CO-OPERATION AND PREVENTION IN CONTRACT LAW

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Under Australian law, the requirement that parties to a contract must co-operate with each other manifests in at least four distinct duties or standards: (i) each party must co-operate in performing acts reasonably necessary to achieve contractual objectives; (ii) each party must not prevent or delay the other party in performing the contract; (iii) each party must do what is reasonably necessary to ensure that the other party enjoys the benefit of the contract; and (iv) each party must not undermine the purpose of any express promise that it has made. These duties and standards exist as default rules given effect, in most cases, as terms implied in law into all contracts. They are justified by the need to protect the bargain or exchange embodied by the contract — the performance interests of the parties. Hence, the scope of each duty or standard is defined through a normative assessment of what is necessary and appropriate in terms of protecting the bargain; the court strikes a balance between maintenance of the bargain and respect for the freedom of each party to act in self-interest.

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I Introduction

The 'duty to co-operate' and the 'prevention principle' are topical features in the modern law of contract in Australia. Since 2020, they have featured in over 25 judgments at first instance or intermediate appellate level. This area of law is a beacon for litigation because it is neither clearly defined, nor properly understood. Uncertainty surrounds not only the proper juridical basis for the imposition of co-operative duties and standards, but also the nature and scope of such duties and standards. This article seeks to provide some much-needed clarity. It examines the minutiae of the cases and considers deeper theoretical questions about co-operation in contract. The article makes three claims.

The first claim is that duties and standards of co-operation in contract law are justified by the need to protect the bargain or exchange embodied by the contract, or, to put it differently, the performance interests of the parties. Hence, co-operative duties and standards feature as default rules of law, usually implemented as implied terms in law or rules of construction.

The second claim of this article is that there are four recognised duties or standards of co-operation under Australian contract law:

1 the 'performance duty', pursuant to which each party must perform acts reasonably necessary to achieve contractual objectives (derived from *Mackay v Dick* ('*Mackay*'));[1]

2 the 'prevention principle', pursuant to which each party must not prevent or delay the other party in performing the contract;

3 the 'benefit duty', pursuant to which each party must do all that is reasonably necessary to ensure that the other party enjoys the benefit of the contract (derived from *Butt v M'Donald* ('*Butt*'));[2] and

[1] (1881) 6 App Cas 251, 263–4 (Lord Blackburn, Lord Selbourne LC agreeing at 272) ('*Mackay*').

[2] (1896) 7 QLJ 68, 70–1 (Griffith CJ) ('*Butt*').

4 the 'negative covenant', pursuant to which each party must not hinder or prevent the fulfilment of the purpose of any express promise made by that party.

Each of these duties or standards is distinct in terms of its sphere of operation, line of authority and the consequences that flow from non-compliance. The performance duty, the benefit duty and the negative covenant are ordinarily characterised as terms implied in law into all contracts, the breach of which gives rise to the usual remedies for breach of contract. The prevention principle, on the other hand, is a free-standing rule, the contravention of which gives rise to bespoke legal consequences. There is overlap between the different duties and standards in the sense that one set of facts may trigger application of more than one duty or standard.

The third and final claim of this article is that the scope of each co-operative duty or standard is ultimately defined through a normative assessment, namely, an assessment of what is necessary and appropriate in terms of protecting the bargain. The duty to co-operate in performance and the duty to co-operate in ensuring contractual benefit are both limited by what is reasonably necessary in the circumstances. And the prevention principle is only triggered if a bespoke test of causation is satisfied, and, as some authorities suggest, if the allegedly preventative conduct is sufficiently wrongful. Through these mechanisms, contract law protects the performance interests of the parties to an appropriate degree; it strikes a balance between maintaining the bargain and respecting the freedom of each party to act in self-interest. What is effectively prohibited is conduct that unacceptably undermines the exchange between the parties.

This article consists of three parts. The first part explores justifications for co-operation in contract. The second part outlines the four distinct duties or standards of co-operation that are recognised under Australian contract law. And the final part examines the scope of co-operation in contract law. To be clear, the article is essentially interpretative; it accepts the law as it is. It is rooted in a thorough examination of the case law. That said, the article draws on theoretical perspectives in exploring the justification for, and scope of, co-operation in contract. The focus is Australian common law. But the extent to which a duty of good faith is recognised under Australian law is beyond the scope of the article.[3] Instead, the focus is those duties and standards that require co-operation between the parties in giving effect to the contractual relationship.

[3] But see below n 101.

II The Justification for Co-Operation in Contract Law

There are at least four potential theoretical justifications for the imposition of co-operative duties and standards under contract law. The first, and most fitting, is that co-operation in contract is needed to protect the bargain or exchange embodied by the contract, or to put it differently, the performance interests of the parties. As Stoljar expressed the point, over half a century ago:

> Since the fundamental and pervasive theory of the common law of contract is that of a bargain between two parties, the natural — though by no means obvious — corollary is that the parties must mutually co-operate to enable and facilitate the fulfilment of their bargain: the corollary is, in other words, that the law must so control and direct the 'performatory' conduct between the parties as to secure the full protection of their respective bargain interests.[4]

The 'performance interest' of each party is essentially its interest 'in getting that which the other party has to offer' — 'the other party's performance [of the contract]'.[5] For many, protection of the performance interest explains or justifies remedies for breach of contract;[6] damages, for example, are seen as a monetary substitute for actual performance.[7] Co-operative duties and standards in contract serve a similar institutional objective. One of the key goals of contract is the enforcement of each party's interest in the other party's promised performance. Put differently and perhaps more broadly, parties must agree on an exchange of consideration as a bargain to form a contract,[8] and contract law is a

[4] Samuel J Stoljar, 'Prevention and Co-Operation in the Law of Contract' (1953) 31(3) *Canadian Bar Review* 231, 231. See also Edwin W Patterson, 'Constructive Conditions in Contracts' (1942) 42(6) *Columbia Law Review* 903, 929.

[5] Daniel Friedmann, 'The Performance Interest in Contract Damages' (1995) 111 (October) *Law Quarterly Review* 628, 629.

[6] See especially ibid 629–32; Brian Coote, 'Contract Damages, *Ruxley*, and the Performance Interest' (1997) 56(3) *Cambridge Law Journal* 537, 541–3 ('Contract Damages, *Ruxley*, and the Performance Interest').

[7] See generally David Winterton, *Money Awards in Contract Law* (Hart Publishing, 2015).

[8] See, eg, *Currie v Misa* (1875) LR 10 Ex 153, 162 (Lush J for Keating, Lush, Quain and Archibald JJ); *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424, 456–7 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ).

valuable 'institution'[9] or 'facility'[10] because, among other things, it enforces that bargain. Hence, broadly speaking, we need co-operation in contract to protect the consensual bargain made between the parties; just as remedies are needed to enforce the performance interest, co-operative duties and standards are needed to maintain it.

The second justification for co-operation in contract is that it is founded upon the notion that a person should not benefit from his or her own wrong. The Victorian Court of Appeal recently embraced this rationalisation.[11] The Court relied on authority that had recognised 'the principle that a man shall not be permitted to take advantage of his own wrong' in the context of the construction of contingent conditions; if a contract stipulates that it will terminate upon the occurrence of an event and one party brings about that event, there is an interpretive presumption that termination of the contract depends upon an election by the innocent party.[12] The difficulty with this justification (for co-operation in contract) is that it presupposes that a lack of co-operation is wrong; it does not explain why co-operation is required under the law of contract.[13]

The third justification for the requirement that contract parties must co-operate is that it is necessary as a matter of fairness, policy or common sense. As Brooking J stated in *SMK Cabinets v Hili Modern Electrics Pty Ltd*, discussing the prevention principle:

[9] See Brian Coote, 'The Essence of Contract' (Pt 2) (1988) 1(3) *Journal of Contract Law* 183, 203 ('The Essence of Contract'); Lord Hoffmann, 'The Intolerable Wrestle with Words and Meanings' (1997) 114(4) *South African Law Journal* 656, 664; JW Carter, *The Construction of Commercial Contracts* (Hart Publishing, 2013) 44 [2-06].

[10] Coote, 'The Essence of Contract' (n 9) 201.

[11] *Bensons Property Group Pty Ltd v Key Infrastructure Australia Pty Ltd* [2021] VSCA 69, [102] (Niall, Emerton and Sifris JJA) ('*Bensons*'). See also *Hera Project Pty Ltd v Bisognin [No 3]* [2017] VSC 268 ('*Hera Project (VSC)*') discussing the prevention principle: at [105] (Riordan J). Note that an appeal from this decision was dismissed on other grounds: *Bisognin v Hera Project Pty Ltd* [2018] VSCA 93, [5], [214]–[215] (Tate JA, Kyrou JA agreeing at [216], Coghlan JA agreeing at [217]) ('*Hera Project (VSCA)*').

[12] *Bensons* (n 11) [102] (Niall, Emerton and Sifris JJA), citing *New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France* [1919] AC 1, 9 (Lord Atkinson), quoted with approval in *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418, 440–1 (Latham CJ, Williams and Fullagar JJ).

[13] The wrongdoing rationale perhaps explains the prevention principle insofar as it is enlivened only in the event of unlawful or otherwise wrongful conduct. However, even accepting that the prevention principle at least requires unlawful or wrongful conduct, the wrongdoing rationale does not explain why, or on what basis, any particular conduct is wrongful such that the principle is triggered.

> [W]hile the basis of prevention is the theory of the implied term, the term is one which is implied by the Court *as a matter of fairness or policy* or in consequence of a rule of law, the Court not being concerned with the intention of the parties except to the extent that the term may be excluded by an expressed contrary intention …[14]

To similar effect, in *ACT Cross Country Club Inc v Cundy* ('*ACT Cross Country Club*'), Perram J described the duty to co-operate in performance and the duty to co-operate in ensuring contractual benefit as constituting 'a basic principle of commonsense'.[15] True it is that fairness, reasonableness and common sense explain some key features of co-operation in contract. But the issue with any rationalisation of co-operative duties and standards as a matter of fairness or common sense is that it does not explain much; in particular, it does not explain why co-operation is required of contract parties aside from saying that it is 'fair' or 'makes sense'. The explanation simply invites or requires further explanation.

The final justification for an overarching principle of co-operation is that it is simply a matter of presumed intention: parties to a contract are required to co-operate because this is what the parties must be taken to have intended. This rationalisation for co-operation in contract explains why parties are required to co-operate. However, it fails to explain the extent and degree of co-operation that is required. Ultimately, any rationalisation of co-operation in terms of presumed intention must link intention with protection of the bargain between the parties. Hence, Peden J noted, writing before her Honour's appointment to the Supreme Court of New South Wales:

> The only justification of the general obligation of cooperation is that cooperation is derived from the very nature of contract in the common law system; the courts assume that parties intend their bargain to have legal effect and they would therefore intend to cooperate to ensure that this happens, unless they express a contrary intention in their contract.[16]

Co-operation is a matter of presumed intention only insofar as one presumes (as one naturally would) that parties intend that the bargain or exchange at the core of the contract be enforced.

[14] [1984] VR 391, 395 (Brooking J, Starke J agreeing at 401, Kaye J agreeing at 401) (emphasis added) ('*SMK Cabinets*').

[15] [2010] FCA 782, [24] ('*ACT Cross Country Club*').

[16] Elisabeth Peden, '"Cooperation" in English Contract Law: To Construe or Imply' (2000) 16(1) *Journal of Contract Law* 56, 56.

In summary, the imposition of duties and standards of co-operation in contract is justified because the bargain or exchange embodied by the contract needs to be protected; co-operation is needed in contract to preserve the performance interest of each party. In this sense, co-operative duties and standards, like remedies for breach, are imposed by law (subject to contrary agreement) on the basis that, by agreeing a contract, the parties assume or consent to the imposition of duties and standards needed to maintain the contract institution.[17]

The fact that co-operation in contract is justified on an institutional basis sheds some light on its proper juridical foundation. Duties and standards of co-operation have been conceptualised in a range of ways under contract law, including as matters of construction, implications in law or in fact, or simply rules of law.[18] In *Commonwealth Bank of Australia v Barker* ('*Barker*'), French CJ, Bell and Keane JJ suggested that the proper juridical basis for the duty to co-operate is not of great importance: '[d]ebates about characterisation … involve taxonomical distinctions which do not necessarily yield practical differences'.[19] Prominent commentators share this view.[20] Even so, the fact that co-operation in contract is justified by the need to protect the bargain suggests that co-operative duties and standards are in the nature of default rules of law,[21] whether given effect simply as rebuttable rules, universally implied terms, or rules of construction. Unless the parties agree otherwise, each party must co-operate in giving effect to the contractual relationship. But there are limits on the extent of co-operation that the law requires. The degree of co-operation warranted is established on a case-by-case basis; it depends on an assessment of what is necessary and appropriate in terms of protecting the exchange between the parties. Before we explore further these questions of scope, we must first analyse the specific duties and standards of co-operation that are recognised under Australian contract law.

