have embraced extensive regulation in the sense I have defined the term, as indeed

<sup>43</sup> Smith (n 17) 5.

<sup>44</sup> Smith (n 17) 5.

could Smith's concept of the tolerable administration of justice, which he was apt to describe as the sovereign's duty "of protecting, as far as possible, every member of the society from the injustice or oppression of every other member of it",<sup>45</sup> and which he believed inevitably would require an expansion of laws in proportion to the improvement of a society.<sup>46</sup> But, though it is right to say that *The Wealth of Nations* was pre-eminently concerned with the promotion of the opulence of commercial society,<sup>47</sup> and though this meant increasing the volume of exchange,<sup>48</sup> Smith certainly did not view police in this expansive manner. Insisting in his conception of general jurisprudence upon a strict separation of justice and police,<sup>49</sup> he saw the latter as a "mean" or "trifling" subject embracing the "inferior parts of government", one which, police being a strange term to the contemporary reader, would perhaps now be better rendered as "(public) management". Being based on the shifting grounds of "expediency" rather than stable principles of "justice",<sup>50</sup> police did not really have to be considered in light of the great principles of government as did the maintenance of external and internal peace.<sup>51</sup> In this concept of police, to speak of regulation was to speak of, as it were, *ad hoc* sets of rules for particular activities intended to promote the growth of opulence, but which are incidental to the core of economic action, which is exchange.

In sum, whilst Smith acknowledges the necessity of regulation to establish private property, he does not similarly recognise the necessity of regulation to establish exchange. His concepts of justice and of police avoid addressing the issue, though a theory of the market economy must establish the legitimacy of both initial endowments and of the transfer of goods in order to demonstrate that ownership actually rests on, as Nozick put it,

<sup>45</sup> Smith (n 14) 687, 708.

<sup>46</sup> Smith (n 17) 16.

<sup>47</sup> Smith (n 14) 428.

<sup>48</sup> Ibid 31.

<sup>49</sup> Smith (n 24) 3, 341-342.

<sup>50</sup> Stewart (n 25) 275.

<sup>51</sup> Smith (n 17) 486.

entitlement.<sup>52</sup> Of course, this avoidance might be said to follow inevitably from Smith's intention to establish the general case for *laissez faire*. The regulations of police and the provision of public works had their place, but the most important thing was to keep government out of the basic economic process of exchange, for there self-interest, the propensity to exchange and the invisible hand would produce the best results, but they could do so only if left alone by government.

I have argued in much previous work that this "deregulatory" view is misleading. The particular error that it has led to in the interpretation of Smith that is of interest here is about the nature of self-interest when pursued through exchange. We will see that Smith's concept of self-interested exchange is an intimately moral, other-regarding one which calls for, but does not adequately receive from Smith himself, consideration of the necessary and necessarily extensive channelling of self-interest into the form of exchange by regulation in the sense I have given the term, albeit that that regulation principally takes the private form of the law of contract. Paradoxically, to grasp this requires us to turn to one who, whilst his profound admiration for Smith was based on very considerable Smith scholarship, put forward what was intended to be the most radical criticism of him: Karl Marx.

### C. SMITH ON SELF-INTEREST AND EXCHANGE

Though they may be deficient in the way I claim, Smith's various comments on exchange yield one of the most important answers yet given to the question why the pursuit of self-interest through exchange is generally beneficent. I have noted that self-interest as mere appropriation is untrammelled, but perhaps the better way to put it is that it is solipsistic. "Exchanges" that are made because one actor has, say, violently exercised duress over

<sup>52</sup> R Nozick, *Anarchy, State and Utopia* (1974) at 150-151.

another show so complete a focus on the actor's own interest as to completely disregard the other's interest.

If language of this grandiloquence may be excused, it has been a matter of economic theory of significance for the entire history of the modern world that the only account of the social process of exchange that fundamentally adds to Smith is, paradoxically, that of the social theorist whose case for the complete abolition of the market economy has most merited serious consideration. In *Capital* volume 1, Marx described the process of exchange as follows. The owners of goods:

must behave in such a way that each does not appropriate the [goods] of the other, and part with his own, except by means of an act done by mutual consent. They must, therefore, mutually recognise in each other the rights of private proprietors. This juridical relation, which thus expresses itself in a contract ... is a relation between two wills and is but the reflex of the real economic relation of the two. It is this economic relation that determines the subject matter comprised in each such juridical act.<sup>53</sup>

Three vital features of exchange emerge from this description of it, two of which Smith clearly embraced, but the third of which, though it is integral to Smith's thinking, Smith himself did not adequately articulate, and Marx's description of exchange is essential to grasping this third feature.

The first feature Marx describes (the second as he presents them) is that economic actors must recognise "the rights of private proprietors". The second feature (the first as he presents them) is that the transfer of goods must be "by means of an act done by mutual consent". We have seen that Smith was fully aware of the necessity of regulating to establish justice in order for private property to exist. But what did he say of how we guarantee transfer by mutual consent?

<sup>53</sup> K Marx, *Capital* volume 1, in K Marx and F Engels, *Collected Works*, vol 35 (1996) at 95. I have replaced Marx's use of "commodities" with "goods" which I trust will more clearly convey his meaning to the readership of this journal.

