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Abstract
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Keywords
contract law, individual preference, Ruxley Electronics v Forsyth

CAN CONTRACT LAW PROTECT INDIVIDUAL RIGHTS AND PREFERENCES?

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Introduction

The issue which we wish to examine in this article concerns contractual rights related to personal preferences. By this, we mean a contract which stipulates a preference, but to which no commercial value can be attached. Suppose, for example, I state in my requirements for a contract, that bricks of a certain type are to be used in a building. After the building has been completed, it is realised that bricks of another type have been used. Now it may well be that the bricks which have been used are just as robust as the ones I stipulated for, and indeed, many may think them to be more attractive. If I compare the value of the building as built, with the building as specified in the statement of requirements, there may be no difference. So I cannot argue that I have been given something of lesser commercial value. Yet if I ask the builder to take the building down and rebuild it using the bricks as specified (at the builder's expense) I might well be met with the argument that the extra cost is out of proportion to the benefit which I could possibly gain. The builder might be quite willing to recognise that I have not, on any account, got what it was that I contracted for. If the courts were willing to award me only a nominal value, in recognition of the substitution which has taken place, then builders might regard the stipulations in the contract which relate to factors which do not affect the utility or commercial value of the project, as amounting to little more than 'voluntary' obligations. I could never be sure that when I stipulate for bricks of a certain colour or type, that they will in fact be the bricks which will be used.

Before we throw ourselves into the specifics of this type of problem, we would like to take a moment to remind ourselves of some of the underlying principles of contract law. Whilst it is common to talk of different 'theories' of contract law - whether it be to do with 'bargains' or with 'promises'[3] or 'reliance'[4] - it may be said that the differences between them are less important than what they have in common. The reason that the State, by way of the law, brings its coercive might in support of what are otherwise private acts of promising and bargaining, is because, in the area of business, a failure to live up to the expectations which we have created in others,

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1 BA (Law), LLM (Lon).

2 ACII, LLB (Hons) (Belf), PhD (Edin).

3 See Fried C, *Contract as Promise: a Theory of Contractual Obligation*, Cambridge, Mass: Harvard University Press (1981).

4 At the level of promise, reliance by one party on another's promise may be sufficient reason for making a promise binding; see Goets and Scott, 'Enforcing Promises: an Examination of the Basis of Contract' (1980) 89 Yale LJ 1261.

undermines certainty and the sense of 'trust' upon which business is based.[5] This need to make such undertakings, or promises, legally enforceable, has tended to focus attention on the consequences for the promisee of the promise having been made. In these developments, the common law has shown that it can evolve to ensure that in commercial undertakings, people are not allowed to be 'led up the garden path'. No doubt the blanket provisions of section 52 of the *Trade Practices Act* 1974 (Cth) against behaviour which is 'misleading or deceptive', also reflects this more general concern.[6] To be misled or deceived attacks my integrity - it makes me a 'means to an end' rather than an 'end in itself''.[7] Does it matter if the other person intended to mislead or deceive me? No, the *Trade Practices Act* has made it clear that we should not become caught up in the psychology and motivations of the maker of the statements, but should instead judge the matter on the effect of the action.[8] Equally, we would argue, the motivations of the person who has stipulated for a certain result are also irrelevant.

We take the view that in cases of 'personal preferences', the law should take an equally clear and unequivocal stance. If the formation of a contract gives rise to legal rights between the parties, then the rights which have arisen should not be whittled down because one party to the contract has undertaken an enforced substitution, against the interests or wishes of the other party. As McLaughlin J said in his dissenting judgement in *Jacob & Youngs v Kent*, '(t)he specifications of the contract become the law between the parties until voluntarily changed'.[9] We argue that where a party is unwilling to accept a substitution, the contractor should be required to complete the contract according to the specifications. This was the issue which arose in 1995 in the House of Lords case of *Ruxley Electronics v Forsyth*[10] where a landowner had specified for the construction of a swimming pool at his home and which was not provided precisely according to the specification. The principle underlying the outcome in that case was neatly expressed by Lord Lloyd when he said that:

> The eccentric landowner is entitled to his whim provided the cost of reinstatement is not 'unreasonable'.[11]

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5 See also Fried's account (see above n 2 at 16) of the nature of promising (and thus contracting), with its emphasis on promising as 'an institution that is intended to invoke the bonds of trust' is broadly consistent with this view.