[17] See Coote, 'Contract Damages, *Ruxley*, and the Performance Interest' (n 6) discussing damages: at 541.

[18] See below the discussion with respect to each distinct duty or standard of co-operation in Part III.

[19] (2014) 253 CLR 169, 187 [24] ('*Barker*').

[20] See, eg, JD Heydon, *Heydon on Contract* (Thomson Reuters, 2019) 847 [21.370]; JW Carter, *Contract Law in Australia* (LexisNexis Butterworths, 7th ed, 2018) 633–4 [28-09] ('*Contract Law in Australia*'). But see Peden (n 16) 66–7.

[21] Cf *Bensons* (n 11) in which the Victorian Court of Appeal held that the prevention principle is not 'a free standing principle of law that, when breached, carries with it enforceable remedies that are independent of the contract': at [101] (Niall, Emerton and Sifris JJA).

III Duties and Standards of Co-Operation in Contract Law

Although the need for co-operation in contract is justified by an overarching rationale, it manifests through concrete duties or standards. That is to say, there is an 'implicit requirement of co-operation' in contract law that is 'implemented by a number of particular legal doctrines'.[22] Under Australian contract law, there are four main duties or standards that impose a requirement to co-operate or, at least, consequences for failing to co-operate.[23] First, under the performance duty, each party must perform acts reasonably necessary to achieve contractual objectives. Second, pursuant to the prevention principle, each party must not prevent or delay the other party in performing the contract. Third, under the benefit duty, each party must do all that is reasonably necessary to ensure that the other party enjoys the benefit of the contract. And finally, under the negative covenant, each party must not hinder or prevent fulfilment of the purpose of any express promise that the party has made.

Broadly speaking, each of these duties or standards requires some sort of co-operation in giving effect to the contractual relationship. Hence, the term 'duty to co-operate' is sometimes used to describe all of the duties and standards, including the prevention principle,[24] and sometimes it is reserved for one of them, in particular, the performance duty[25] or the benefit duty.[26] In addition, the obligations are often conflated with one another.[27] For example, in *Bensons*

[22] Patterson (n 4) discussing co-operation under American contract law: at 931.

[23] There are further manifestations in particular contexts: see, eg, below nn 51, 54. For more discussion, see generally Stoljar (n 4); JF Burrows, 'Contractual Co-Operation and the Implied Term' (1968) 31(4) *Modern Law Review* 390.

[24] See, eg, *Spiers Earthworks Pty Ltd v Landtec Projects Corporation Pty Ltd [No 2]* (2012) 287 ALR 360 ('*Spiers*') where the 'prevention principle' was described as a 'manifestation of the obligation to cooperate': at 370 [47] (McLure P, Newnes JA agreeing at 373 [64]); *Australis Media Holdings Pty Ltd v Telstra Corporation Ltd* (1998) 43 NSWLR 104 ('*Australis*') where the 'prevention principle' was described as a 'negatively expressed duty of co-operation': at 125 (Mason P, Beazley and Stein JJA); *New South Wales v Banabelle Electrical Pty Ltd* (2002) 54 NSWLR 503, 528 [67] (Einstein J) ('*Banabelle*').

[25] See, eg, *Jackson Nominees Pty Ltd v Hanson Building Products Pty Ltd* [2006] QCA 126, [50] (McMurdo J, Jerrard JA agreeing at [24]) ('*Jackson Nominees*').

[26] See, eg, NC Seddon and RA Bigwood, *Cheshire and Fifoot Law of Contract* (LexisNexis Butterworths, 11th Australian ed, 2017) 480–2 [10.41].

[27] See, eg, *ACT Cross Country Club* (n 15) [23]–[24] (Perram J) where the Court endorsed the duties derived from *Mackay* (n 1) and *Butt* (n 2).

Property Group Pty Ltd v Key Infrastructure Australia Pty Ltd ('*Bensons*'),[28] the Victorian Court of Appeal recently described what appeared to be a unified obligation. Citing both *Mackay* (co-operation in performance) and *Butt* (co-operation in ensuring contractual benefit), the Court weaved in the concept of prevention in describing an obligation pursuant to which 'a party to a contract must not engage in conduct that prevents the other from enjoying the benefit of the contract'.[29]

This article submits that each duty or standard of co-operation is distinct in terms of its line of authority, its sphere of operation, and the consequences that flow from non-compliance. The aim of this part of the article is to summarise the nature of each duty or standard and explain why each of them is distinct under Australian contract law.

A *Co-Operation in Performance: The 'Performance Duty'*

It is a default rule of law, most commonly characterised as a term implied in law into all contracts,[30] that each party to a contract must perform acts that are reasonably necessary to achieve performance of the contract. To put it differently, if the contract requires that something be done, the parties must do all that is reasonably necessary to achieve that contractual objective. For example, if a contract for sale of goods requires that the goods be tested in some way, each party is obligated to do what is reasonably necessary to ensure that the goods are properly tested.[31]

The obligation to co-operate in performance — the performance duty — is usually framed according to Lord Blackburn's statement in *Mackay*:

> [W]here in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is

[28] *Bensons* (n 11).

[29] Ibid [102] (Niall, Emerton and Sifris JJA), citing *Mackay* (n 1) and *Butt* (n 2). Special leave to appeal to the High Court of Australia was refused due to the case not being 'a suitable vehicle for consideration by [the] Court of the prevention principle': Transcript of Proceedings, *Key Infrastructure Australia Pty Ltd v Bensons Property Group Pty Ltd* [2021] HCATrans 185, [435] (Keane J).

[30] See, eg, *Barker* (n 19) 189 [29] (French CJ, Bell and Keane JJ); *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 449 (McHugh and Gummow JJ) ('*Byrne*').

[31] See *Mackay* (n 1) 264 (Lord Blackburn, Lord Selbourne LC agreeing at 272).

> necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.[32]

The High Court has endorsed this statement of principle on several occasions.[33] The obligation has also been described as a duty 'to do all co-operative acts necessary to bring about the contractual result'.[34]

The performance duty is conventionally understood as a default rule of law given effect as a term implied in law into all contracts. For example, in its most recent discussion of the topic, the High Court clearly indicated, albeit obiter, that the duty was an implication in law in all contracts — a 'universal' implication.[35] That said, the duty is also often described as a rule of 'construction' that applies to all contracts.[36] And at least two intermediate appellate judgments in Australia indicate that the duty is properly understood as a duty implied in law into a particular class of contracts, namely, contracts 'where the parties have agreed that something shall be done which cannot be done unless both concur in doing it'.[37] The obligation to co-operate in performance has also occasionally been conceptualised as an implication in fact based on business necessity.[38]

[32] Ibid 263 (Lord Blackburn).

[33] See, eg, *Bruce v Tyley* (1916) 21 CLR 277, 287–8 (Isaacs J) ('*Bruce*'); *Electronic Industries Ltd v David Jones Ltd* (1954) 91 CLR 288, 297–8 (Dixon CJ, McTiernan, Webb, Kitto and Taylor JJ) ('*Electronic Industries*'); *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, 607 (Mason J, Gibbs J agreeing at 599, Stephen J agreeing at 599, Aickin J agreeing at 615) ('*Secured Income*'); *Barker* (n 19) 187–8 [25] (French CJ, Bell and Keane JJ), 201 [61] (Kiefel J).

[34] *Perini Corporation v Commonwealth* [1969] 2 NSWR 530, 545 (Macfarlan J) ('*Perini Corporation*'). For a slightly different description, see *Secured Income* (n 33): 'an obligation on one contracting party to co-operate in doing all that is necessary to be done for the performance by the other party of his obligations under the contract': at 607 (Mason J, Gibbs J agreeing at 599, Stephen J agreeing at 599, Aickin J agreeing at 615).

[35] *Barker* (n 19) 189 [29] (French CJ, Bell and Keane JJ). See also *Byrne* (n 30) 449 (McHugh and Gummow JJ).

[36] This description was adopted by Lord Blackburn in *Mackay* (n 1) 263 (Lord Selbourne LC agreeing at 272). It is also one of the characterisations endorsed by Mason J in *Secured Income* (n 33) 607 (Gibbs J agreeing at 599, Stephen J agreeing at 599, Aickin J agreeing at 615). See also Peden (n 16) 67.

[37] *Jackson Nominees* (n 25) [52] (McMurdo J, Jerrard JA agreeing at [24]). See also *Elders IXL Ltd v National Employers' Mutual General Insurance Association Ltd* (1988) 5 ANZ Ins Cas ¶60-847 ('*Elders IXL*') where the New South Wales Court of Appeal held that the duty applies to cases 'where the parties have agreed to do something which requires their joint co-operation': at 75,299 (McHugh JA, Samuels and Priestley JJA agreeing at 75,297).

[38] See, eg, *Bruce* (n 33) 287–8 (Isaacs J); *Perini Corporation* (n 34) 545 (Macfarlan J); *Banabelle* (n 24) 528 [67] (Einstein J).

Whatever its proper juridical basis, the authorities make clear that the 'content' and 'operation' of the performance duty is to be determined in light of the express terms of the contract.[39] Resort to the duty may save a contract that is otherwise void for uncertainty and incompleteness.[40] A failure to comply with the duty amounts to a breach of contract.[41] It gives rise to an entitlement to damages[42] and potentially a power to terminate.[43] It may also excuse the other party from its obligation to perform (if performance is no longer possible).[44]

Often, what is required under the performance duty is the performance of joint acts; that is to say, the contract requires that something be done, and that something can only be done through the combined actions of the parties. For example, in *Mackay*, a contract for the sale of an excavator was expressed to be conditional upon the excavator being tested and meeting specific performance requirements.[45] The parties expressly agreed that the machine would be erected and tested at a particular location before a particular date.[46] Hence, the purchaser breached its duty to co-operate by failing to work with the vendor so as to ensure that the machine was fairly and properly tested.[47]

Whether parties are obligated to co-operate in performance beyond the performance of joint acts is, on one view, uncertain. Some authorities suggest that the duty to co-operate in performance only extends to the performance of joint acts. Most notably, in *Elders IXL Ltd v National Employers' Mutual General*

[39] *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 358 [168] (Gummow, Hayne, Heydon and Kiefel JJ) ('*Campbell*'). See below n 151 and accompanying text.

[40] See, eg, *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600, 605 (Gibbs CJ, Murphy and Wilson JJ); *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444, 484 (Lord Fraser, Lord Diplock agreeing at 480, Lord Scarman agreeing at 487, Lord Bridge agreeing at 488). Cf *Banabelle* (n 24) where the failure to expressly identify an expert under an expert determination regime could not be cured by resort to the duty: at 528–9 [70]–[71] (Einstein J).

[41] See, eg, *Secured Income* (n 33) 609 (Mason J, Gibbs J agreeing at 599, Stephen J agreeing at 599, Aickin J agreeing at 615).

[42] See, eg, *Electronic Industries* (n 33) where the High Court awarded damages of £1,086 for breach of contract: at 293, 298–9 (Dixon CJ, McTiernan, Webb, Kitto and Taylor JJ). See also *Colley v Overseas Exporters* [1921] 3 KB 302, 310–11 (McCardie J).

[43] See, eg, *ACT Cross Country Club* (n 15) [40] (Perram J).

[44] *National Power Australia LLC v Energy Australia* (Supreme Court of New South Wales, Rolfe J, 24 July 1998) 115. See also below n 79 and accompanying text.

[45] *Mackay* (n 1) 263 (Lord Blackburn).

[46] Ibid.