We have examined one example of a famous description by Smith of the workings of commercial society taking on a somewhat different aspect if the usual quotation of that description is expanded. Leaving nature alone in order to give her her fair play involved, it emerged, establishing a system of justice.<sup>54</sup> A very similar thing happens with other quotations from Smith in which he describes exchange. We have seen him claim that, standing in need of the co-operation and assistance of great multitudes, an economic actor will best obtain this by appealing to the multitudes' self-interest.<sup>55</sup> But how does this appeal precisely take place? The passage which begins "He will be more likely to prevail if he can interest their self-love in his favour" is in full:

He will be more likely to prevail if he can interest their self-love in his favour *and show them that it is for their own advantage to do for him what he requires of them. Whoever offers to another a bargain of any kind proposes to do this. Give me that which I want and you shall have this which you want is the meaning of every such offer;* and it is in this manner that we obtain from one another the far greater part of those good offices which we stand in need of.<sup>56</sup>

The significance of the now included and emphasised clauses is that it shows the economic actor indeed entering into an exchange to pursue his own self-interest – "give me that which I want" – but he can pursue his own self-interest only by obtaining the consent of the other actor to transfer that which is wanted by giving the other actor what he wants – "you shall have this which you want". The first actor must secure the other actor's consent to exchange by, as Smith put it in the *Lectures on Jurisprudence*, "setting before him a sufficient temptation" to transfer the goods wanted.<sup>57</sup> To adopt the term used in the *Lectures on Jurisprudence*, exchange is based on persuasion:

If we should enquire into the principle in the human mind on which the [propensity to exchange] is founded, it is clearly the natural inclination everyone has to persuade. The offering of a shilling, which to us appears to have so plain

<sup>54</sup> See text accompanying n 25.

<sup>55</sup> See text accompanying n 14.

<sup>56</sup> Smith (n 14) 26 (emphasis added).

<sup>57</sup> Smith (n 17) 493.

and simple a meaning, is in reality offering an argument to persuade one to do so and so as it is for his interest.<sup>58</sup>

In its ideal typical form, exchange is not altruistic.<sup>59</sup> Neither actor directly wishes to promote the well-being of the other but only to pursue his own self-interest. But, as with the initial recognition of private property, the process of transfer is not based on solipsistic self-interest. It is analytically based on a recognition of the self-interest of the other, and the economic actor accepts, not merely that pursuit of his own self-interest must allow the other actor to pursue his own self-interest, but that the first actor can pursue his own self-interest only by being the means by which the other pursues his. Self-interest in exchange is, Marx tells us when identifying the third vital feature of exchange, a form of “mutual recognition”. Though there is no direct textual warrant for this, Marx undoubtedly derived his description of exchange from GWF Hegel’s various comments on contract, which make the necessity of consensual exchange,<sup>60</sup> and mutual recognition as the means of obtaining consent,<sup>61</sup> essential features of contract. The concept of mutual recognition is at the heart of Hegel’s entire contribution to moral and political philosophy,<sup>62</sup> and has most important dimensions which cannot be considered here. It is necessary only to emphasise that exchange is based on self-interest, and shares this with mere appropriation, but that, whereas mere appropriation is a solipsistic exercise of self-interest,<sup>63</sup> this is the last thing that can be said of exchange, which has the moral, other-regarding component of mutual recognition as its analytically essential feature, ie the feature that distinguishes exchange from solipsistic forms of the pursuit of self-

<sup>58</sup> Ibid 352.

<sup>59</sup> Smith would have referred to “benevolence” rather than “altruism”, and gave a very restricted, if very important, role to benevolence amongst human motivations, believing self-interest to be far more important: Smith (n 24) 85-86.

<sup>60</sup> G W F Hegel, *Philosophy of Mind* (1971) at sec 492.

<sup>61</sup> G W F Hegel, *Elements of the Philosophy of Right* (1991) at sec 71.

<sup>62</sup> G W F Hegel, *Phenomenology of Spirit* (1976) at 118-119.

<sup>63</sup> And so fraud, as opposed to breach of contract, is a crime: Smith (n 17) 105.

interest such as duress. Self-interested exchange that is fully self-conscious of its own nature, or “actual” as Hegel would have put it,<sup>64</sup> rejects solipsism.

Criticisms may be made of the limited nature of Smith’s conception of the work of government necessary to establish justice. But his conception of what is needed to establish mutual consent in transfer by exchange is much more limited, reflecting the nature of his concept of police. Like almost all subsequent advocacy of *laissez faire*, Smith’s concepts of justice and police work as a metaphor of erecting a minimalist framework – “restricted”, as JS Mill put it, to “protection … against force or fraud”<sup>65</sup> - and standing back. But even regulation which intends, not to intervene, but to facilitate allocation by choice cannot be passive in this way. If we reflect on the topics Smith saw as covered by police – “the trade, commerce, agriculture [and] manufactures of the country” – it can be seen that adequate regulation covering these topics should not be conceived of passively but should be seen to require, not only the in itself demanding task of initially positing the law, but also then monitoring and adjusting it in light of moves made by economic actors in response to the posited law; a continuous and active, reflexive process which Matthias Klaes and I have called “institutional direction”.<sup>66</sup>

The extent to which the government of Smith’s day could be involved in the active promotion of police is, of course, very different from what would be expected now, and even those like myself who believe that contemporary government very frequently indeed exceeds the bounds of its competence should not, I submit, deny that that expectation is essentially justified, which denial would be a mere affectation. But the point is that the passive conception of regulation which leads to *laissez faire* is wrong in principle. In his excellent review of the subject, Fine defined *laissez faire* as “the arguments of those who [accept]

<sup>64</sup> Hegel (n 61) 19-21 and G W F Hegel, *The Encyclopaedia Logic* (1991) at sec 6.

<sup>65</sup> J S Mill, *Principles of Political Economy*, in *Collected Works*, vols 2-3 (1965) at 936.

<sup>66</sup> D Campbell and M Klaes, “The principle of institutional direction: Coase’s regulatory critique of intervention” (2005) 29 Camb J Econ 263 at 277-280.

government as a necessity but [nevertheless wish] to see its functions reduced to the narrowest possible limits".<sup>67</sup> But the accuracy of Fine's definition in part follows from its leaving the way of determining the "narrowest possible limits" unspecified. In this vacuum, "narrowness" becomes associated with passivity and minimalism. This cannot be right. The narrowest optimal limits are set at the points where regulation intended to promote private opulence through exchange actually ceases to promote it; which, to put the point the other way around, means that regulation more minimal than this is not optimally sufficient.