6 *Trade Practices* Act 1994 (Cth) s 52 (relating to corporations) and the States' equivalent *Fair Trading Acts* (relating to persons) state that they shall not engage in conduct which is misleading or deceptive.

7 Kant I, *Critique of Pure Reason (*Kemp Smith ed) Mac Millan (1929) and Kant I *Groundwork of the Metaphysic of Morals* (Paton ed) Harper & Row (1964). In Kant's moral reasoning, the absolute prohibition against lying, was that in so acting we are treating the other person as a means by which we may achieve our own ends, rather than respecting the person as an 'end in themselves'. The obvious and most difficult cases arise in places like Belfast and Beirut, where a terrorist asks where your parent or child is - with the obvious intention of shooting them. In lying to the terrorist, we treat that person as a 'means to an end' just as that terrorist regards the other in shooting them.

8 *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre* (1978) 140 CLR 216 at 228 (Stephen J), 234 (Murphy J).

9 *Jacob & Youngs v Kent* 23 ALR 1429 at 1434, citing *Smith v Brady* 17 NY 173.

10 *Ruxley Electronics and Constructions Ltd v Forsyth* [1996] 1 AC 344. There has been extensive literature on this case. See for example, Swanton J and McDonald B, 'Measuring Contractual Damages for Defective Work' (1996) 70 ALJ 444; Loke A, 'Cost of Cure or Difference in Market Value? Toward a Sound Choice in the Basis for Quantifying Expectation Damages' (1996) 10 JCL 189; Davenport P, 'Damages - Disappointed Expectations - the Test of Reasonableness (1995) ACLN Issue No 44 50; Sharley J, 'Some Solace for Owners', (1996) 2 (6) Building and Construction Law 380; Miller D, 'Damages for Defective Works: Reasonableness and Restitution' (1995) ACLN Vol 43 13; Nankervis S, 'Recovery for Defective Works' (1995) ACLN Vol 40 29.

11 Ibid at 371.

Although not entirely clear from that small extract, and for reasons which we will explore shortly, we believe that the essential misunderstanding underlying that position relates to the introduction of the concept of 'reasonableness'. The 'eccentric landowner' in the above quotation could just as easily be called 'the contracting party'. The 'whim' could equally be called 'the contractual rights which have been specified in the contract'. When viewed in this way, the court suggests that 'the contracting party is entitled to their rights, provided they are not 'unreasonable'. The force of our argument is to claim that *reasonableness* should have nothing whatever to do with the enforcement of rights in circumstances such as these. Let us first look briefly at the facts in *Ruxley*

The facts of *Ruxley*

A Mr Forsyth had entered into a contract with Ruxley Electronics to build a swimming pool in Mr Forsyth's garden at a cost of £17,797. Mr Forsyth pointed out to the contractor that being a fairly big man, he would feel anxious about diving into a pool which, according to the original specification, was only 6' 6" deep. Mr Forsyth wanted to have a depth of 7' 6", and the contractor agreed to amend the specification accordingly. However, once the pool had been completed it was discovered that the maximum depth of the pool was only 6' 9", and at the entry point where a diver would come into contact with the water, the pool was only 6' deep.

The parties were in agreement that the failure to provide the required depth for the pool amounted to a breach of contract. However, there was a conflict about what should be done about it. The expert evidence was that it was not possible to simply knock out the bottom of the pool and excavate it to a greater depth. The only sound engineering solution was to entirely remove the existing pool and rebuild it to the required depth. The cost of doing this would include £4,000 for the dismantling of the pool and the removal of waste, which when added to the original price would bring the total cost to some £21,560.

The issue for the court was that, apart from failing to meet the specification with regard to the depth of the pool at the deep end, the pool was in all respects useable, both for swimming and diving. Indeed, expert evidence was provided to the effect that even larger people such as Mr Forsyth could dive safely into the pool without hitting the bottom. However, the court also accepted that Mr Forsyth did suffer a real loss in that he personally did not feel safe diving into the pool. The extra depth would not increase the objective utility of the pool in any way, and neither would it make any difference to the market value of the pool or the property.