[47] Ibid 264 (Lord Blackburn, Lord Selbourne LC agreeing at 272), 270–1 (Lord Watson, Lord Selbourne LC agreeing at 272).

Insurance Association Ltd ('*Elders IXL*'), McHugh JA stated and applied the duty in this narrow way:

> [The duty to co-operate recognised in *Mackay*] applies only to a case where the parties have agreed to do something which requires their joint co-operation. It does not apply to a case where one party has promised to pay money or confer a benefit in exchange for the other party's act or forbearance.[48]

At least one subsequent decision at first instance has also applied this reasoning.[49] But more recent judgments have questioned whether the obligation to co-operate in performance is limited in this way.[50] And, as a matter of principle, co-operation in performance should extend to the performance of any act reasonably necessary to achieve a contractual objective because this is what is necessary and appropriate in terms of protecting the performance interests of the parties.[51]

B *Co-Operation in Not Preventing Performance: The 'Prevention Principle'*

It is a default rule of law, usually conceptualised as the 'prevention principle', that each party must not prevent or delay the other party in performing the contract.[52] The consequences of engaging in preventative conduct are not ordinarily the usual consequences that flow from a breach of contract. Instead, if one party prevents the other in performance, bespoke consequences may result, such as that any time for performance is suspended and any conditions

[48] *Elders IXL* (n 37) 75,299. The Court held that there was no breach of the performance duty by an insurer who cancelled certain workers' compensation policies after having promised to pay a rebate on premiums if those policies continued for a further 12 months; the policies were not renewed because the insurer decided to cease writing that type of insurance: at 75,297 (Samuels JA, Priestly JA agreeing at 75,297), 75,301 (McHugh JA).

[49] *Jackson Nominees* (n 25) [53] (McMurdo J, Jerrard JA agreeing at [24]).

[50] See, eg, *Wellington v Huaxin Energy (Aust) Pty Ltd* (2019) 12 ARLR 316, 334–5 [73] (Jackson J) ('*Wellington (QSC)*'), affd [2020] QCA 114, [100] (Philippides JA, Morrison JA agreeing at [1], Ryan J agreeing at [101]) ('*Wellington (QCA)*').

[51] Hence, an arguable manifestation of the duty is the obligation to take reasonable steps to satisfy any condition precedent to performance. See, eg, *Butts v O'Dwyer* (1952) 87 CLR 267 ('*Butts*') where the High Court, without citing *Mackay* (n 1), found that an obligation requiring that a vendor take reasonable steps to obtain ministerial consent for a sale of Crown land was implied as a matter of business necessity: *Butts* (n 51) 280, 283 (Dixon CJ, Williams, Webb and Kitto JJ).

[52] Particularly in the building and construction context: see, eg, *Spiers* (n 24) 370 [47] (McLure P, Newnes JA agreeing at 373 [64]).

precedent are taken to be dispensed with or satisfied. Hence, the prevention principle is better understood as a standard or norm of conduct, rather than a duty.

The prevention principle can be traced back to several 19th century building cases.[53] The principle is usually conceptualised as one pursuant to which each party must not prevent or delay performance by the other party.[54] For example, in *Marshall v Colonial Bank of Australasia*, the High Court framed the principle as follows: 'all contractual relations impose upon the parties a mutual obligation that neither shall do anything which is calculated to hamper the other in the performance of the contract on his part'.[55] Likewise, in *Barque Quilpué Ltd v Brown* ('*Barque Quilpué*'), Vaughan Williams LJ stated: 'there is an implied contract by each party that he will not do anything to prevent the other party from performing the contract or to delay him in performing it'.[56]

The prohibition on prevention in performance is properly understood as a 'rule',[57] 'rule of law',[58] 'doctrine'[59] or 'principle'[60] that applies to all contracts.[61] However, like other elements of co-operation in contract, it is in the nature of a default rule because parties are generally free to modify the prevention

[53] See, eg, *Holme v Guppy* (1838) 3 M & W 387; 150 ER 1195, 1196 (Parke B) ('*Holme*'); *Dodd v Churton* [1897] 1 QB 562, 566 (Lord Esher MR) ('*Dodd*').

[54] There is an apparently separate but related line of authority pursuant to which each party must not make performance impossible (including, it would seem, one's own performance) by bringing about the end of a continuing state of affairs necessary for the contract to take effect: see *Stirling v Maitland* (1864) 5 B & S 840; 122 ER 1043, 1047 (Cockburn CJ); *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701, 717 (Lord Atkin) ('*Southern Foundries*'); *Bahr v Nicolay [No 2]* (1988) 164 CLR 604, 646 (Brennan J); *Australis Media Holdings* (n 24) in which the New South Wales Court of Appeal framed the duty as a 'negatively expressed duty of co-operation': at 123–5 (Mason P, Beazley and Stein JJA).

[55] (1904) 1 CLR 632, 647 (Griffith CJ for the Court) ('*Marshall*').

[56] (1904) 2 KB 264, 271 ('*Barque Quilpué*').

[57] See, eg, *Marshall* (n 55) 652 (Griffith CJ for the Court).

[58] See, eg, *Hera Project (VSC)* (n 11) [108] (Riordan J), quoting *SMK Cabinets* (n 14) 394 (Brooking J); *Jackson Nominees* (n 25) [28] (Jerrard JA).

[59] *Geys v Société Générale, London Branch* [2013] 1 AC 523, 573 [131] (Lord Sumption JSC) ('*Geys*').

[60] See above n 52.

[61] See also *Built Environs Pty Ltd v Tali Engineering Pty Ltd* [2013] SASC 84, [152] (Blue J). Cf *Bensons* (n 11) in which the Victorian Court of Appeal held that the prevention principle is not 'a free standing principle of law that, when breached, carries with it enforceable remedies that are independent of the contract': at [101] (Niall, Emerton and Sifris JJA).

principle by express agreement.[62] The principle is sometimes said to arise as an implication, as it was described in *Barque Quilpué*.[63] But the authorities rarely conceptualise the prohibition on prevention as a contract term or refer to a 'breach' or 'contravention' of the prevention principle. Instead, it is usually simply said that the principle is 'enlivened' such that the unique legal consequences available can be considered.[64]

Conduct in prevention rarely gives rise to liability in damages.[65] Instead, the consequences of preventative conduct are bespoke; they usually do not take the form of remedies for breach of contract. Three main examples are discussed below. First, if party A prevents or delays performance by party B, party A may be precluded from insisting on performance (or at least timely performance) by party B.[66] Second, if party A delays the completion of works by party B, party B may be entitled to disregard requirements to perform on time under the contract[67] and party A may be precluded from claiming liquidated damages for delay from party B.[68] Third, if party A prevents the satisfaction by party B of a contingent condition (including by evincing an unwillingness or inability to

[62] At least in the building and construction context: *SMK Cabinets* (n 14) 395 (Brooking J, Starke J agreeing at 401, Kaye J agreeing at 401). An extension of time regime under a building and construction contract is a typical example: see, eg, *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* (2017) 95 NSWLR 82, 110 [117] (McColl JA, Beazley ACJ agreeing at 85 [1], Macfarlan JA agreeing at 116 [146]) ('*Probuild Constructions*'). See also *MP Water Pty Ltd v Veolia Water Australia Pty Ltd [No 3]* [2021] NSWSC 1023, [274] (Williams J) ('*MP Water*').

[63] *Barque Quilpué* (n 56) 271 (Vaughan Williams LJ).

[64] See, eg, *Spiers* (n 24) 372 [58] (McLure P, Newnes JA agreeing at 373 [64]).

[65] For authorities and commentary indicating that damages are recoverable, see, eg, *Perini Corporation* (n 34) 543–4 (Macfarlan J); Carter, *Contract Law in Australia* (n 20) 635 [28-10]; Burrows (n 23) 401; *Nitrate Producers Steamship Co v George Wills & Co* (1903) 19 TLR 626, 626–7 (Kennedy J); *Spiers* (n 24) 373 [61] (McLure P, Newnes JA agreeing at 373 [64]), discussed in *Midson Construction (Qld) Pty Ltd v The Haggarty Group Pty Ltd* [2021] QDC 280, [129] (Porter DCJ). See also below n 71.

[66] *Spiers* (n 24) 370 [47] (McLure P, Newnes JA agreeing at 373 [64]). See also *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd* [2007] BLR 195, 205 [47] (Jackson J) ('*Multiplex Constructions*').

[67] Time is said to be 'at large': see, eg, *Probuild Constructions* (n 62) 110 [116] (McColl JA, Beazley ACJ agreeing at 85 [1], MacFarlan JA agreeing at 116 [146]), citing *Holme* (n 53) 1196 (Parke B), Nicholas Dennys and Robert Clay, *Hudson's Building and Engineering Contracts* (Sweet & Maxwell, 13th ed, 2015) 740 [6-028].

[68] See, eg, *Holme* (n 53) 1196 (Parke B); *Dodd* (n 53) 567 (Lord Esher MR); *SMK Cabinets* (n 14) 394–5 (Brooking J, Starke J agreeing at 401, Kaye J agreeing at 401).

perform), the condition may be taken to be dispensed with or satisfied.[69] If the stipulation is a condition precedent to the payment of money by party A to party B, party B may be able to recover the money in debt.[70] If the stipulation is otherwise a condition precedent to performance by party A, party B may be able to recover damages for party A's failed performance;[71] but the principle does not extend to simply deeming that party A performed or performed in a particular way.[72] In all instances, the remedial consequences of conduct in prevention of performance depend on the terms of the contract[73] and 'the circumstances of the case'.[74]

For conduct to be preventative, the conduct must make it impossible for a party to perform at all or on time. This is a question of causation.[75] It involves two enquiries. First, one must establish what is required under the contract; that is, one must identify the contractual requirement the performance of which has been prevented.[76] Second, one must ascertain

[69] *Foran v Wight* (1989) 168 CLR 385, 395–6 (Mason CJ) ('*Foran*'); *Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* (1954) 90 CLR 235, 246–7 (Dixon CJ) ('*Peter Turnbull*'); *Park v Brothers* (2005) 222 ALR 421, 434 [43] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ) ('*Park*').

[70] See, eg, *Mackay* (n 1) 264 (Lord Blackburn, Lord Selborne agreeing at 272), 270 (Lord Watson, Lord Selborne agreeing at 272). In *Geys* (n 59), Lord Sumption JSC described this as 'the doctrine of deemed performance': at 573 [131]. But see Heydon (n 20) which states that '[d]oubts have been raised over whether the "doctrine" in truth exists': at 850 [21.390]. See also *Newmont Pty Ltd v Laverton Nickel NL* (1983) 1 NSWLR 181 (Privy Council) ('*Newmont*') in which the Privy Council held that 'whether the performance of a condition precedent is excused where a party has prevented its performance must depend on the nature of the condition and the circumstances of the case': at 188 (Sir Gibbs for the Judicial Committee).

[71] For example, party B may be able to recover damages if party A prevents satisfaction of the condition by being unwilling to perform and party A continues to be unwilling to perform when the time for performance of its obligation would have arrived had the condition been satisfied: *Peter Turnbull* (n 69) 250 (Kitto J), quoted in *Park* (n 69) 433 [42] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

[72] *Multiplex Constructions Pty Ltd v Abigroup Contractors Pty Ltd* [2005] 1 Qd R 610, 630–1 [42] (Jerrard JA, McMurdo P agreeing at 618 [1], Mullins J agreeing at 632 [50]).

[73] *SMK Cabinets* (n 14) 395 (Brooking J, Starke J agreeing at 401, Kaye J agreeing at 401); *Probuild Constructions* (n 62) 110 [117] (McColl JA, Beazley ACJ agreeing at 85 [1], MacFarlan JA agreeing at 116 [146]); *Newmont* (n 70) 188 (Sir Gibbs for the Judicial Committee).

[74] *Newmont* (n 70) discussing the prevention of satisfaction of a condition p3recedent to remuneration: at 188 (Sir Gibbs for the Judicial Committee).

[75] See, eg, *Turner Corporation Ltd (in prov liq) v Co-Ordinated Industries Pty Ltd* (1995) 11 BCL 202, 221–2 (Rolfe J) ('*Turner Corporation*'); *Spiers* (n 24) 370 [47]–[48] (McLure P, Newnes JA agreeing at 373 [64]).