Smith was nothing if not the most pragmatic of philosophers, and scattered throughout the *Lectures on Jurisprudence* and *The Wealth of Nations* are approving comments on or suggestions for legal and other actions for the facilitation of beneficent exchange. These actions cannot easily be regarded as interventions in the market but should be seen as regulations facilitative of the market, and they include statutory guarantees of the quality<sup>68</sup> or quantity<sup>69</sup> of goods when there are valid reasons to doubt private guarantees, statutory setting of rates of interest to limit usury<sup>70</sup> and excessively speculative investment,<sup>71</sup> statutory limits on the issue of banknotes to prevent excessive concentration of bank capital,<sup>72</sup> and the statutory prohibition of truck on the ground that truck typically allowed effective short payment by the employer.<sup>73</sup> In particular, Smith insisted that the superior reliability in commercial society of the enforcement of contracts by the courts, which of course depends on government expenditure, was an essential advantage of that society over rude societies.<sup>74</sup> This is a paradigm of the role of regulation as I am using the term.

<sup>67</sup> S Fine, *Laissez Faire and the General-Welfare State* (1956) at vii.

<sup>68</sup> Smith (n 14) 138-139.

<sup>69</sup> Smith (n 17) 372.

<sup>70</sup> Smith (n 14) 356.

<sup>71</sup> Ibid 357.

<sup>72</sup> Ibid, 329.

<sup>73</sup> Smith (n 14) 158.

<sup>74</sup> Ibid 112.

The point is that Smith was inadequately conscious of the extent of the regulation necessary, not to intervene in the market, but to create the general market economy in which one might occasionally intervene. As a result, the fundamental impression left on the contemporary reader's mind by *The Wealth of Nations* is of a wonderful optimism which it is hard now to share to anything like the same degree. The shortcomings of the system of natural liberty which have since led to regulation and intervention at the scale and scope now considered normal are very largely recognised by Smith, but not thought sufficiently serious, given the power of the system of natural liberty, to warrant active and extensive government action. He would be aghast at the extent of government action which now claims justification on this basis. Interpretations of Smith which take the things he undoubtedly said in favour of regulation and intervention to claim him for the modern welfare economics of widespread intervention are badly mistaken; indeed they are merely the equally exaggerated obverse of extreme liberal attempts similarly to claim him for a literal *laissez faire*. But I submit it would be entirely correct to say that he saw government action to ensure justice and police as essential to the opulence of commercial society and that the narrowness of his conception especially of police is inconsistent with his own views and with what it is now right to recognise is actually involved in regulating for, not intervening in, a market economy. In principle, Smith could and should have given regulation facilitating markets a greater scale and scope. Any proposed regulation would, however, have to be defended on its merits after it has been acknowledged, in no small part due to Smith, that regulation which, even if not intended to do so, hinders rather than facilitates exchange, runs counter to the public interest in the operation of the market as the best conceivable form of general economy.

#### D. SMITH ON SELF-INTEREST AND THE LAW OF CONTRACT

Smith's failure to appreciate the extent of regulation which his own argument shows to be optimal is even more clear in regard of the law of contract than it is with regard to government action. This was inevitable as the wide concept of regulation I am using in one sense simply overrides the strong distinction between government (ie executive and legislature) and the courts, and the confidence that the courts were strictly confined to adjudication,<sup>75</sup> which were central to Smith's views on the constitutional law and politics of liberty.<sup>76</sup> Smith could not be expected to systematically bring private law under his concept of police. I believe I am justified in doing just this because it is essential to include the private law in any comprehensive account of the regulation of economic action, and because it is possible to do so without reducing the private law to merely a means of implementing government intervention. Though Smith's account of the law of contract is brief and in fact somewhat derivative, it makes, as one of course expects, points of value, and in particular contains a reliance theory of liability that has continuing interest. But Smith had no great familiarity with the law, and there is little or nothing of value in his work explicitly on the law of contract about how economic exchanges are actually made. But once one appreciates the active aspect of regulation for facilitation of the market economy, then the extremely important implication for the law of contract of understanding that exchange is based on mutual recognition may be made clear.

There is a striking footnote provided by a Victorian editor of *The Wealth of Nations* that expresses this implication of Smith's views so well that even so acute a commentator as the late Professor Stein mistakenly thought that Smith himself was responsible for that

<sup>75</sup> Smith (n 17) 275.

<sup>76</sup> Ibid 313.

footnote.<sup>77</sup> In 1869, the Clarendon Press brought out an edition under the editorship of JE Thorold Rogers, the distinguished economic historian and liberal political economist. To the famous sentence which we have seen runs in full “He will be more likely to prevail if he can interest their self-love in his favour and show them that it is for their own advantage to do for him what he requires of them”, Thorold Rogers provided the following footnote:

In all voluntary contracts, both parties gain. For a long time, however, people were possessed of the idea that one man’s gain is another man’s loss. Unfortunately, legislation proceeded on this fallacy, and consequently busied itself with restrictions, prohibitions, compensation and the like.<sup>78</sup>

By no means novel at its time, this footnote anticipated the formalisation of what now stands as “the first theorem” of welfare economics: Pareto optimality. The principal value of Pareto optimality is that it captures the way that the legitimacy of the market economy does not inhere in the substantive production of a set of collectively valued goods but in the pure procedure of whatever goods are produced being produced because of the choices of individual economic actors. Pareto optimality states that an economy is in an equilibrium constituting optimum welfare when all exchanges of goods between economic actors have taken place, this being identified by the impossibility of a reallocation of goods that would not leave at least one actor worse off.

There surely can be few if any statements in social thought which seem so dry and yet are more densely packed with social content than Pareto optimality. In the ideal typical market economy, goods are allocated by the free choices of economic actors expressed in voluntary economic exchanges institutionalised as contractual agreements. Economic actors are motivated by self-interest, but voluntary exchange agreements can take place only when both parties perceive an advantage to be gained. It is, not the pursuit of self-interest, but the possibility of its pursuit through mutually advantageous exchanges that makes the market

<sup>77</sup> P Stein, “The General Notions of Contract and Property in Eighteenth Century Scottish Thought” [1963] Jur Rev 1 at 11.