Mr Forsyth argued that it was all well and good for the experts to argue about its 'utility', and its 'value', but that all of this was really beside the point. He was someone who had expressly contracted for a swimming pool which was to be 7'6" deep. He did so because this would make him feel safe and happy, and anything less would not provide him with the degree of satisfaction and pleasure which he sought. He had explicitly contracted for something, and it was his view that he should get what he had contracted for - neither more nor less.

The legal view pre-*Ruxley* - Diminution or Reinstatement?

Prior to *Ruxley*, the court took the view that where a builder in a building contract performed defective work, the owner was entitled to either:

1 the difference in value between the actual performance and that which was contracted for. The in value costs. Or,

2 the cost of having the work corrected or completed so as to bring it into line with the original specification. The *reinstatement* costs - as discussed in *Bellgrove v Eldridge*[12].

Until *Ruxley* these had been the only available choices, and so the courts had felt that they were obliged to opt for one or the other. It was argued in *Ruxley* that as there had been no diminution in value, then because the courts had to award *some* damages, they were left with only the reinstatement option. However, at first instance, the Judge was reluctant to award reinstatement costs and took the view that the only loss Forsyth would have suffered would be something akin to a loss of enjoyment in not having a deeper pool to swim in. Accordingly, he awarded him £2,500 being 'the loss of that amenity'.[13]

The Court of Appeal

Mr Forsyth took his case on appeal, contending that the trial judge should have made an award for there construction of the pool to conform to the original specification of the contract.

In allowing the appeal, the Court of Appeal by a majority of 2:1(Staughton LJ and Mann LJ in the majority with Dillon LJ dissenting) held that it was not unreasonable in contracts of personal preferences to make an award of reinstatement costs even though there had been no diminution in value.[14] This was because Forsyth had suffered a real loss which could only be measured by the cost of curing it. The Court of Appeal referred to the well accepted principle that parties have a duty to mitigate or minimise their loss where it is reasonable for them to do so. However, they thought that the 'reasonableness' which comes into the question of mitigation was not relevant here. They said that in pursuing reinstatement, the owner was merely taking steps to secure the very thing which was promised under the contract, therefore there was no *avoidable* loss.[15] It would have been strange logic to say the owner had failed to mitigate the loss when the owner was pursuing the only avenue by which that expectation interest (or right) could be protected. It had been suggested that Forsyth might obtain a 'windfall' if he could obtain a payment representing the full cost of the pool, plus the cost of the remedial work, and still retain a pool which any other users would have thought to be perfectly satisfactory. Whilst Forsyth did give an

12 (1954) 90 CLR 613 - High Court of Australia.

13 As pointed out by Lord LLoyd in [1996] 1 AC 344 at 363.

14 *Ruxley Electronics and Constructions Limited v Forsyth* [1994] 1 WLR 650 at page 660. In *Radford v DeFroberville* [1977] 1 WLR 1262 at 1284, Oliver J said that while 'a plaintiff maybe willing to accept a less expensive method of performance [there] is nothing unreasonable in his wishing to adhere to the contract specification'.

15 Ibid at 659.

undertaking to the court to expend any damages awarded in remedial work, all 3 judges agreed that Forsyth's intention as to the use to which he would put any money awarded by way of damages was irrelevant.[16]

The House of Lords

Ruxley Electronics then appealed to the House of Lords where the appeal was allowed unanimously.[17] The House of Lords (mistakenly in our view) placed emphasis on the central importance of the concept of 'reasonableness' in selecting the appropriate measure of damages. They agreed with the trial judge that the cost of reinstatement was not the appropriate measure of damages as the expenditure would be out of all proportion to the good to be obtained.[18] They referred to the High Court of Australia in *Bellgrove v Eldridge*[19] which discusses whether reinstatement is the '*necessary and reasonable*' course to undertake in such circumstances. In *Bellgrove*, reinstatement costs were held to be the reasonable remedy because there was a substantial departure by the builder from the specifications in the contract making the construction unsafe. Lord Mustill in *Ruxley* acknowledged that:

> Having taken on the job the contractor is morally as well as legally obliged to give (the owner) what he stipulated to obtain, and this obligation ought not to be devalued.[20]

We would say that if you substitute for the contractual obligation, which has been specified in some detail in the contract, something else which is not wanted by the owner, then you *are* devaluing the obligation which has been specified in the contract. This is particularly so where the owner stipulated for something of an aesthetic or emotional value and which cannot be measured by money or money's worth.