[76] Cf *Australis Media Holdings* (n 24) 124 (Mason P, Beazley and Stein JJA).

whether the particularised conduct caused a failure to perform the contractual requirement.[77]

There is debate regarding whether conduct must also be unlawful or otherwise wrongful so as to enliven the principle.[78] Conduct in breach of contract, including a breach of the performance duty,[79] may trigger the principle, And, to this extent, the prevention principle does not impose any obligation beyond that already imposed by the contract (or contract law). However, to the extent that the prevention principle is also triggered by conduct that is unlawful or wrongful but not in breach of contract, or if the principle is triggered by any conduct that is preventative whether wrongful or not, the principle effectively requires that a party avoid such conduct even though (absent the principle) there is no express or implied term to this effect in the contract. In fact, in the building and construction context, a principal can engage in preventative conduct by ordering variations (ie extra work) in accordance with the contract;[80] at least in this context, even conduct in the exercise of a contractual right can be preventative.

C *Co-Operation in Ensuring Contractual Benefit: The 'Benefit Duty'*

It is a default rule of law, most commonly characterised as a term implied in law into all contracts,[81] that each party to a contract must do all that is reasonably necessary to ensure that the other party enjoys the benefit of the contract. The benefit duty is conceptually distinct from the performance duty in that the latter requires the performance of acts necessary to achieve contractual objectives, while the former primarily applies as a restraint on the inherent discretions of each party. For example, if the contract confers a benefit on party A, and party B enjoys a discretion the exercise of which can impact on the conferral of that benefit, then party B might be restricted in its exercise of its

[77] See, eg, *Bensons* (n 11) [179]–[185] (Niall, Emerton and Sifris JJA).

[78] See below nn 205–12 and accompanying text.

[79] For example, in *Mackay* (n 1), the purchaser's refusal to properly test the machinery that he had agreed to purchase amounted to a breach of the duty to co-operate in performance: at 264 (Lord Blackburn, Lord Selborne agreeing at 272), 269–70 (Lord Watson, Lord Selborne agreeing at 272). It also enlivened the prevention principle such that the vendor was entitled to claim the purchase price in debt: see above n 70 and accompanying text.

[80] See, eg, *SMK Cabinets* (n 14) 396–7 (Brooking J, Starke J agreeing at 401, Kaye J agreeing at 401).

[81] See, eg, *Barker* (n 19) 189 [29] (French CJ, Bell and Keane JJ). See also *Byrne* (n 30) 449 (McHugh and Gummow JJ).

discretion. Pursuant to the benefit duty, party B might be precluded from taking action (eg it cannot make a donation)[82] or it may be required to take action (eg it must grant a lease).[83] There is no reason in principle why the duty to co-operate in ensuring contractual benefit should require the performance of acts, but not also abstinence from action; what is required is conduct that does not unacceptably undermine the bargain.[84]

The obligation to co-operate in ensuring contractual benefit — the benefit duty — was first stated under Australian law by Griffith CJ in *Butt*:

> It is a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract.[85]

The duty has been cited with approval by the High Court on numerous instances.[86] The dominant conceptualisation of the duty is that it is a term implied in law into all classes of contracts.[87] However, it is also sometimes said to be a 'rule of construction'.[88] Recently, it has been suggested that the ad hoc implication of the duty depends on the test of necessity employed in determining whether a term is implied in law into a particular class of contracts.[89] As with

[82] See, eg, *Adaz Nominees Pty Ltd v Castleway Pty Ltd* [2020] VSCA 201, [139]–[141], [145]–[146] (Whelan JA and Riordan AJA) ('*Adaz Nominees*').

[83] See *Secured Income* (n 33) 608 (Mason J, Gibbs J agreeing at 599, Stephen J agreeing at 599, Aickin J agreeing at 615). The grant of a lease was not required in the circumstances: at 615 (Mason J, Gibbs J agreeing at 599, Stephen J agreeing at 599, Aickin J agreeing at 615).

[84] For an example of the benefit duty requiring abstinence from action, see, eg, *Adaz Nominees* (n 82) [139]–[141] (Whelan JA and Riordan AJA). Cf *BAE Systems Australia Ltd v Cubic Defence New Zealand Ltd* (2011) 285 ALR 596 ('*BAE Systems*') where Besanko J remarked that the applicant's pleaded breach was 'expressed in negative terms' and did not identify 'the acts the respondent should have performed to comply with its duty of cooperation': at 611–12 [67].

[85] *Butt* (n 2) 70–1 (Cooper J agreeing at 71, Power J agreeing at 71). See also Burrows (n 23) which states that it is 'a general principle that if one man contracts to confer a benefit on another, he must not do an act which substantially detracts from the other's enjoyment of that benefit': at 390.

[86] See, eg, *Secured Income* (n 33) 607 (Mason J, Gibbs J agreeing at 599, Stephen J agreeing at 599, Aickin J agreeing at 615); *Nullagine Investments Pty Ltd v The Western Australian Club Inc* (1993) 177 CLR 635, 659 (Deane, Dawson and Gaudron JJ) ('*Nullagine Investments*'); *Barker* (n 19) 190 [30] n 121 (French CJ, Bell and Keane JJ), 201 [61] (Kiefel J).

[87] See, eg, *Barker* (n 19) 189 [29] (French CJ, Bell and Keane JJ); *Jackson Nominees* (n 25) [49] (McMurdo J, Jerrard JA agreeing at [24]); *Adaz Nominees* (n 82) [116] (Whelan JA and Riordan AJA).

[88] See, eg, Peden (n 16) 67.

[89] See *Adaz Nominees* (n 82) [116], [139]–[140] (Whelan JA and Riordan AJA).

the performance duty, a failure to comply with the benefit duty amounts to a breach of contract[90] that may sound in damages,[91] excuse performance[92] or give rise to a power to terminate.[93] The 'content' and 'operation' of the duty is said to be subject to express terms.[94]

The obligation to co-operate in ensuring contractual benefit only protects benefits conferred under the contract;[95] one cannot rely on the duty to secure a benefit that is not provided by the contract.[96] In *Wolfe v Permanent Custodians Ltd* ('*Wolfe*'), the Victorian Court of Appeal remarked:

> Although the duty to co-operate is broadly stated in *Butt v McDonald*, the scope of the duty is defined by what has been promised under the contract; it is not a general duty to ensure another party obtains an anticipated benefit.[97]

Hence, in *Barker*, where the employer bank had failed to notify Mr Barker of redeployment opportunities following termination of his employment,[98] the High Court held that there was no breach of the duty because there was 'no relevant contractual benefit'; Mr Barker had no 'contractual entitlement to the benefit of the Redeployment Policy'.[99] By contrast, in *Butt*, a vendor who had sold a 'butcher's shop' (when they did not own the property on which the shop was located) was held to have impliedly warranted that he had good title to the

[90] *Butt* (n 2) 70–1 (Griffith CJ, Cooper J agreeing at 71, Power J agreeing at 71); Ibid [116]–[117], [139]–[140].

[91] In *Butt* (n 2), damages of £30 were awarded for breach of an implied warranty: at 71 (Griffith CJ, Cooper J agreeing at 71, Power J agreeing at 71).

[92] *Famestock Pty Ltd v The Body Corporate for No 9 Port Douglas Road Community Title Scheme 24368* [2013] QCA 354, [15] (Douglas J, de Jersey CJ agreeing at [1], Fraser JA agreeing at [2]).

[93] See, eg, *ACT Cross Country Club* (n 15) [40] (Perram J).

[94] *Campbell* (n 39) 358 [168] (Gummow, Hayne, Heydon and Kiefel JJ). See below n 151 and accompanying text.

[95] *Beerens v Bluescope Distribution Pty Ltd* (2012) 39 VR 1, 13 [54] (Nettle JA, Redlich JA agreeing at 22 [90]) ('*Beerens*'); Seddon and Bigwood (n 26) 483 [10.42].

[96] See, eg, *McMahon v National Foods Milk Ltd* (2009) 25 VR 251, 265 [12]–[13] (Nettle JA, Neave JA agreeing at 288 [100], Dodds-Streeton JA agreeing at 288 [101]); *WIN Corporation Pty Ltd v Nine Network Australia Pty Ltd* (2016) 341 ALR 467, 481–2 [73] (Barrett AJA, McColl JA agreeing at 468 [1], Sackville AJA agreeing at 468 [2]).

[97] (2013) 9 BFRA 88, 95 [28] (Warren CJ, Neave and Whelan JJA) ('*Wolfe*'). See also *Adaz Nominees* (n 82) [118] (Whelan JA and Riordan AJA), [278] (McLeish JA).

[98] *Barker* (n 19) 178–80 [2]–[8] (French CJ, Bell and Keane JJ).

[99] Ibid 188 [27] (French CJ, Bell and Keane JJ, Gageler J agreeing at 217 [119]).

structure of the butcher's shop even though the structure constituted a fixture attached to the land; the benefit of the shop structure was secured by the duty.[100]

Considering that the benefit duty merely secures benefits conferred under a contract, one may wonder how the duty adds to the relevant express promise to confer the benefit. The answer is that the duty acts primarily as a restraint on the inherent discretions of each party, that is, the discretions not expressly conferred by the contract[101] — 'the acts or omissions which are clearly within the obligor's control'.[102] For example, if the purchaser of an office building promises to pay a purchase price in part determined by aggregate rentals in the building four months after settlement, the duty may require that the purchaser not act capriciously or arbitrarily in determining whether to grant any lease in the building.[103] Likewise, if a services agreement provides for the payment of a service fee calculated by reference to the principal's group profits, the principal may breach the benefit duty by making a charitable donation to a related entity that has the effect of substantially reducing the service fee.[104] That said, if an unfettered discretion is clearly established by the contract, then the duty arguably cannot act as a restraint on that discretion.[105] Ultimately, the extent to which a party must exercise a discretion in a particular way so as to ensure that the other party enjoys the benefit of the contract depends upon the terms of the contract, properly construed, and a broader consideration of what is necessary and appropriate in terms of protecting the bargain between the parties. Indeed, it might turn on whether the party has a legitimate interest in exercising the discretion.[106]

[100] *Butt* (n 2) 71 (Griffith CJ, Cooper J agreeing at 71, Power J agreeing at 71).

[101] The duty of good faith, if implied, usually acts as a restraint on the exercise of express contractual powers and discretions: see, eg, *Burger King Corporation v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558, 571–2 [176]–[177], 572 [185] (Sheller, Beazley and Stein JJA).

[102] Patterson (n 4) 937.

[103] *Secured Income* (n 33) 609–10 (Mason J, Gibbs J agreeing at 599, Stephen J agreeing at 599, Aickin J agreeing at 615).

[104] *Adaz Nominees* (n 82) [139]–[141] (Whelan JA and Riordan AJA).

[105] See, eg, *Beerens* (n 95) 13 [54] (Nettle JA, Redlich JA agreeing at 22 [90]). See also *Link v Gannawarra Shire Council* [2020] VSC 511, [38]–[45] (Delany J) ('*Link*') which involved an unfettered discretion under a related instrument.

[106] See below nn 190–1 and accompanying text.

D *Co-Operation in Not Undermining Express Promises: The 'Negative Covenant'*

It is a default rule of law, given effect as an 'implication'[107] or a 'matter of construction',[108] that each party to a contract must not hinder or prevent the fulfilment of the purpose of any express promise made by that party. This obligation is often described as the 'negative covenant'.[109] It sounds very similar to the benefit duty. Indeed, it has been conceptualised as a 'negative correlate' of that duty.[110] But it is slightly different. It involves the imposition of additional ancillary obligations of a negative character — obligations that go beyond what is required under the relevant express promise, but which are necessary to fulfill the purpose of the promise.

The duty not to undermine express promises was first expressed, in the Australian context, by Dixon J in *Shepherd v Felt & Textiles of Australia Ltd*.[111] The High Court affirmed the existence of the duty in *Peters (WA) Ltd v Petersville Ltd*: '[t]he law … implies a negative covenant not to hinder or prevent the fulfilment of the purpose of the express promises made in [a contract]'.[112] However, at least one judge has questioned the universal application of the duty.[113] A breach of the negative covenant amounts to a breach of contract.[114] Conceptually at least, breach may give rise to an entitlement to

[107] *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* (1993) 45 FCR 84, 94 (Gummow J) ('*Service Station*'); *Peters (WA) Ltd v Petersville Ltd* (2001) 205 CLR 126, 142 [36] (Gleeson CJ, Gummow, Kirby and Hayne JJ) ('*Peters*').