<sup>78</sup> A Smith, *The Wealth of Nations* (1869) at 15 n 1. The footnote is identically located in a second edition of 1880.

economy possible. When all exchange possibilities have been exhausted in a therefore automatically established Pareto optimal equilibrium, further reallocation of goods cannot take place save by, say, a “contract” which is not actually an agreement, or a transfer by government ultimately dependent on the monopoly of violence, for this reallocation must be to at least one actor’s disadvantage as the actor defines it. If it were not to the actor’s disadvantage, there would be no need to induce it by contractual force or fraud or compel it by government. It would automatically follow from actors’ pursuit of their self-interest. The beautiful symmetry of the model lies in its being driven by voluntary exchange motivated by subjectively defined self-interest, and working only because it is so driven.

The point implicit in Smith that is brought out by Thorold Rogers is that it is wrong to see the legitimacy of the market economy as essentially resting on the liberation of the propensity to exchange if exchange is not viewed socially. Behind the neo-classical economics which understand freedom of choice as a matter of the economic actor “revealing” his preferences, and behind the classical law of contract which understands freedom of contract as a matter of the contracting party giving effect to his subjective will, stands the value of the autonomy of the economic actor or contracting party. The legitimacy of the market economy does, indeed, ultimately rest on autonomy, but seen as a matter of preference revelation or subjective will, autonomy is focused on the individual and abstracts from the social processes of economic exchange and contractual agreement which constitute the market economy. However, individual autonomy is possible only because of mutual advantage. The economic actor could not reveal his preferences if those preferences could not form the basis of an exchange. The contracting party could not act on his subjective will if that will could not form the basis of a voluntary agreement giving effect to objective intentions. What is essential to the processes of exchange and contract is not solipsistic self-interest but self-interest which is other-regarding; self-interest based on mutual recognition.

The implication of thoughts of this nature for Smith's own view of self-interest is, I believe, undeniable if unclear. We have seen that when Smith discusses the process of exchange in itself rather than the urge to betterment which begins the process, the essential feature of that process is shown to be, not the solipsistic pursuit of self-interest, but persuasion. These passages are brief or very brief. But they should be read in the context of Smith's much more sustained examination of the bounds of the legitimate exercise of self-interest generally, ie in economic and other contexts, the principal theme of which is that the untrammelled exercise of self-interest is immoral, and will be felt to be so by the human being of good will:

There is no commonly honest man ... who does not inwardly feel the truth of the great Stoical maxim that for one man to deprive another unjustly of anything, or unjustly to promote his advantage by the loss of another, is more contrary to nature than death, than poverty, than pain, than all the misfortunes which can affect him either in his body or in his external circumstances.<sup>79</sup>

This sets rules, to put it this way, for the legitimate pursuit of self-interest, rules that may allow the acquisition of goods from another, but not their unjust deprivation; and may allow the promotion of individual advantage, but not by unjustly causing another loss. Such rules certainly cover the initial ownership of goods, but they would be pointless unless they included rules about the process of transfer, for, of course, the value of initial ownership will be reduced or nullified by defects in that process. Smith accordingly tells us that "In the race for wealth and honours and preferments", one who is legitimately self-interested must:

humble the arrogance of his self-love, and bring it down to something which other men can go along with. They will indulge it so far as to allow him to be more anxious about, and to pursue with more earnest assiduity, his own happiness rather than that of any other person ... In the race for wealth and honours and preferments, he may run as hard as he can, and strain every nerve and muscle, in order to outstrip all his competitors. But if he should justle, or throw down any of them, the indulgence of the spectators is entirely at an end. It is a violation of fair

<sup>79</sup> Smith (n 24) at 138. Smith was profoundly influenced by Stoicism and this maxim undoubtedly is taken, indeed taken almost *verbatim*, from *De Officiis*, iii, 21: Cicero, *On Duties* (1991) at 108. I am indebted to G Vivenza, *Adam Smith and the Classics* (2001) at 2 for the identification of this source.

play, which they cannot admit of ... they do not enter into that self-love by which he prefers himself so much to this other.<sup>80</sup>

Though Smith's views on contract are very limited in range for the reasons I have tried to explain, he would not have conceived of the process of contractual agreement as an exercise of solipsistic self-interest. His views on the limits to self-interest necessary for justice are well-developed and relatively clear. His much less well-developed and, in part therefore, much less clear views on the centrality of persuasion to exchange, situated in a generally other-regarding view of the legitimate pursuit of self-interest, would have led him to conceive of contractual agreement in the spirit of mutual recognition, and the concrete form such a law would take would, in fact, be somewhat like the English law described by Leggatt J. It is not that the common law of contract is not essentially other-regarding; it is that we are not self-conscious of what the wisdom of the common law has brought about. In order to defend this claim, I now want to return to the source of our modern discontents: *Walford v Miles*.<sup>81</sup>

#### E. GOOD FAITH IN *WALFORD v MILES*

In *Walford v Miles*, the defendants wished to sell their photographic processing company, PNM Laboratories Ltd. On their own behalf, the defendants' longstanding accountants, who previously had tried to buy the business, made an offer of £1.9 million. The claimants made an offer of £2 million which was accepted subject to contract. The defendants immediately told their accountants of this development, and continued negotiations with them which led to the accountants increasing their own offer to £2 million and the defendants accepting this

<sup>80</sup> Smith (n 24) 83.

<sup>81</sup> I believe that the analysis I am about to put forward of the particular issue in *Walford v Miles* could be traced back to *Hillas and Co Ltd v Arcos Co Ltd* (1932) 43 Ll L Rep 359 and *May and Butcher Ltd v R* [1934] 2 KB 17n , and from this to the treatment of "selfishness" in numerous important cases of the period.

offer. The claimants regarded this as a breach of contract.<sup>82</sup> The claimants did not dispute that the conveyance itself was subject to contract, and the breach they alleged was not of this agreement but of a collateral contract which stipulated certain conditions under which negotiation of the main contract was to have been conducted.