Lord Mustill then continued by referring to the issue of reinstatement costs and diminution costs:

> In my opinion however ... here are not two alternative measures of damages, at opposite poles, but only one; namely the loss truly suffered by the promisee. In some cases the loss cannot be fairly measured except by reference to the full cost of repairing the deficiency in performance.[21]

In saying this, Lord Mustill clearly accepts that there are certain categories where the 'true loss' could only be satisfied by reinstatement costs. And in such cases, he says:

> Neither the contractor nor the court has the right to substitute for the (owner's)individual expectation of performance a criterion derived from what ordinary people would regard as sensible.[22]

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16 Ibid at 657. This was also the view taken in *Bellgrove vEldridge* (1954) 90 CLR 613 at 620 and in *Darlington Borough Council v Witshier Northern Ltd* [1995] 1 WLR 68 at 80-81where Steyn J held that it was not the law's concern what the plaintiff does with his damages.

17 See above note 10 at 367.

18 Ibid at 133 per Lord Lloyd. That the actual performance of the contract would result in something akin to economic waste.

19 See above n 12.

20 See above n 10 at 127.

21 Ibid at 360.

22 Ibid at 361.

The very point which we are trying to bring out in this article is that owners such as those we are considering will almost by definition, not be 'ordinary' persons – if there is such a thing. Being 'ordinary' cannot surely be a criterion for the enforcement of one's contractual rights. People who have important 'personal preferences' may have individual or distinctive requirements – but even 'extraordinary' people have contractual rights too. However, both Lords Mustill and Bridge took a more qualified view by saying that the reinstatement costs may not be recovered, even in contracts of personal preferences, where:

> (T)he test of reasonableness plays a central part in determining the basis of recovery, and will indeed be decisive in a case such as the present when the cost of reinstatement would be wholly disproportionate to the non-monetary loss suffered by the (owner).[23]
>
> The cost of doing this would be so great in proportion to any benefit it would confer on the owner that no reasonable owner would think of incurring it.[24]

By resorting to the concepts of 'reasonableness' and 'disproportionality', the judges are in fact bringing about the substitution which they just said they would be reluctant to do. The specified rights of an individual contracting party are being substituted for what is thought by *others* to be reasonable and proportionate. But how does one measure that lack of benefit which is to be weighed against the monetary cost? Here we are talking about *this* particular owner - and to substitute the 'reasonable' owner for this particular owner is to deprive contracting owners of the characteristics that make them what they are. It is clear that respect for persons is the basis for moral[25] and political rights. Therefore to substitute a 'generalised other' for this particular contracting party is to deprive that party of their essential characteristics, and offends against the principle which demands respect for persons, which in turn undermines their essential political rights.

If we were to think of a 'pre-legal' society, as an association of individuals, we may have there the fullest extent of individual moral rights. But without the Civil Society to support and protect them in the form of a legal order, life becomes in the words of Thomas Hobbes, 'solitary, poore, nasty brutish and short.'[26] In the move from individualism to Civil Society, there is in effect a trade-off – often referred to as the Social Contract[27]. I may well decide to give up or limit my individual moral rights, in order to better protect and render more certain those which I retain. I could, for

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23 Ibid per Lord Mustill at 361 and quoting with approval Cardozo J in the Court of Appeals of New York in *Jacob & Youngs v Kent* 23 ALR 1429.