[108] *Castlemaine Tooheys Ltd v Carlton & United Breweries Ltd* (1987) 10 NSWLR 468, 483 (Hope JA, Samuels JA agreeing at 497, Priestley JA agreeing at 497) ('*Castlemaine Tooheys*').

[109] *Service Station* (n 107) 94 (Gummow J).

[110] Seddon and Bigwood (n 26) 481 [10.41] n 414. Cf *Perini Corporation* (n 34) 540–1, 545 (Macfarlan J).

[111] (1931) 45 CLR 359, 378 (Dixon J, Starke J agreeing at 374, McTiernan J agreeing at 391) ('*Shepherd*').

[112] *Peters* (n 107) 142 [36] (Gleeson CJ, Gummow, Kirby and Hayne JJ). See also *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]* (1984) 156 CLR 414, 434–5 (Deane J, Gibbs CJ agreeing at 421, Mason J agreeing at 421, Wilson J agreeing at 421, Dawson J agreeing at 446) ('*Moorgate Tobacco*').

[113] 'Sometimes positive language may import a negative stipulation as a matter of construction or of implication, but often there is no justification for doing either of these things': *Castlemaine Tooheys* (n 108) 482 (Hope JA, Samuels JA agreeing at 497, Priestley JA agreeing at 497).

[114] *Shepherd* (n 111) 378–9 (Dixon J, Starke J agreeing at 374, McTiernan J agreeing at 391); *Service Station* (n 107) 99–100 (Gummow J).

damages.[115] It may also give rise to injunctive or declaratory relief[116] or a power to terminate.[117]

As with the benefit duty, one may wonder why the negative covenant is necessary considering that an innocent party can claim for breach of the relevant express promise. For example, in *Castlemaine Tooheys Ltd v Carlton & United Breweries Ltd*, Hope JA stated:

> If a party to a contract acts or threatens to act in a way which will prevent, impede or frustrate the performance or satisfaction of a positive obligation on his part, there may be an actual or anticipatory breach by him of that obligation, and he will be liable accordingly.[118]

Putting to one side the overlap between co-operation and repudiation, what the negative covenant adds turns on the fact that it protects the fulfilment of the purpose of express promises. It prohibits conduct that does not constitute a breach of an express promise, but nevertheless undermines the purpose of the express promise. For example, in *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd*, a publishing contract expressly required that the publisher submit proofs to the principal before publication, but it did not expressly prohibit publication by the publisher without approval of the proofs.[119] Nonetheless, the negative covenant applied to restrain the publisher from proceeding with publication in the absence of approval; permitting the publisher to publish without approval would undermine the purpose of the express promise requiring that the publisher submit proofs before publication.[120] By comparison, in *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]*, there was no breach of any negative covenant because no express promise was undermined.[121] Under a licence to manufacture and distribute a particular brand of cigarettes in Australia, the licensee promised to respect and assist in the

[115] The author could find no example of damages being awarded for breach of the covenant. But damages would have presumably been an available remedy in *Adaz Nominees* (n 82).

[116] See, eg, *Service Station* (n 107) where the Court ordered declaratory relief for breach of the negative covenant: at 99–100 (Gummow J).

[117] See, eg, *Shepherd* (n 111) 370–1 (Rich J), 385 (Dixon J, Starke J agreeing at 374, Evatt J agreeing at 391, McTiernan J agreeing at 391).

[118] *Castlemaine* (n 108) 483 (Hope JA, Samuels JA agreeing at 497, Priestley JA agreeing at 497).

[119] *Service Station* (n 107) 88–9 (Gummow J).

[120] Ibid 99–100.

[121] *Moorgate Tobacco* (n 112) 435–6 (Deane J, Gibbs CJ agreeing at 421, Mason J agreeing at 421, Wilson J agreeing at 421, Dawson J agreeing at 446).

maintenance of the licensor's trade marks with respect to 'Licensed Products'.[122] The licensee registered a trade mark for its own new light brand of cigarettes, 'Golden Lights'.[123] The trade mark was very similar to an overseas 'line extension' of the licensor's mark, 'Kent Golden Lights'.[124] However, the licensee did not undermine the purpose of its express promise under the licence agreement (to respect and maintain the licensor's trade marks with respect to 'Licensed Products') because the line extension 'Kent Golden Lights' would not have qualified as a 'Licensed Product' under the licence agreement.[125] The alleged negative covenant required abstinence from action beyond what was necessary to fulfil the purpose of the express promises made under the contract.

E *Distinct but Overlapping Duties and Standards*

One can see from the discussion in this part of this article that the negative covenant, along with each of the performance duty, the benefit duty and the prevention principle, constitute distinct duties or standards of co-operative conduct. Each duty or standard requires some sort of co-operation in giving effect to the contractual relationship, whether it be, for example, performing acts necessary to achieve contractual objectives or abstaining from interfering with the other party's performance of the contract. And each duty or standard is distinct because its sphere of operation can be clearly defined and a failure to comply gives rise to legal consequences. That said, there is certainly overlap.

In particular, a failure to perform a particular act may constitute a breach of both the duty to co-operate in performance and the duty to co-operate in ensuring contractual benefit. For example, in *ACT Cross Country Club*, a settlement agreement between the ACT Cross Country Club and Mr Cundy provided that Mr Cundy was to have the right to organise and administer the upcoming edition of the Canberra Marathon.[126] The Club's failure to notify the roads authority that its dispute with Mr Cundy had settled constituted a failure to perform an act reasonably necessary to achieve a contractual objective

[122] Ibid 430–1 (Deane J, Gibbs CJ agreeing at 421, Mason J agreeing at 421, Wilson J agreeing at 421, Dawson J agreeing at 446).

[123] Ibid.

[124] Ibid 423 (Deane J, Gibbs CJ agreeing at 421, Mason J agreeing at 421, Wilson J agreeing at 421, Dawson J agreeing at 446).

[125] Ibid 435–6 (Deane J, Gibbs CJ agreeing at 421, Mason J agreeing at 421, Wilson J agreeing at 421, Dawson J agreeing at 446).

[126] *ACT Cross Country Club* (n 15) [4] (Perram J).

(namely, Mr Cundy holding the marathon) and a failure to do all that was reasonably necessary to ensure that Mr Cundy enjoyed the benefit of the contract (namely, the benefit of organising and administering the marathon).[127] In essence, in some cases, the same act or acts are needed to achieve a contractual objective and to ensure contractual benefit; unsurprisingly, contractual objectives and contractual benefits are often tied together. However, this is not always the case. For example, a party may need to perform an act to ensure contractual benefit in circumstances where the act is not also necessary to achieve a contractual objective. *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* ('*Secured Income*') can be understood in this way.[128] The question was whether the purchaser of an office building had breached its duty to co-operate by refusing to grant a lease-back of space to the vendor.[129] The final instalment of the purchase price was to be paid four months after settlement and it was to be reduced if aggregate rentals in the building fell below a certain threshold.[130] When aggregate rentals fell well below the threshold, the vendor proposed leasing back space in the building.[131] On one view at least, granting the lease-back was not an act reasonably necessary to achieve a contractual objective under the sale contract; payment of the purchase price was certainly a contractual objective, but only payment in accordance with the terms of the contract was required and the terms provided for a reduction in the case of the final instalment. Hence, it is hard to view the case as one involving the performance duty. By contrast, the failure to grant the lease-back certainly had the effect of reducing the purchase price that would otherwise be paid to the vendor, making the case one that clearly enlivened the benefit duty (even if the duty was not breached in the circumstances).[132] Perhaps for this reason, the benefit duty has been conceptualised as broader than the performance duty.[133]

Beyond the intersection between the performance duty and the benefit duty, there is also a practical overlap between other duties and standards of co-operation in contract. For example, taking a specific action may enliven the

[127] Ibid [40].

[128] *Secured Income* (n 33).

[129] Ibid 607–8 (Mason J).

[130] Ibid 600–1.

[131] Ibid 602.

[132] For further discussion of *Secured Income* (n 33), see below Part IV(A).

[133] *Secured Income* (n 33) 607 (Mason J, Gibbs J agreeing at 599, Stephen J agreeing at 599, Aickin J agreeing at 615), discussed in Seddon and Bigwood (n 26) 481 [10.41] n 415; *Jackson Nominees* (n 25) [50] (McMurdo J, Jerrard JA agreeing at [24]).

prevention principle and amount to a breach of both the negative covenant and the benefit duty. As is demonstrated in *Adaz Nominees Pty Ltd v Castleway Pty Ltd* ('*Adaz Nominees*'), a party can breach the negative covenant and the benefit duty through the same act (in that case being the making of a donation by a principal that had the effect of substantially diminishing a service fee payable to a service provider).[134] One can also see in *Mackay* that a breach of the duty to co-operate in performance may enliven the prevention principle.[135] Even so, as the law currently stands, each duty or standard of co-operation outlined in this article exists as a distinct and rebuttable rule of law, pursuant to which, in the event of non-compliance, legal consequences may follow.

IV The Scope of Co-Operation in Contract Law

Those who treasure the power of party autonomy in contract may be concerned by the apparent scope of the duties and standards of co-operation that are recognised under Australian contract law. However, the role of co-operation in contract is not unbridled; co-operative duties and standards are curtailed and shaped in line with their underlying rationale, namely, protection of the performance interests of the parties. To be more specific, the scope of co-operation in contract is limited in at least two ways:

1 the performance duty and the benefit duty are both limited by what is reasonably necessary in the circumstances; and

2 the scope of the prevention principle is circumscribed by the question of causation and, in some cases at least, an assessment of the wrongfulness of any preventative conduct.

To understand these limits on the scope of co-operation in contract, one needs to understand how, in a practical sense, co-operative duties and standards are defined. And this requires an appreciation of the different techniques and considerations involved.

Jurists and commentators largely agree that it does not matter whether co-operation is a matter of construction or implication.[136] Perhaps one reason for this is that the definition of co-operative duties and standards involves both elements of interpretation and elements of implication. While it is hard to draw

[134] *Adaz Nominees* (n 82) [139]–[141] (Whelan JA and Riordan AJA).

[135] See above n 79.

[136] See above nn 19–20 and accompanying text.

a sharp distinction between the two techniques, it is generally accepted that interpretation and implication are at least 'different processes governed by different rules'.[137] Interpretation is the tool used to define what the parties expressly agreed in the contract.[138] Implication, on the other hand, is a technique employed to fill gaps in the express terms[139] — a technique through which terms are added 'to deal with matters for which, ex hypothesi, the parties themselves have made no provision'.[140] Roughly speaking, terms are implied in law into particular classes of contract as a matter of 'necessity', the test of necessity being whether 'the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless, or, perhaps, be seriously undermined'.[141] And a term is implied in fact on an ad hoc basis as a matter of presumed intention[142] if, among other things, it is necessary to give business efficacy to the contract.[143]

In defining co-operative duties and standards, one obviously needs to interpret the contract to identify a contractual foundation on which the duty or standard is based. That is to say, co-operation in contract requires a 'contractual anchor'.[144] For example, to define the scope of the benefit duty, the contract

[137] *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742, 756 [26] (Lord Neuberger PSC). See also *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, 345 (Mason J). On the nature of interpretation and implication as contract law techniques, see also Ryan Catterwell, *A Unified Approach to Contract Interpretation* (Hart Publishing, 2020) ch 7.

[138] The aim of interpretation is to ascertain the reasonable person's understanding of the meaning of the terms, taking into account the surrounding circumstances (when appropriate), the objects served by the transaction and the practical consequences of competing interpretations: see, eg, *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, 656–7 [35] (French CJ, Hayne, Crennan and Kiefel JJ).

[139] HK Lücke, 'Ad Hoc Implications in Written Contracts' (1973) 5(1) *Adelaide Law Review* 32, 47; Andrew Robertson, 'The Foundations of Implied Terms: Logic, Efficacy and Purpose' in Simone Degeling, James Edelman and James Goudkamp (eds), *Contract in Commercial Law* (Lawbook, 2016) 143, 148–9.