It was clear at the outset that these negotiations would take some time, not least because the defendants sought an assurance of the claimants' ability to pay the price offered, and a comfort letter was obtained from the claimants' bankers. But, aware of the defendants' relationship with their accountants, the claimants were extremely insistent that they would provide this letter, and otherwise commit themselves to the negotiations, only if the defendants agreed to negotiate with them exclusively.<sup>83</sup> It was not disputed that the relevant terms under which the comfort letter was provided were set out in a letter from the claimants to the defendants' solicitor:

[the defendants] agreed that if [the comfort] letter were in [their] hands by close of business on Friday of this week [they] would terminate negotiations with any third party or consideration of any alternative with a view to concluding agreements with [the claimants,] and [they] further agreed that even if [they] received a satisfactory proposal from any third party before close of business on Friday night [they] would not deal with that third party and nor would [they] give further consideration to any alternative.<sup>84</sup>

The alleged breach was of this contract which purported to "lock out" other potential buyers of PNM, including, of course, the accountants who did eventually buy it.

Without fully going into the commercial background which certainly can justify the use of a lock-out agreement in appropriate circumstances, it is necessary here only to say that it was not really argued that a potential offeror cannot in principle protect the expenditure it must make in drawing up its offer by seeking a period of exclusivity in negotiations, and this

<sup>82</sup> For reasons of space, a claim for misrepresentation, though of significance, will not be discussed. This claim was not the occasion of the reference to misrepresentation in Lord Ackner's famous *dictum*.

<sup>83</sup> *Walford v Miles* [1990] 1 EGLR 212 at 214D-E (QB).

<sup>84</sup> *Walford v Miles* (HL) (n 9) 133E.

was allowed by Lord Ackner.<sup>85</sup> Confirming the Court of Appeal's reversal of the trial judge's verdict for the claimants, Lord Ackner found, however, that the particular lock-out agreement relied on by the claimants was an agreement to agree and as such unenforceable in English law for want of certainty. Lord Ackner believed the law about agreements to agree to have been settled over 15 years previously in *Courtney and Fairbairn v Tolaini*, and he approvingly cited the reasoning there of Lord Denning MR:

If the law does not recognise a contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force ... It seems to me that a contract to negotiate, like a contract to enter into a contract, is not a contract known to the law ... I think we must apply the general principle that where there is a fundamental matter left undecided and to be the subject of negotiation, there is no contract.<sup>86</sup>

In *Courtney and Fairbairn v Tolaini*, negotiations had been started about the development of a building site, but the term which remained to be agreed, about which it was argued there was an agreement to agree, was in essence the price of extensive works to be undertaken. Though the case does, in fact, give rise to some concern,<sup>87</sup> it is submitted that it is correct to refuse to enforce an agreement of this nature in circumstances akin to those of *Courtney and Fairbairn v Tolaini*.<sup>88</sup> But the fundamental reason this is so is, not a want of certainty, but that the voluntary, persuasive nature of the main agreement which would likely be reached (the works contract in *Courtney and Fairbairn v Tolaini*, the sale of PNM in

<sup>85</sup> *Walford v Miles* (HL) (n 9) 139D-E.

<sup>86</sup> *Courtney and Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd* [1975] 1 WLR 297 at 301-302, cited in *Walford v Miles* (HL) (n 9) 136H-137A.

<sup>87</sup> The decision in the case allowed the defendant to benefit from work the claimant did in arranging finance for the works without the claimant deriving any of the benefit of the consideration of carrying out the works itself.

<sup>88</sup> As we shall see, the nature of the main contract is crucial context for deciding upon the enforceability of the collateral contract, and in particular the pricing of complex works, conveyances and the like must be distinguished from the pricing of standard goods or goods about which a price can be ascertained by reasonable inquiry, which, of course, are dealt with under The Sales of Goods Act 1979 s 8(2). Even more significant is the distinction between possible gap-filling in agreements and gap-filling in performance after, *ex hypothesi*, agreement has been reached. Lord Ackner was anxious to draw this distinction when commenting on the idea of "best endeavours" (*Walford v Miles* (HL) (n 9) 138B-C) and from, as it were, the opposite perspective, so was Leggatt J in *Yam Seng* (n 1) [122], *Yam Seng* being akin to a best endeavours case. For reasons of space, I shall not pursue this issue.

*Walford v Miles*) would certainly be undermined were the collateral contract enforceable. Discussion of the agreement to agree is in general undermined by confusion over the concept of the want of certainty. It is not that performance of the principal obligations under any main contract would need an undesirable or indeed impossible level of court supervision in order to be performed.<sup>89</sup> It is that, were an agreement to agree enforced then, fearing a substantial damages award reflecting lost expectation on the main contract,<sup>90</sup> the defendant would be effectively obliged to reach an agreement (or pay for release), and such constraints obliging the defendant to agree would unacceptably undermine the persuasive, voluntary nature of that agreement. I repeat that, whilst it is entirely conceivable that a party would agree to conduct its negotiations under certain restrictions of its freedom to contract (such as an exclusivity agreement), it is not reasonably conceivable that a party would objectively intend to curtail its capacity to choose in this drastic way.

As much commentary has indicated, *Walford v Miles* can readily be distinguished from *Courtney and Fairbairn v Tolaini*. A lock-out agreement *qua* lock-out agreement is not an agreement to agree. It rather obliges the defendant to negotiate exclusively with the claimant for the agreement's duration. As we have seen, Lord Ackner himself allowed such agreements in principle. The issue is why the lock-out agreement in *Walford v Miles* was viewed differently.

Lord Ackner regarded it as very important that this particular lock-out agreement did not specify its duration.<sup>91</sup> It may have been wiser for the claimants to have specified a date by

<sup>89</sup> There could be no question of specific performance and I am unaware of any authority in relevant circumstances leading to, as it were, indirect specific performance by means of prohibitory injunction.