24 Ibid per Lord Bridge at 353.

25 See above n 3 at 16. Fried explains 'promising' in terms of the promisor voluntarily and deliberately invoking a convention which gives rise to a moral basis for enforcement. See also Smith S's defence of contractual obligation being based on the moral duty in 'Performance, Punishment and the Nature of Contractual Obligation' (1997) 60 MLR 360. In the English and Australian Courts the view had been expressed that contracts should be kept and that a contract is not merely an option to perform or pay damages where enforcement remedies are available. See *Coulls v Bagots Executor and Trustee Co Ltd* (1967) 19 CLR 460 at504 (Windeyer J); *Czarnikow Ltd v Koufos* [1966] 2 QB 695at 730-1 (Diplock J).

26 Hobbes T, *Leviathan*, ed Macpherson CB, Penguin, (1968) Chap 13, 186.

27 See reference to social contract, and its modern variant in Rawls J, *A Theory of Justice*, Oxford University Press (1971).

example, give up my individual moral right to resort to violence to protect my interests, provided that others also agree to give up their equivalent rights to use violence against me. Collectively, and as individuals, we assign to an abstract third party which we have brought into existence (the State) the right to use force – on our behalf– to protect our other interests.[28] It may be said that the individual moral rights give rise to political rights which serve to protect the moral rights. But we will notice here that the individual rights are given up as part of a 'trade'– which forms part of a 'contract'. In this case, a social contract. The agreement is supported by 'consideration' on both sides, as we would put it in contract law. But in the example which we are looking at, it is accepted that the property owner starts off with a legally binding agreement that a task will be completed according to the specification. At some point thereafter, they are then deprived of this right in a manner which suits the interests of the contractor (based on cost), or to suit some wider social interest (based on waste). At no point is it made clear what the contracting owner obtains as the price of this sacrifice. This amounts, in contract terms, to the imposition of an obligation, to accept the substitution, without 'consideration'. In normal circumstances, the obligations under a contract may be varied, but only as a result of a further contract, or agreement between the parties, which brings about that variation.

We feel that in the circumstances of this case, the court was too immersed in the details, and insufficiently aware of the broader implications of its findings. The basic choice, as we have seen, is between diminution in value and reinstatement. As there had been no diminution in value, then one had to look to reinstatement. The difficulty here, was that the court would not actually order anyone to reinstate the pool. Given the already unhappy history between the contractor and Mr Forsyth, a court order to direct the contractor to reinstate the pool could lead to months of further acrimony between these parties as they attempt to complete the reinstatement. The cleaner solution is to award damages against the contractor, sufficient to cover the cost of reinstatement. However, under the law relating to damages, whether persons receiving the damages actually spend them in that way is entirely a matter for themselves. The court obviously thought that this could result in Mr Forsyth ending up with a perfectly useable pool (although not exactly to his liking) together with a payment of some £21,000 which would be the reinstatement cost. The court was obviously concerned that this would give rise to a 'windfall' in the hands of an 'over-particular' owner, just because of some shortcoming in the way in which the work was completed. He not only has the pool, but the full cost of building it returned to him, together with a 'bonus'£4,000. Could this be an incentive for rogues, and if so can the rogue factor be eliminated?

The 'rogue factor'

Given what we have said, one must clearly be mindful that this could be an incentive for rogues to find something wrong with the contractor's work in the hope of getting

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28 Austin J, in *Lectures on Jurisprudence or The Philosophy of Positive Law,* (5th ed), revised and edited by Robert Campbell, Murray (1885) *Lecture* VI at 283 pointed out that to all civil actions there are at least 3 parties:

> The sovereign government of one or a number which sets the positive law, and which through the positive law confers the legal right, and imposes the relative duty: the person or persons on whom the right is conferred: the person or persons on whom the duty is imposed or to whom the positive law is set or directed.

Hart HLA, in *The Concept of Law*, Oxford University Press (1961) at 27 also acknowledges that contract law deals with issues of rights and duties 'within the coercive framework of the law'.

the costs returned. However, we must retain a proper perspective on all this. It is not just any shortcoming which would enable one to apply for reinstatement damages. Most shortcomings can be adequately dealt with under the normal principles of damages. Only factors or features which have been clearly specified in the contract, but not delivered, would be candidates here. With regard to those, many would not consider it to be worth their while to be bothered with applying for reinstatement costs, as many would be willing to accept a small discount in the price to offset any shortcoming in performance. On the other hand we should be mindful that:

> It is alarming to be told that a builder can get away with shoddy work and charge the full price whilst making some small allowance unrelated to the cost of putting the defective work right.[29]

Only the committed individual to whom the shortcoming was of serious concern would put up with the problems and risks attendant upon the attempt to obtain redress by way of legal action. If legal action is required, one has to say that the time, costs and risks involved are considerable.