[140] *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472, 481 (Sir Bingham MR).

[141] *Byrne* (n 30) 450 (McHugh and Gummow JJ), quoted in *Barker* (n 19) 189 [29] (French CJ, Bell and Keane JJ).

[142] *The Moorcock* (1889) 14 PD 64, 68 (Bowen LJ).

[143] *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 283 (Lord Simon for Viscount Dilhorne, Lords Simon and Keith) (Privy Council); *Barker* (n 19) 185 [21] (French CJ, Bell and Keane JJ).

[144] *Adaz Nominees* (n 82) [288] (McLeish JA).

must be construed to establish the conferral of a benefit under the contract.[145] One also needs to interpret the contract in determining what is reasonably necessary to protect that benefit. However, the definition of co-operative duties and standards involves more than simply ascertaining the meaning of words in a contract. This is because the contract itself rarely talks about, for example, a party needing to do everything reasonably necessary to achieve contractual objectives or confer contractual benefits.[146] As a result, the formulation and definition of co-operative duties and standards resembles the process of implication, particularly in those instances where a failure to co-operate sounds in damages for breach of contract; there is no breach of an express term, and so a term is implied. As part of the process, the court necessarily draws on external standards; most if not all cases involve a normative assessment or what Patterson described as 'an (ethical) evaluation of … fairness or justice'.[147] The scope of the performance duty and the benefit duty turn on an assessment of whether the conduct allegedly in breach is reasonably necessary.[148] And the question whether the prevention principle is enlivened involves the application of bespoke tests of causation, and, in some cases at least, an examination regarding whether the conduct was unlawful or otherwise wrongful.[149] These mechanisms define the boundaries of co-operation in contract; they ensure that the parties do not undermine the bargain to an unacceptable extent. In the end, the court must strike a balance between maintaining the bargain and respecting the freedom of the parties to act in self-interest.

A *Performance and Benefit: Reasonableness and Necessity*

The scope of both the performance duty and the benefit duty turns on what is reasonably necessary in the circumstances: what is reasonably necessary to achieve contractual objectives and what is reasonably necessary to ensure that

[145] See, eg, ibid [72]–[74] (Whelan JA and Riordan AJA, McLeish JA agreeing at [254]).

[146] But see, eg, cls 13.2 and 14 in *Castlemaine Tooheys* (n 108) 474 (Hope JA); cl 15.1 in *Wellington (QSC)* (n 50) 327 [43] (Jackson J).

[147] Patterson (n 4) 930.

[148] *Secured Income* (n 33) 607 (Mason J, Gibbs J agreeing at 599, Stephen J agreeing at 599, Aickin J agreeing at 615).

[149] See below Part IV(B) for discussion and authorities.

the other party enjoys the benefit of the contract.[150] The question of reasonable necessity can be informed by what the parties expressly agreed. At least theoretically, the parties can significantly narrow the scope of each duty, and perhaps exclude it altogether, by agreeing express words to this effect.[151] However, in practice, the parties rarely expressly agree any obligation to co-operate.[152] As a result, the court resorts to its understanding of what is reasonable and necessary. In doing so, the court effectively defines the extent to which each party can act in self-interest at the expense of the contractual bargain. Each assessment of what is reasonably necessary in the circumstances establishes the degree to which contract law protects the performance interests of the parties; it demonstrates the extent to which a party can act in a way that undermines the bargain.

What is reasonably necessary in terms of co-operation in performance depends on an assessment of the acts allegedly required to fulfil the duty. Acts that are 'necessary to the performance … of fundamental obligations under the contract' must be performed;[153] otherwise, the bargain would be unacceptably undermined. For example, in *Mackay*, it was fundamental to the contract that the excavator be properly tested; after all, the proper testing of the machine was a condition precedent to the buyer's obligation to pay the contract price.[154] However, it is not so clear whether the duty to co-operate in performance requires the performance of acts that are not fundamental,[155] that is, 'lesser

[150] *Secured Income* (n 33) 607 (Mason J, Gibbs J agreeing at 599, Stephen J agreeing at 599, Aickin J agreeing at 615); *Wellington (QCA)* (n 50) [78] (Philippides JA, Morrison JA agreeing at [1], Ryan J agreeing at [101]).

[151] The author has not been able to find examples of either duty being expressly excluded: but see *Spiers* (n 24): 'it is unnecessary to determine whether contractual parties are free to exclude the implied duty to cooperate, which is a term implied by law': at 373 [61] (McLure P, Newnes JA agreeing at 373 [64]); *Wellington (QSC)* (n 50) where the duty to co-operate was not excluded by further assurance clauses: at 327–8 [43]–[47] (Jackson J), affd *Wellington (QCA)* (n 50) [40], [78]–[82] (Philippides JA, Morrison JA agreeing at [1], Ryan J agreeing at [101]); *Castlemaine Tooheys* (n 108) discussing the exclusion of an implied term restraining a vendor, under a sale of business, from diminishing goodwill: at 495–7 (Hope JA, Samuels JA agreeing at 497, Priestly JA agreeing at 497); *Wang v HMG Capital Pty Ltd [No 2]* [2023] VSC 399, [94]–[97] (Elliott J).

[152] See above n 146 and accompanying text.

[153] *Secured Income* (n 33) 607 (Mason J, Gibbs J agreeing at 599, Stephen J agreeing at 599, Aickin J agreeing at 615).

[154] *Mackay* (n 1) 263 (Lord Blackburn).

[155] *Secured Income* (n 33) 607 (Mason J, Gibbs J agreeing at 599, Stephen J agreeing at 599, Aickin J agreeing at 615).

obligations'.[156] On one view, the failure to perform an act that is not fundamental to the contract is acceptable because it would not undermine the bargain to an unacceptable degree.

Beyond considering the fundamentality or essentiality of any acts to be performed, the court must also determine the degree of co-operation that is reasonably necessary in the circumstances. As the High Court stated in *Electronic Industries Ltd v David Jones Ltd*: 'what is reasonable depends on all the circumstances including the nature and purpose of the express stipulations'.[157] In that case, a company was engaged to install a television display for demonstration in a retail store for a 13-day period. Due to industrial action, the retailer sought to postpone the demonstration period without fixing a new date. The electronics company agreed to the postponement and subsequently sought to arrange a new date for the demonstration. However, the retailer refused to agree a new date.[158] The High Court held that the retailer had breached its duty to co-operate by failing 'to make its store available … at some proper and reasonable time'.[159] The retailer only had to take reasonable steps to facilitate the demonstration, but it failed to do so.[160]

Moving on from the performance duty, the benefit duty primarily applies as a restraint on the inherent discretions of each party, that is, the discretions that are not expressly conferred by the contract. If the contract confers a benefit on party A, and party B enjoys a discretion the exercise of which can impact on the conferral of that benefit, then party B may be restricted by the duty in exercising that discretion. In essence, the key question is: to what extent can a party act in a way that impacts on a benefit conferred on the other party to the contract?

On one view, the standard of performance — what is reasonably necessary to ensure contractual benefit — must be based in the contract text. In an oft-cited passage from *Secured Income*, Mason J (with Gibbs J, Stephen J and Aickin J agreeing) remarked that 'whether the contract imposes a duty to co-operate [in ensuring contractual benefit] … depends … not so much on the application of the general rule of construction as on the intention of the parties

156 *Banabelle* (n 24) 526 [62] (Einstein J).

157 *Electronic Industries* (n 33) 298 (Dixon CJ, McTiernan, Webb, Kitto and Taylor JJ).

158 Ibid 293–4.

159 Ibid 298.

160 Ibid.

as manifested by the contract itself'.[161] In that case, a contract for sale of a commercial office building provided that a portion of the purchase price was to be reduced if, and to the extent that, aggregate rental income did not meet a certain threshold four months after settlement.[162] When it appeared that the aggregate rental income would fall well short of the contractual threshold, the vendor proposed a lease-back of space in the building on commercial terms, namely, a three-year term at the minimum rental specified for leases under the sale contract.[163] The purchaser rejected the proposal. The vendor alleged that the purchaser's conduct amounted to a breach of the benefit duty because, as a result of rejecting the lease-back proposal, the balance of the purchase price under the contract was reduced to nil.[164] However, the High Court concluded that, in the circumstances, the purchaser's duty to co-operate in ensuring contractual benefit only required that the purchaser not act 'capriciously or arbitrarily' in refusing any lease from the vendor.[165] This standard of performance — the purchaser must not act 'capriciously or arbitrarily' — was found in the contract itself. The parties had agreed that the purchaser could not 'capriciously or arbitrarily' withhold consent to any lease proposed by the vendor *prior to settlement*;[166] it was appropriate to apply a similar standard in defining the scope of the vendor's implied obligation *following settlement*.[167] The purchaser did not breach the duty because it had not acted capriciously or arbitrarily in refusing the lease-back; it held reasonable doubts regarding whether the vendor would pay rent due under the proposed arrangement.[168]

Obviously, very few cases involve a contract expressly stating a standard of conduct that can be applied in determining what is reasonably necessary to ensure contractual benefit. Indeed, very few cases involve a contract that addresses co-operation in any way. Yet, there are cases where, absent an express statement regarding the extent of co-operation required, it is quite clear that a party has breached its duty. For example, in *ACT Cross Country Club*, the benefit of running the upcoming marathon was clearly conferred on Mr Cundy,

[161] *Secured Income* (n 33) 607 (Mason J, Gibbs J agreeing at 599, Stephen J agreeing at 599, Aickin J agreeing at 615).

[162] Ibid 599–600 (Mason J).

[163] Ibid 601–2.

[164] Ibid 602.

[165] Ibid 609 (Mason J, Gibbs J agreeing at 599, Stephen J agreeing at 599, Aickin J agreeing at 615).

[166] See cl 1(d) of the contract in question: ibid 601 (Mason J).

[167] Ibid 609 (Mason J, Gibbs J agreeing at 599, Stephen J agreeing at 599, Aickin J agreeing at 615).

[168] Ibid 615 (Mason J, Gibbs J agreeing at 599, Stephen J agreeing at 599, Aickin J agreeing at 615).

and it is hard to deny that the Club breached its duty by failing to notify the roads authority that the dispute between them had settled. The contract itself did not contain any standard against which to assess that this action was reasonably necessary; it was simply obvious that the Club needed to perform such a 'trivial' and 'minor' action.[169]

It follows that, as a matter of principle, each party to a contract must do what is reasonably necessary to ensure that the other party enjoys the benefit of the contract, even if the contract does not clearly indicate that this is required or the standard to be applied. What is reasonably necessary in the circumstances is what is required to ensure that the bargain or exchange underpinning the contract is not unacceptably undermined; the level of co-operation warranted is that which is necessary and appropriate in terms of protecting the performance interests of the parties. As the cases demonstrate, the determination of reasonable necessity warrants consideration of: (i) the extent to which the relevant benefit has been or would be impacted; (ii) the impact of the duty on the party allegedly in breach and the degree to which that party is entitled to act in self-interest; (iii) the extent to which the acts required are essential or fundamental to the contract; and (iv) whether it is possible, in practical terms, to establish what was reasonably necessary as at the time of contracting.

In determining what is reasonably necessary to protect a contractual benefit, the natural starting point is an assessment regarding the extent to which the relevant benefit has been or would be infringed. One way to make this assessment is to invoke the test of necessity for implication of terms in law into particular classes of contract. That is to say, in determining what is reasonably required from party B in terms of protecting a benefit conferred on party A, one considers whether party B, in the exercise of its discretions, 'rendered nugatory, worthless, or, perhaps, … seriously undermined' the benefit conferred on party A.[170] At least one judgment at intermediate appellate level appears to have rejected this approach.[171] Nonetheless, it was effectively the approach taken by a majority of the Victorian Court of Appeal in *Adaz Nominees*.[172] A contract for property development services provided that the service provider was entitled

169 *ACT Cross Country Club* (n 15) [4], [40] (Perram J).

170 *Byrne* (n 30) 450 (McHugh and Gummow JJ).

171 'It would be … fallacious to elide the purpose of implying such terms with the terms themselves': *Australis Media Holdings* (n 24) 124 (Mason P, Beazley and Stein JJA). See also *Wellington (QCA)* (n 50) [77] (Philippides JA, Morrison JA agreeing at [1], Ryan J agreeing at [101]).