<sup>90</sup> The judgment at first instance in *Walford v Miles* (QB) (n 83) 214E-F would lead one to think such an award would have been made but the parties had agreed that quantum would be determined by a higher court. The matter was discussed by Bingham LJ in *Walford v Miles* [1991] 2 EGLR 185 at 188G, 189G-J (CA) and *en passant* in *Walford v Miles* (HL) (n 9) 137B-C, but, of course, these discussions were *obiter*. For reasons of space I will not examine this difficult question as it arose in the law applicable to *Walford v Miles* but, in principle, I believe that expectation loss on the main contract is clearly proximate and should be recoverable for breach of the collateral contract. Limitations on any award of expectation damages might arise from reasons of want of certainty which are not specific to an exclusivity agreement.

<sup>91</sup> *Walford v Miles* (HL) (n 9) 136D-E.

which agreement should have been reached, and after *Walford v Miles* one would be inclined to take this into account when giving advice.<sup>92</sup> But in the case itself it is hard to maintain this position for one can readily see why the parties instead saw the matter as one of the agreement lasting for a “reasonable time”,<sup>93</sup> which, by avoiding a specific date, or by being usefully relaxed about any such date,<sup>94</sup> would itself have minimised one source of pressure to agree. In the Court of Appeal, Bingham LJ, dissenting, had little problem implying the necessary term,<sup>95</sup> and it is not necessary to go into the considerable authority which may be marshalled in justification of his doing so because it is, I believe, generally agreed that, had the lock-out agreement been seen only as a negative exclusivity agreement rather than a positive agreement to agree, it would have been enforceable, and the defendants’ breach of it, though it was the principal issue of fact to be decided at first instance,<sup>96</sup> should then have been unarguable.

It was very largely some unwise over-ambitious pleading by the claimants in response to the perceived difficulty of the agreement’s having no specific duration that led Lord Ackner to formulate the *dictum* which has led to *Walford v Miles* becoming so influential.<sup>97</sup> The lock-out agreement detailed in the claimants’ letter quoted above<sup>98</sup> was made the basis of the statement of claim, but that statement was amended so that the following was added:

It was a term of the [lock-out] agreement necessarily to be implied to give business efficacy thereto that, so long as they continued to desire to sell the said

<sup>92</sup> *Pitt v PHH Asset Management Ltd* [1994] 1 WLR 327 at 332-333.

<sup>93</sup> *Walford v Miles* (HL) (n 9) 136D.

<sup>94</sup> I am at a loss to explain why the trial judge’s finding that the claimants specified that the exclusivity agreement was agreed “with a view to concluding the deal as soon as possible after April 6” did not play a larger part in the appeals: *Walford v Miles* (QB) (n 83) 214E.

<sup>95</sup> *Walford v Miles* (CA) (n 90) 188F-G.

<sup>96</sup> Evidence that the defendants and the eventual buyers of PNM did not in fact continue to negotiate was not believed by the trial judge: *Walford v Miles* (QB) (n 83) 214F-215B.

<sup>97</sup> *Walford v Miles* (HL) (n 9) 140D.

<sup>98</sup> See text accompanying n 84.

property and shares, the [defendants] would continue to negotiate in good faith with the plaintiff.<sup>99</sup>

The purpose of this was to show that the negotiations could not, in the absence of a date for their conclusion, go on forever, but this particular way of doing this purports to transform the negative agreement not to negotiate with others into a positive agreement to agree with the claimant if PNM was to be sold at all, and as such it was rightly rejected by Lord Ackner.<sup>100</sup> Lord Ackner claimed that there was a want of certainty because the main contract was still subject to contract and so literally had not been agreed,<sup>101</sup> but an air of casuistry about this arises from its being an indirect way of referring to the real mischief, which is that enforcing this specific collateral contract as it emerged from the claimants' pleadings would tend to push the defendants into the main agreement in an unacceptable way. The vital clause was not "negotiate in good faith" but "so long as they continued to desire to sell".

If this was not enough, when further pressed on the, as it were, variant point of how the defendants were to end the negotiations if an agreement to sell was not concluded, the defendant suggested that "a term was to be implied giving the [defendants] a right to determine the negotiations, but only if they had 'a proper reason'".<sup>102</sup> Lord Ackner was unprepared to countenance the burden he saw this imposing on the courts of deciding whether or not any reason given was proper,<sup>103</sup> and this was the precise occasion for his famous comments on good faith:

uncertainty is demonstrated in the instant case by the provision which it is said has to be implied in the agreement for the determination of the negotiations. How can a court be expected to decide whether ... a proper reason existed for the termination of negotiations? The answer suggested depends upon whether the negotiations have been determined "in good faith". However 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

<sup>99</sup> Ibid 135B-C.

<sup>100</sup> Ibid 139G-H.

<sup>101</sup> Ibid 137H-138A.

<sup>102</sup> Ibid 136F.

<sup>103</sup> Ibid 138D.

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.<sup>104</sup>

As with some of the famous passages from Smith I have discussed, Lord Ackner's famous *dictum* reveals a different aspect when viewed more widely. In their context, Lord Ackner's comments on good faith are barely connected with the issue *Walford v Miles* actually presented. In defence of an agreement to provide a period of exclusive negotiations with the defendant, the claimant unwisely argued for an agreement that the defendant agree to sell to the claimant, or give a proper reason why it did not do so to the court. But there is no necessary connection between an undertaking to negotiate exclusively with a party and an undertaking to reach agreement with that party. Lord Ackner followed the claimant in eliding them and rejected the resultant view of the agreement. He specifically did not believe it possible to "sever" the exclusivity agreement.<sup>105</sup> Claiming that the agreement the parties had reached was an agreement to agree, and following the claimants in describing such an agreement as a "good faith" commitment to agree, Lord Ackner held that good faith should have no part in negotiations. He had, with respect, no need to do this, and by doing it his rejection of the agreement to agree as unacceptably resting on good faith blurred his rejection of what precisely was unacceptable about the agreement in dispute. That agreement was found unenforceable, not because it involved good faith, but because, in the circumstances of the case,<sup>106</sup> it would have extinguished or unacceptably undermined the persuasive, voluntary quality of the sale agreement it was to facilitate. In those circumstances, and on the claimants' pleadings, Lord Ackner sought to preserve the defendants' right to withdraw from negotiations as protection from an agreement to agree. If his interpretation of the agreement

<sup>104</sup> Ibid 138D-E.