During the conduct of the hearing, some doubts had arisen as to whether Mr Forsyth would actually apply any reinstatement damages, in completing the reinstatement. At one stage, Mr Forsyth gave an explicit undertaking to do this, but the Court of Appeal determined that it was not necessary for him to do this.[30] He was entitled in accordance with the normal legal principles, to spend any reinstatement damages in any way he wished. Whether there is anything in all of this to suggest that Mr Forsyth was just 'trying it on' is difficult to determine, but the more general issue as to whether people would 'try it on' because of some inconsequential shortcoming, was obviously a matter of concern to the courts. However, we should be reluctant to form legal principles upon the assumption that the courts cannot distinguish between genuine and unscrupulous applicants. The focus for consideration should be on the agreed failure of performance - and its consequences - and not upon the character, real or imagined, of the applicant.

'Consumer surplus' as an intermediate concept

What the House of Lords wanted to achieve was some recognition of the nature of the shortcoming in the way in which the work was completed – to recognise that there had been a breach of contract - where it was thought that both the diminution in value, and reinstatement remedies were not appropriate. They did this by the introduction of the intermediate concept of 'consumer surplus'[31]. This concept was to recognise the *subjective* value of whatever it was that had been produced, and which was in addition to both its utility, and the market price for the product.

The difficulty is that this intermediate concept may be fine in recognising the subjectivity of the contractual right, but in this case, it was used to effect a transition from the contractual right to something else with which it could be equated - with a monetary value, for example. This clearly amounts to substituting that which has been

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29 Gee S, in his comment upon the *Ruxley* decision in (1995) vol 92 no 30 The Law Society's Guardian Gazette 31.
30 See above n 14 at 657.
31 See Harris, Ogus and Phillips, 'Contract Remedies and the Consumer Surplus' (1979) 95 LQR 581.

contracted for with something else. This translation from the contractual right to the remedial right, was facilitated in the court's judgments by the concepts of 'reasonableness', 'common sense' and 'value'. Are these concepts really adequate to enable the substitution of what the contracting party actually stipulated for, and indeed contracted for, with something else - what other people (whether real or fictitious) think that person should accept?

In doing this, the court is replacing the individual right with a socially ordered substitute, and one which by its very nature is different from that which was specified. This is not an uncommon occurrence in the law - for example, *Kemp and Kemp on Quantum of damages*[32] places a monetary value on every part of the human anatomy. Clearly a finger is not the same as $5,000, but given that a person has lost a finger, they might as well have the money as compensation. The court can no more make fingers than they can turn back the hands of the clock. In contract law, the underlying principle is that the person should, so far as is possible, be put in the position they would have been in had the contract been completed. One way of doing this is to provide money in return for loss, damage and inconvenience. Clearly, there are limits to the extent to which money can be used as an effective substitute for that which has been lost or damaged. In personal injuries matters, there is a very real sense in which the money cannot substitute for loss or damage. It can attempt to protect against the financial consequences of that loss or damage. In a case such as this, there was a way in which the monetary remedy could effectively be used - that was to provide sufficient money to enable the owner to reinstate. Anything short of this means that the owner cannot reinstate – is effectively deprived of what they have contracted for - and is left with an amount of money which has no real relationship with that which has been lost. Whilst the court attempted to justify this reduced sum of money by appealing to the concepts of 'reasonableness', 'value' and 'consumer surplus', we wish to argue in what follows, that the use of these concepts in this type of case is inappropriate.

As a result of this reasoning, certain individuals will be unable to realise through the process of contract law their moral and legal rights, and will in an important sense be legally disenfranchised. So now we must examine in some more detail the key features of the reasoning in this case in order to understand the way in which the individual rights were whittled away.