172 *Adaz Nominees* (n 82) [141] (Whelan JA and Riordan AJA).

to be paid an annual service fee, its main source of remuneration under the contract, calculated as a scaled percentage of the property developer's group profits.[173] Immediately prior to termination of the contract, the property developer made a $20 million donation to a recently formed charitable foundation established by the family in control of the property group.[174] If this donation were taken into account when calculating group profits for the purpose of determining the service fee, the service fee would be significantly reduced.[175] Among other things, the service provider claimed that the property developer had breached its duty to co-operate in ensuring contractual benefit.[176] The Court unanimously agreed that, on its proper construction, the contract required that all tax-deductible expenses, including the donation, had to be included when establishing group profits for the purpose of calculating the service fee.[177] However, by majority, Whelan JA and Riordan AJA held that the property developer breached the benefit duty (and the negative covenant) by making the $20 million donation.[178] Their Honours concluded that the donation would 'seriously [undermine]' and 'drastically [devalue]' — and had the potential to render 'nugatory' or 'worthless' — the benefit for which the service provider had contracted.[179] It would deprive the service provider 'of a substantial part of its remuneration'.[180] Hence, the developer breached its duty by making the donation and thereby reducing the service fee.[181] By contrast, in dissent, McLeish JA reasoned that the benefit duty had not been breached.[182] Any benefit secured by the duty had to be expressly promised by the contract; the contract, on its proper construction, required deduction of the donation.[183]

It is certainly unconventional to invoke the test of necessity for implying terms in law into classes of contract when determining what it is reasonably necessary for a party to do to ensure that the other party enjoys the benefit of a

[173] Ibid [3], [15], [30].

[174] Ibid [35]–[37].

[175] Ibid [39].

[176] Ibid [101]–[102].

[177] Ibid [73]–[74] (Whelan JA and Riordan AJA, McLeish JA agreeing at [254]).

[178] Ibid [139]–[141] (Whelan JA and Riordan AJA).

[179] Ibid [141], using the language of McHugh and Gummow JJ in *Byrne* (n 30) 450, 453, quoted in *Barker* (n 19) 189 [29] (French CJ, Bell and Keane JJ).

[180] *Adaz Nominees* (n 82) [140]–[141] (Whelan JA and Riordan AJA).

[181] Ibid [139]–[141].

[182] Ibid [288] (McLeish JA).

[183] Ibid [278]–[282].

contract. Even so, on one view, the test is appropriate considering that the underlying justification for co-operation is the maintenance of the exchange at the core of the contract. If a party's benefit under a contract has been seriously undermined or drastically devalued, or rendered nugatory or worthless, it can be presumed that the bargain has been undermined to an unacceptable degree. As a default position, such conduct should be prohibited.

However, one cannot simply look to the diminishment of a party's benefit in determining what it is reasonably necessary for the other party to do to ensure that that benefit is enjoyed. One must also take into account the rights and interests of the party allegedly in breach of duty, in particular, the burden of the duty on that party and the extent to which that party is free to act in self-interest. For example, the performance of a 'trivial' or 'minor' act would ordinarily be warranted.[184] By contrast, it may be unreasonable to require that a party co-operate by ensuring the performance of acts by a third party;[185] a party may not be obligated to perform acts that are 'likely to be utilised by the other party for purposes extraneous to the contract and detrimental to the co-operating party';[186] and it may be unreasonable to require that a party 'assume a risk extraneous to the risk inherently contained in the transaction or to assume burdens excessive with regard to the benefits it could reasonably contemplate under the contract'.[187]

In each case, a delicate balance is struck between protecting one party's entitlement to enjoy the benefit of the contract and respecting the other party's freedom to act in self-interest. Only conduct that unacceptably undermines the bargain amounts to a breach of duty. In *Secured Income*, the purchaser was entitled to reject the lease-back arrangement because it had serious doubts regarding the vendor's ability to pay the rent.[188] By comparison, in *Adaz Nominees*, the

184 *ACT Cross Country Club* (n 15) [4], [40] (Perram J). See also *Rossi Recycling Pty Ltd v Buckland Valley Pty Ltd* (2022) 165 ACSR 332, where Connock J held that there was a breach of the benefit duty by reason of a failure to take steps to prepare a lease: at 423 [322].

185 *Australian Coarse Grains Pool Pty Ltd v The Barley Marketing Board* [1989] 1 Qd R 499, 507 (Connolly J, Andrew CJ agreeing at 500), 514–15 (Ryan J, Andrew CJ agreeing at 500); *Banabelle* (n 24) 528 [69] (Einstein J).

186 *Banabelle* (n 24) 528 [69] (Einstein J).

187 Ibid.

188 *Secured Income* (n 33) 615 (Mason J, Gibbs J agreeing at 599, Stephen J agreeing at 599, Aickin J agreeing at 615). See also *Melbourne Property Group Investments (MPGI) Pty Ltd v Knight 43 Martin Street Pty Ltd* [2022] VSC 41 where Garde J held that an investor in a property development was entitled to reject proposed offers to buy the property so as to protect its security interest: at [296].

developer had no such reasonable justification for its donation.[189] As these cases demonstrate, it may be that a party needs to have a 'legitimate nee[d]'[190] or a 'legitimate interest'[191] in exercising any discretion that significantly impacts upon a benefit conferred on the other party to the contract.

If conduct in self-interest is contemplated or warranted by the contract itself, then it would seem to be reasonable or 'legitimate' and not in breach of duty. Hence, in *Central Coast Council v Pastoral Investment Land & Loan Pty Ltd*, a landowner agreed with a local council for the rezoning of its land.[192] In exchange, the landowner was to subdivide the land and transfer a portion to the council for environmental conservation. The landowner was held to be under a duty to do all that was reasonably necessary to facilitate the approval of the plan of subdivision by the council.[193] However, the landowner did not breach the duty by exercising its right of appeal with respect to the council's decision (approving the subdivision);[194] the contract contemplated at least the basis upon which the landowner could appeal.[195]

To similar effect, if a party clearly enjoys an unfettered discretion under a related instrument, the exercise of that discretion may not trigger the duty. For example, in *Link v Gannawarra Shire Council*, a sub-licensor of land terminated the head licence by giving one month's notice in accordance with an express termination right.[196] As a result, the sub-licence terminated according to its own machinery. The sub-licensee unsuccessfully argued that the sub-licensor had breached its duty to co-operate.[197] There was no breach of duty because the sub-licensor enjoyed what the court described as an 'absolute and unqualified' power to terminate the head licence;[198] the sub-licensee could not rely on the

189 *Adaz Nominees* (n 82) [122] (Whelan JA and Riordan AJA).

190 Cf Patterson (n 4) 937.

191 Legitimate interest is a concept employed in the law regarding penalties: see, eg, *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525, 553–4 [54]–[55] (Kiefel J), 581 [166] (Gageler J), 613–15 [271]–[279] (Keane J). The concept is also employed in the context of restraints of trade: see, eg, *Peters* (n 107) 134 [14] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

192 (2020) 247 LGERA 104, 108 [3] (Darke J) ('*Central Coast Council*').

193 Ibid 124 [59].

194 Ibid 124 [60]–[63]. The council had approved the subdivision, but not vegetation clearing that was fundamental to the arrangement from the landowner's perspective: at 108 [8].

195 Ibid 124 [59]–[61]. See also *Beerens* (n 95) 13 [54] (Nettle JA, Redlich JA agreeing at 22 [90]).

196 *Link* (n 105) [19] (Delany J).

197 Ibid [38]–[45].

198 Ibid [44].

duty to claim an entitlement to occupy the land for the remaining term of the sub-licence.[199]

Whether conduct is reasonably necessary to ensure contractual benefit also depends on the extent to which the conduct is 'essential' or 'fundamental to the contract'.[200] The performance of acts that are fundamental to the conferral of a contractual benefit are obviously more readily required by the duty; but it is questionable whether acts that are not fundamental to the conferral of benefit are also necessary. Hence, in *Wolfe*, the duty to co-operate was not breached by a lender who agreed on a deferred repayment schedule with a borrower but failed to ensure that the borrower properly completed a direct debit form facilitating repayment.[201] To enjoy the benefit of the lender forbearing from enforcing its security, the borrower simply needed to make repayments on time; the use of direct debit for repayment, and the oversight of the direct debit process by the lender, were not fundamental to the conferral of that benefit.[202]

Finally, it appears that a party alleging breach of the benefit duty must be able to articulate, by reference to circumstances existing at the time of contracting, what is required under the duty. Hence, in *Wellington v Huaxin Energy (Aust) Pty Ltd*, a claim for breach of duty failed because there was no basis, at the time of contracting, upon which to assess what was reasonable (both as a matter of cost and scope of action) in terms of exploring a mining tenement.[203] In short, a party alleging breach of duty must be able to point to conduct that is reasonably necessary in the circumstances; it must be possible to define the scope of the duty to co-operate.

B *Prevention: Wrongfulness and Causation*

As with the performance duty and the benefit duty, the scope of the prevention principle is moulded both by reference to the parties' intentions and by

[199] Ibid [43].

[200] *Secured Income* (n 33) 607 (Mason J, Gibbs J agreeing at 599, Stephen J agreeing at 599, Aickin J agreeing at 615). It may be the case that a 'fundamental' act is established using the test for determining the implied essentiality of a term: *Banabelle* (n 24) 526 [62] (Einstein J), citing *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* (1938) 38 SR (NSW) 632, 641–2 (Jordan CJ). But note Jackson J's statement in *Wellington (QSC)* (n 50) that 'the cases do not yield an easy answer' to the question of what is 'essential' or 'fundamental': at 328 [50].

[201] *Wolfe* (n 97) 93 [25], 95 [30]–[32] (Warren CJ, Neave and Whelan JJA).

[202] Ibid 95 [30]–[31]. See also *Wellington (QSC)* (n 50) 328–9 [48]–[51] (Jackson J).

[203] *Wellington (QCA)* (n 50) [82] (Philippides JA, Morrison JA agreeing at [1], Ryan J agreeing at [101]).

reference to broader normative considerations. The prevention principle can be excluded or modified by express agreement; for example, the principle is often ousted by an extension of time clause in the building and construction context.[204] However, where the prohibition on prevention does apply, the scope of the prohibition — what is necessary and appropriate to protect the bargain or exchange — turns on the application of bespoke tests of causation, and, in some cases, an assessment of the wrongfulness of the conduct in question.

If we focus first on the wrongfulness of the conduct, there is a divergence of opinion regarding whether, in addition to causing prevention, conduct needs to be unlawful or otherwise wrongful to be preventative.[205] It may be that different requirements apply in different contexts. If the question is whether a principal is precluded from claiming liquidated damages from a builder (because the principal prevented performance by the builder), numerous authorities indicate that conduct does not need to be in breach of contract or otherwise unlawful or wrongful to be preventative.[206] In this context, 'perfectly legitimate' conduct can give rise to prevention;[207] it need not be 'morally blameworthy'.[208] For example, the ordering of variations (ie extra work) by a principal under a building contract is often preventative.[209] Moving outside the building and construction context, whether conduct needs to be unlawful or otherwise wrongful to be preventative is a more contentious issue. A recent popular view in the Victorian Court of Appeal is that conduct needs to be at least 'wrongful' to be preventative.[210] A breach of contract amounts to 'wrongful' conduct, as does a breach of the duty to co-operate in performance.[211] That said, to the extent that

[204] See above n 62 and accompanying text.

[205] For a summary of the different views, see *SMK Cabinets* (n 14) 395–6 (Brooking J, Starke J agreeing at 401, Kaye J agreeing at 401).

[206] See, eg, *Spiers* (n 24) 370 [48] (McLure P, Newnes JA agreeing at 373 [64]); *Multiplex Constructions* (n 66) 207 [56] (Jackson J); Nicholas Dennys and Robert Clay, *Hudson's Building and Engineering Contracts* (Sweet & Maxwell, 14th ed, 2020) 725 [6-026]. But see the statement of Williams J that 'the principle has two elements: wrongful conduct and the consequences of that wrongful conduct': *MP Water* (n 62) [270], citing *Bensons* (n 11) [109]–[111] (Niall, Emerton and Sifris JJA). See also the statement of Digby J that there must be a 'relevant breach or "wrong"': *V601 Developments Pty Ltd v Probuild Constructions (Aust) Pty Ltd* [2021] VSC 849, [448].