<sup>105</sup> Ibid 139C. One of the majority in the Court of Appeal, Stocker LJ, also advanced a substantial argument that an exclusivity agreement could not be "compartmentalised" or "severed": *Walford v Miles* (CA) (n 90) 190F, 191B.

<sup>106</sup> See n 88.

was correct, then he was right to do this. Rather than the defendants' being bound to agree, Lord Ackner wanted the position to be that, in order to press negotiations to what they regarded as a successful conclusion, the claimants would have had to persuade the defendant by "offering him improved terms". This is, I suggest, an instance of exactly what Smith had in mind by "setting before him a sufficient temptation".<sup>107</sup>

I do not wish to argue that Lord Ackner's approach to the particular facts of *Walford v Miles* is ultimately anything other than unclear, nor that it has been entirely helpful to the subsequent development of the law. He was obliged to reject Bingham LJ's reasoning which, though he himself did not use the term, was based on "severance" of the exclusivity agreement,<sup>108</sup> but one does, I am afraid, get the impression that, focusing on good faith and a proper reason, Lord Ackner talked past Bingham LJ. The significance of the way that Bingham LJ had to distinguish *Walford v Miles* by identifying precisely what was objectionable about the agreement in *Courtney and Fairbairn v Tolaini* - "the terms of the transaction were almost entirely at large"<sup>109</sup> – is not fully appreciated. However, whether Bingham LJ was justified, not in generally distinguishing lock-out agreements from agreements to agree, but in severing a lock-out agreement from the actual collateral agreement reached in *Walford v Miles*, are two different things. If what was agreed was an agreement to agree, Lord Ackner's rejection of this in the circumstances of *Walford v Miles* is, it is submitted, the preferred view.<sup>110</sup>

Where the line between an enforceable exclusivity agreement and an unenforceable agreement to agree should be drawn (and where various forms of agreement that the parties should negotiate, in connection with which "good faith" seems to have become a specific term of art, fall with regard to that line) need not be discussed here. I can only repeat that, as

<sup>107</sup> See text accompanying n 57.

<sup>108</sup> *Walford v Miles* (CA) (n 90) 190E and *Walford v Miles* (HL) (n 9) 139C.

<sup>109</sup> *Walford v Miles* (CA) (n 90) 188H.

<sup>110</sup> *Walford v Miles* (HL) (n 9) 138H-140D.

Lord Ackner himself allowed, some agreements which impose bargaining restrictions serve a valuable commercial purpose and it is regrettable that the way he phrased his argument would seem to have led to his judgment obstructing the development of the law of such agreements.

But this is not at all the point I am trying to make. The crucial point here is that, far from legitimating the exercise of solipsistic self-interest, Lord Ackner was seeking, in the circumstances of *Walford v Miles*, to preserve the persuasive, voluntary nature of any possible agreement between the parties for the sale of PNM. He may to some extent have been wrong in the way he went about this, but, however this is, his motivation in reaching his conclusion is the opposite of what it is generally taken to be.

One intent on underwriting solipsistic self-interest could hardly have found the claimants' position in *Walford v Miles* unattractive, for their self-interest is a prominent feature of the case. We do not know how the claimants learned of PNM's being put up for sale, but we do know that they themselves had no knowledge of photographic processing,<sup>111</sup> and one imagines they would quickly have sold on the business. They believed that the offer price "dramatically undervalued" PNM,<sup>112</sup> and indeed their contract claim was based on the difference between their £2 million offer and the £3 million which they believed was the market value of the company.<sup>113</sup> In addition to the favourable price, in the negotiations the claimants secured, not only the purported lock-out agreement, but a guarantee of PNM's profitability which it was very unwise of the defendants to agree but which nevertheless should itself have been enforceable.<sup>114</sup> The claimants evidently entered into these negotiations in the correct belief that the default rules of contractual negotiation impose no barrier to, indeed facilitate, seeking to gain an advantage from what a contracting party

<sup>111</sup> *Walford v Miles* (HL) (n 9) 132G.

<sup>112</sup> Ibid 132H.

<sup>113</sup> Ibid 135D.

<sup>114</sup> Ibid 132H. Apart from the relationship between the defendants and the eventual buyers, their seeking to avoid this guarantee may be the explanation of the defendants not concluding an agreement with the claimants, though they certainly feared that do so was likely to lead to dispute: *ibid* 134A, 134D.

believes is the superiority of its acumen over that of the other party. Had they clearly confined themselves to a lock-out agreement as a negative exclusivity agreement, the claimants' further exercise of their self-interest would still have been found acceptable to the law of the contract. But when they very arguably tried to interpret the lock-out agreement as a positive agreement to agree, they pushed their self-interest too far and their conduct no longer was found acceptable by Lord Ackner, who sought to prevent the unacceptable undermining of the persuasive, voluntary nature of any resultant main agreement. If it were legitimate to pursue self-interest in any way other than by making misrepresentations, on what ground could Lord Ackner have objected to the claimant putting pressure on the defendant by an agreement to agree which he nevertheless found to be illegitimate and therefore unenforceable?

Lord Ackner's famous *dictum* is, in the end, a very confusing, indeed, with respect, flatly contradictory attempt to state the *ratio* of his judgment. This follows from a misconception about the nature of, not only economic exchange, but also of contractual agreement. With regret and with respect, it is necessary to state baldly that this *dictum* is simply wrong about the law. It is not the law that parties to a negotiation may pursue their self-interest in a way which is limited only by the necessity of avoiding misrepresentations. In *Yam Seng*, Leggatt J identifies all sorts of specific duties which regulate agreement, and even his pathbreaking judgment does not cover all the ground. Those who simply do not agree that these duties regulating agreement are to be found in the English law and I must part company. As it happens, I would not wish to argue that these are the correct duties or that they should be amalgamated into a general doctrine of good faith.<sup>115</sup> I do, however, wish to argue that the law of contract contains an extensive set of other-regarding duties constituting a framework for facilitating agreement, and I am of the opinion that a clear

<sup>115</sup> Campbell (n 11) and Campbell (n 3).

understanding about this may best be reached through a concept (not a general doctrine) of good faith. Even if this is so, it can be only because contractual agreement is not based on solipsistic self-interest but on self-interest which recognises other-regarding duties.