Consumer surplus and loss of amenity

The trial judge held that the diminution remedy was not available, because there was no diminution in value, yet the cost of reinstatement was not appropriate as it would be 'out of all proportion to the good to be obtained'. Therefore, the sensible approach was to consider that the contract was one for the construction of a pleasurable amenity, and that there had been, to some extent, some loss of amenity due to its non-conformity with the contract (rather like the 'loss of enjoyment' in the holiday

32 Kemp and Kemp, *Quantum of Damages in Personal Injury and Fatal Accident Claims*, (Rev 4th ed), London: Sweet and Maxwell, (1975-) 3 vol looseleaf.

cases[33]). As a result, Mr Forsyth could be awarded some £2,500 as general damages for this loss of amenity. This suggests that the right which has not been fulfilled is distinct, or severable, from the main part of the contract. Then, it is suggested, an evaluation can be made of the loss which has been brought about by the non-fulfilment of this distinct aspect. This has to be separately valued, as the only other basis for evaluation - the cost of replacement -has been ruled out. The countervailing factor, which disentitles the claimant to the full amount, is based on the idea that the cost of this would be 'disproportionate' or in some sense wasteful. This appears to be not too dissimilar to the US concept of 'economic waste'[34]. What we need to know is whether this is an appropriate factor to weigh in the balance in the negotiation of private rights, as opposed to public rights, or a contest between a public and a private right. We will argue that the notions of 'disproportionality', or 'wastefulness' are only appropriate where the element of public right is involved. Where the contest is merely between private rights, then this concept is inappropriate.

Proportionality to the good to be obtained

When we speak of 'public' rights, we mean those that are exercised by or on behalf of those holding public office. Where the State is, in some capacity, a party to a relationship, there is an element of public interest involved. This is partly because the public officials are usually spending other people's money, and partly because they are exercising powers which go beyond those normally available to private individuals. Different standards of disclosure and responsibility may be sought from those who are acting in such a public capacity, as opposed to those who are acting in a private capacity.[35] A public official is usually required to state the reasons for a decision whereas the same requirement will not be made of people when acting privately. Public officials may be required to act responsibly, and not be wasteful in their expenditure of funds, whereas private individuals are quite free to 'waste' their money if they see fit. We must ask then whether the concepts of 'proportionality' and 'reasonableness' are at all appropriate in the negotiation of rights between private individuals or organisations.

Clearly, the judges are taking a view which says, in essence, that if it costs £21,000 to reinstate a pool with the right depth, then from some undefined social perspective, the expenditure of this amount of money is 'disproportionate' to the 'good' to be obtained. Therefore, they are then making a judgement as to whether that 'good' should be obtainable - and obviously answering this question in the negative. It may be that the sum of £21,000 is a lot for the contractor to spend to enable the pool to be built to the required depth. But by all accounts, the sole responsibility for the error was with that same contractor. It is clear that the expenditure of £21,000 is the only way in which that particular 'good' can be achieved. Therefore, by awarding a lesser amount, they are determining that the contracting owner will have to live without that

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33 *Jarvis v Swan Tours* [1973] QB 233, *Jackson v Horizon Holidays* [1975] 1 WLR 1468, *Baltic Shipping v* Dillon (1993) 176 CLR 344. It is interesting to to note that in *Jarvis*, the plaintiff was awarded damages which included the cost of a substitute holiday.

34 This concept gained recognition in the First Restatement of Contracts, s346 (1) and was embraced in a number of American cases. However the Second Restatement no longer uses this notion of economic waste as a limitation to one's right to the cost of reinstatement.

35 Aronson M, and Dyer B, *Judicial Review of Administrative Action*, Law Book Company (1997) chap 3.

particular 'good'. In thus depriving the person of something which they have specifically contracted for, they are going against a fundamental rule of contract law, and bringing in some other incommensurable factors.