[207] *Multiplex Constructions* (n 66) 95–6 [56] (Jackson J).

[208] Dennys and Clay (n 206) 725 [6-026].

[209] See, eg, *SMK Cabinets* (n 14) 396–7 (Brooking J, Starke J agreeing at 401, Kaye J agreeing at 401).

[210] *Bensons* (n 11) [111] (Niall, Emerton and Sifris JJA).

[211] See ibid.

the prevention principle requires conduct that is otherwise wrongful, the court must make a normative assessment. For example, the court may assess whether the allegedly preventing conduct serves the party's 'legitimate needs'.[212] In essence, in determining whether any conduct is wrongful, the court must determine whether the relevant conduct undermines the bargain to an unacceptable degree.

The question of causation in prevention cases also involves an evaluative judgement; in particular, it requires a determination regarding the threshold that must be met for conduct to cause prevention. The 'subjective reasons' of a party alleged to have prevented the other party in performing the contract are not relevant; the question is not 'why [the party] acted in the way that it did, but what was the effect of its conduct' on the other party's ability to perform.[213] The critical enquiry is usually framed as being whether a party's conduct made performance impossible (either at all or on time).[214] As a matter of basic principle, one might think that, in determining whether a party's conduct made performance impossible, we apply the same test for causation that is applied in determining loss caused by breach, namely, a commonsense 'but for' test.[215] That is to say, we ask whether, but for the allegedly preventing conduct, performance would have still been possible. However, the question of causation in prevention is not addressed in this way. Instead, a bespoke approach is employed.

The broad-brush causation test that is applied in prevention cases is variously described. For example, conduct is said to be preventative if: (i) the conduct deprives a party of a 'substantial chance' of performance;[216] (ii) the conduct was an 'operative reason' in preventing performance;[217] (iii) there is 'an

[212] Cf Patterson (n 4) 937.

[213] *Bensons* (n 11) [180] (Niall, Emerton and Sifris JJA).

[214] *Southern Foundries* (n 54) 717 (Lord Atkin); *Australis Media Holdings* (n 24) 124 (Mason P, Beazley and Stein JJA).

[215] See, eg, *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 174–5 (McHugh J).

[216] See, eg, *Joseph Street Pty Ltd v Tan* (2012) 38 VR 241, 257 [47] (Warren CJ, Nettle JA and Cavanough AJA) ('*Joseph Street*'), which has been cited in: *Hera Project (VSC)* (n 11) [107], [142] (Riordan J), affd *Hera Project (VSCA)* (n 11) [131]–[133], [143] (Tate JA, Kyrou JA agreeing at [216], Coghlan JA agreeing at [217]), *Cahill v Kiversun Pty Ltd* [2017] VSC 641, [242], [252], [254] (Kennedy J), *Simcevski v Dixon* [2017] VSC 197, [62]–[63] (Riordan J).

[217] *Bensons* (n 11) [161] (Niall, Emerton and Sifris JJA).

interdependence between the failed act and the wrong of the other party';[218] (iv) the conduct 'materially prevents' performance;[219] or (v) the conduct causes an 'actual, as opposed to potential, inhibition, interference or delay'.[220] Ultimately, these tests establish the level of preventative conduct that is prohibited; they establish what is necessary and appropriate in terms of protecting the bargain.

The recent case of *Bensons* provides a good example of how the question of causation is determined in a case of prevention. Under a development management agreement, a consulting company was to be paid a $2 million management fee by a property developer in exchange for procuring a planning permit by the 'sunset date' (31 December 2016).[221] Due to delay by the relevant council, in May 2016, it was apparent that the consulting company would need to apply to a tribunal to secure the planning permit in time.[222] On 18 May 2016, the company applied to the relevant tribunal. However, on the same day, the developer wrote to the company claiming that any tribunal application would constitute a breach of contract. The company then withdrew the application, only to reinstate it several weeks later. As a result, the planning permit was not issued until after the 'sunset date' and the developer denied that the company was entitled to the management fee.[223]

The Victorian Court of Appeal held that the developer's conduct did not, as a matter of causation, prevent performance by the consulting company.[224] The 18 May 2016 letter from the developer was not an 'operative reason' why the company withdrew its tribunal application and only reinstated it several weeks later.[225] The company delayed in reinstating the tribunal application because it needed to seek legal advice regarding the prospects of success at the tribunal; it knew that it had to pay the costs of the application and that it did not need the

[218] *Kyrwood v Drinkwater* [2000] NSWCA 126, [152] (Powell JA, Meagher JA agreeing at [1]), quoting *Drinkwater v Caddyrack Pty Ltd* (Supreme Court of New South Wales, Young J, 25 September 1997) 26.

[219] Stoljar (n 4) 235.

[220] *Turner Corporation* (n 75) 218 (Rolfe J).

[221] *Bensons* (n 11) [3]–[4] (Niall, Emerton and Sifris JJA).

[222] Ibid [5].

[223] Ibid [6].

[224] Ibid [131]. The Court also held that the prevention principle was not enlivened because the property developer had not breached the contract, including any duty to co-operate: at [155].

[225] Ibid [161].

developer's approval to make the application.[226] The bargain was not undermined to an unacceptable degree; the developer was free to act as it did in alleging that the making of the tribunal application constituted a breach of contract.

Beyond broad-brush tests for causation, specific causation rules are also applied in cases of prevention, further demonstrating the way in which the scope of the principle is moulded by its normative justification. For example, conduct is usually taken to prevent performance if it causes the failure of a condition precedent to performance,[227] unless the nature of the condition indicates that non-fulfilment, even if caused by a breach of contract by one party, does not amount to prevention.[228] In addition, even if a party that is prevented from performing contributes to its own delay, the other party may be taken to have prevented performance if it 'would in ordinary circumstances have made it impossible for [the first-named party] to complete in time'.[229] In each instance, the bargain is taken to have been unacceptably undermined. By contrast, a party that apparently causes its counterpart to be unable to perform may nonetheless avoid engaging the prevention principle if that party had no other option than to act as it did.[230] Conduct in self-interest is ordinarily permitted if there is no alternative. These specific causation rules, in combination with the broad-brush tests applied to determine causation in cases of prevention, demonstrate that the scope of the prevention principle is defined through an assessment of what is acceptable in the circumstances — what is necessary and appropriate in terms of protecting the exchange between the parties.

V Conclusion

Co-operation is an essential feature of contract law because, without it, the bargain or exchange at the core of the contractual relationship could be unacceptably devalued and undermined. 'The essence of contract is performance.'[231] An agreement is recognised as a contract because it involves an exchange; hence, contract law requires that the bargain be protected, and, by making a contract,

226 Ibid [163]–[168].

227 See above n 69.

228 *Newmont* (n 70) 188 (Sir Gibbs for the Judicial Committee).

229 *SMK Cabinets* (n 14) 399 (Brooking J, Starke J agreeing at 401, Kaye J agreeing at 401).

230 See, eg, *BAE Systems* (n 84) 611 [66] (Besanko J).

231 Friedmann (n 5) 629.

the parties are taken to have assumed or consented to the imposition of co-operative duties and standards. Of course, these duties and standards only function in contract as default rules, usually terms implied in law, that can be overridden or moulded by the parties through express agreement. However, the reality is that parties rarely address co-operation in the contract. As a result, the scope of co-operative duties and standards in contract are effectively defined through a normative assessment as to what is necessary and appropriate in terms of protecting the bargain. In many cases, the court weighs the need to protect the performance interest of one party against the freedom of the other party to act in self-interest.

One issue that was beyond what could be covered in this article is coherence: how does co-operation in contract fit with the rest of contract law and the law of obligations more broadly? For example, the prevention principle has been conceptualised in terms of estoppel and waiver.[232] And one can see similarities between the duty to co-operate in performance and the so-called duty to mitigate loss in the context of contract damages. Recent cases also note the potential overlap between co-operation, prevention and repudiation. A party who indicates an unwillingness or inability to perform before the time for performance commits a repudiation or renunciation by anticipatory breach, which may lead to termination of the contract.[233] The party may also thereby engage in preventative conduct enlivening the prevention principle, with the potential consequence that any condition to be performed by the other party is held to be satisfied or dispensed with.[234] However, it appears that the performance duty at least cannot be breached before the time to co-operate has arrived.[235]

[232] See, eg, Burrows (n 23) which conceptualises the principle as 'a sort of estoppel': at 396. See also the High Court's statement that the deemed satisfaction of a condition precedent (due to prevention) has been 'explained sometimes in terms of waiver, and sometimes in terms of estoppel': *Park* (n 69) 434 [43] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

[233] See, eg, *Foran* (n 69) 394–5 (Mason CJ).

[234] Ibid 395–6. For a discussion of the overlap between anticipatory breach and the duty to co-operate, see *Australis Media Holdings* (n 24) 123 (Mason P, Beazley and Stein JJA); *Macquarie International Health Clinic Pty Ltd v Sydney Local Health District* (2020) 383 ALR 688, 763 [335] (Bathurst CJ, Bell P agreeing at 763 [339], McCallum JA agreeing at 763 [340]) ('*Macquarie International Health Clinic*'); *Bensons* (n 11) [156]–[160] (Niall, Emerton and Sifris JJA). See also *Castlemaine Tooheys* (n 108) for a discussion of the overlap between anticipatory breach and the negative covenant in particular: at 483 (Hope JA, Samuels JA agreeing at 497, Priestley JA agreeing at 497).

[235] Cf *Macquarie International Health Clinic* (n 234) 762–3 [331]–[337] (Bathurst CJ, Bell P agreeing at 763 [339], McCallum JA agreeing at 763 [340]).

It is hoped that the analysis presented in this article assists in further defining and understanding the co-operative duties and standards that feature in contract law. Of course, much work remains to be done. In particular, we need to understand the basis upon which the line is drawn between acceptable conduct in self-interest and an unacceptable interference with the bargain made by the parties. Why is it that contract law, as it stands, permits some undermining of the performance interests of the parties? Is it simply because, in most cases, the parties have not expressly agreed any co-operative obligation, such that the law will not 'imply' an absolute or strict one?

The law regarding co-operation in contract also needs more structure and clarity so as to provide for greater predictability. In this regard, resort may be had to concepts and criteria employed in other areas of contract law. For example, the test for determining whether a term is implied in law into a particular class of contracts (or something similar) could be applied to assess the impact needed to constitute a breach of the benefit duty; namely, the conduct allegedly in breach must 'seriously undermine', 'drastically devalue' or render 'nugatory' or 'worthless' the benefit in question. Likewise, in determining whether a party is entitled to act in self-interest without breaching its duty to co-operate, courts could draw on the jurisprudence regarding legitimate interest that has developed in the context of penalties and restraints of trade.[236]

It is this sort of thinking that is needed in the law regarding co-operation in Australia. As it stands, the law is rich with uncertainty and ripe for litigation. As a result, co-operation is so often a contested issue. Under English law, the duty to co-operate in performance has been narrowly confined, it seems, as an implication that needs to meet the test for implication of terms in fact.[237] This is perhaps one reason why it does not attract the same level of attention as in Australia. As a matter of principle, it is a good thing that Australian law goes further in terms of protecting the performance interests of the parties. But whether that protection goes too far is a matter of degree. The current borders of co-operation under Australian law reflect the extent to which parties are permitted to undermine the bargain or exchange by acting in self-interest. Whether those boundaries need to be expanded, or narrowed, remains to be seen. Certainly, greater clarity and coherence is required.

[236] See above n 191.

[237] See Gerard McMeel, *McMeel on the Construction of Contracts: Interpretation, Implication and Rectification* (Oxford University Press, 3rd ed, 2017) 346–7 [9.56]; Hugh G Beale (ed), *Chitty on Contracts* (Sweet & Maxwell, 34th ed, 2021) vol 1, 1197–8 [16-026]; *North Sea Energy Holdings NV v Petroleum Authority of Thailand* [1997] 2 Lloyd's Rep 418, 431 (Thomas J).