#### F. WALFORD v MILES AS A RELATIONAL CONTRACT

It remains the case that the relational theory of contract which the late Ian Macneil did most to put on a theoretically sound foundation is generally understood as an attempt to distinguish a class of “relational”, or “cooperative”, contracts from “discrete”, or “competitive” contracts. Something like this was indeed a very important theme of Macneil’s work, and it has very considerable value. But an even more important theme, present from the very outset though Macneil himself became properly aware of it only at a relatively late stage of his development of the relational theory, is that all contracts are, indeed, relational, in that the essence of the economic exchange and the law of contract is, not the subjective choices of the individual parties, but the objective relationship between them recognised by the state through which their subjective choices are given effect. The quality of exchange and contract I have tried to identify as the social or other-regarding one of mutual recognition is the core of what Macneil was driving at in the relational theory.

On this basis, Macneil was able coherently to explain why the law of contract is constituted of doctrines which are “plainly restrictions on freedom of contract”,<sup>116</sup> a puzzlingly state of affairs if that freedom is looked upon as a matter of solipsistic self-interest. These doctrines, such as those that Lord Ackner’s famous *dictum* omits but on which Leggatt J focuses:

appear as exceptions to some general rule permitting the parties fully to define their legal status [but] if the role of the law in creating contracts were more completely presented this distortion would not occur, and these matters would be

<sup>116</sup> IR Macneil, “Review of H Shepherd and BD Sher, *Law in Society: An Introduction to Freedom of Contract*” (1960) 46 Cornell LQ 176.

seen not as exceptions to freedom of contract but as simply part of the law's definition of contract.<sup>117</sup>

It is a sign of our current confusion that Lord Ackner's attempt to preserve the persuasive, voluntary nature of agreement has been interpreted as a defence of the solipsistic self-interest which he himself in fact rejects, and that he no doubt understood the issue in this mistaken way himself. Whilst Lord Ackner was in a most important sense right to describe negotiations as "adversarial", and one can admire the air of certainty he therefore gave to his statement of the point he was trying to make, he omitted the essential features of what he was trying to describe. It is, of course, pure speculation, but nevertheless reflection on the extremely elaborate system of rules and courtesy that govern, and so make possible, the legal proceedings that Lord Ackner, formerly a very distinguished advocate, may have had in mind when choosing the word "adversarial" perhaps makes his real meaning clear. We must come to terms with the fact that *Walford v Miles*, like all contracts, is a relational contract.

## G. CONCLUSION

The disappointing reception of Leggatt J's recognition of the existence of duties connected to good faith in *Yam Seng* is, in the end, traceable, not to explicit legal doctrine, but to the attitude taken by parties making a contractual agreement which is implied by those who deny they are implying any such attitude when interpreting such an agreement. Solipsistic self-interest is so much regarded as legitimate or even natural that it disappears from conscious understanding. Such a way of understanding freedom of contract constitutes a literal acceptance of *laissez faire* which is simply unsupportable (and so is overwhelmingly hedged about with incoherent exceptions when actually put into effect in legislation and adjudication).

<sup>117</sup> Ibid at 177.

Within Smith scholarship, it has long not been possible credibly to attribute an acceptance of *laissez faire* of this nature to Adam Smith himself. The possible influence of acknowledging this on the law of contract has so far been restricted by two things in particular. First, Smith's own writings on the law of contract, and indeed private law as such, were limited in extent and, more importantly, were theoretically limited by concepts of justice and especially police that heavily focused on government action understood as regulation in its usual sense, ie as intervention. The position taken here, that regulation (of which intervention is but a part) should embrace all actions by the state, including legislation and adjudication facilitative of economic action, simply was not Smith's position. It of course implies no criticism in the pejorative sense of Smith to now maintain that this wide concept of regulation allows us to develop the theory of the law of contract that Smith himself could not develop.

This is particularly to be regretted because what Smith says of the exercise of economic self-interest is of the first importance for our understanding of the task of the law of contract in regulating agreement. Far from conceiving of economic self-interest as solipsistic, Smith intrinsically saw it as other-regarding. The recognition of both the other's ownership of the goods and of the other's power to decide to transfer them (or not), which decision therefore could legitimately be brought about only by persuasion, are essential to Smith's concept of exchange. Though his concept of police would not allow him properly to analyse the law of contract as the process by which exchange is carried out, what he said of that process is best seen as the exercise of self-interest based on mutual recognition.

Leggatt J has made it much clearer than it has previously been in the case law that the English law of contract contains many duties which may usefully be seen as related to good faith. If the analysis put forward here is found persuasive, then Leggatt J's conclusion is in one sense unsurprising. The law of contract exists to give legal institutional form to

exchange, and exchange has to be based on mutual recognition if it is to display the properties given for its legitimacy in economics (mutual advantage and Pareto optimisation through choice) and law (voluntariness of agreement through freedom of contract). It is not a question of limiting exploitative contracts. It is a question of what is necessary for contract “to exist at all”.<sup>118</sup> As the reception of *Yam Seng* shows, the current situation is one in which the existing rules relating to good faith which are to be found in the positive law of contract cannot be welded into a coherent doctrine because it is thought that legitimate contractual self-interest is solipsistic. It is not. Rather, it is other-regarding as those existing rules indicate and as an explicit concept of good faith would make clear. The development of a concept of good faith would not be an altruistic imposition on the contractual law of agreement and the negotiations of contracting parties. It would be a clarification of the actual nature of the self-interest of the contracting parties which the law of contract must facilitate.

<sup>118</sup> D Markovits, “Good Faith as Contract’s Core Value”, in G Klass et al (eds), *Philosophical Foundations of Contract Law* (2014) 272 at 293.