The fundamental rule of contract law is that one who suffers loss as a result of a breach of contract should be placed, so far as money can do so, in the position they would have been in, had the contract been properly completed.[36] Clearly, £21,000 would achieve this objective - the person can spend the money to bring about exactly the same result as had originally been intended. £2,500 would clearly not achieve this result. In situations such as this, we are presumably dealing with people who are by any account fairly well off. In this context, what they are receiving - some £2,500 is relatively meaningless. Yet what they have lost, by virtue of the fact that they were willing to write it into their contract, is presumably of some importance to them. If we were to have asked them at the time that they completed the contract, 'can we strike this item out of the specification, in return for reducing the contract price by £2,500?', which, in effect, would have been to give them the same deal as that offered by the court, their answer would probably have been a very clear 'No'. At all events, the only time for such negotiations was at the time of entering into the contract. From the individual owner's point of view, they are getting something that they do not value, in return for something that they obviously did value, and this exchange or substitution is being imposed upon them without their consent.

The apparent reason for doing this is that the courts now consider it to be 'wasteful' or 'inappropriate' to use a certain amount of resources (£21,000) to achieve some desired end (swimming pool depth). But these elements of wastefulness, or inappropriateness, are not relevant in the context of the expenditure of private funds. We see around us all the time examples of conspicuous consumption, extravagance even waste. Although one might dearly like to see a socialist government which would put an end to all of this, and use all of the resources of our society in good and useful ways - the arbitrary elimination of private rights within a capitalist society, by the substitution of incommensurable outcomes, does nothing to develop the social order, but does much to undermine the order of private rights.

The difficulty is that one is bringing in at the remedial stage, factors which were not present at the contracting stage and which serve to limit the established contractual rights. The factors of 'wastefulness' and of 'proportionality to the good to be obtained' are obviously social policy factors which limit the rights which had been contracted for. The individual right is being constrained by a social right, and a social right at that, which was not, and could not have been asserted at the time of contract formation. Where we are concerned about the construction of contractual terms, it is a standard procedure to ask what the parties would have agreed to if that issue had been raised at the time of contract formation. Where we are dealing with an omission, or with something which has been inadequately expressed, this is an entirely appropriate procedure as we are attempting to make up for some inadequacy in the way in which their arrangements had been expressed. But is it useful where the very right which is in question has been both clearly and adequately expressed? We would suggest not, as will be seen in the discussion of 'reasonableness'.

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36 *Robinson v Harman* (1848)1 Exch 850 at 855 per Parke B.

'Reasonableness' as an appropriate test

Is it appropriate to use the reasonableness test at all? After all, it was introduced into the Australian High Court judgment in *Bellgrove v Eldridge*, as if it was so obvious that it did not need the support of any prior legal authority.[37] Yet the immediately prior reference in that judgment to 7th edition of *Hudson on Building Contracts* referred to the owner's right to 'making the work or building conform to the contract' without any mention of 'where reasonable to do so'.[38] Is the reasonable person here to be imbued with all of my characteristics - family background, emotional state, needs, desires etc. If so, why not just talk about *me* as the specific contracting party? If the reasonable person is to be a generalised other *without* my specific characteristics, then the nature of the bargain is being changed retrospectively and without my consent or participation. This is at odds with the fundamental principles of contract law and morals which we have discussed. It achieves none of the political or social gains required from a limitation of individual rights, yet undermines the security of contracting. If we look at other areas of law where the concept of reasonableness is used, we can see that in some areas, such as the criminal law, it is used to set an appropriate standard applicable to all. In other areas, such as in certain aspects of contractual relationships, it is used to cure defects, where the contracting parties have either failed or have been inadequate in the expression of their respective rights.

As an appropriate social standard, whether in the criminal law, or in torts, its role can be declared well in advance. If one launches a murderous assault upon another, and claims to have been acting in self-defence, one's response will be measured in accordance with what a reasonable person would have been expected to do in the circumstances. A social standard operates in accordance with which one's activities can be measured, in an area which must be a matter of social policy.

Let us suppose that a person has just found out, after months of living on a building site, that their swimming pool has been badly built, and in frustration throws their cigarette butt over the fence - which sets alight to a piece of string, which in turn causes the petrol tank in the nearby car to explode, which ignites the gas tank on the side of the house, which fires part of the tank into the air causing the aircraft flying overhead to crash on landing at the nearby airport. Apart from being very unfortunate, and making the person wish that they had thrown their cigarette into the swimming pool instead, they would certainly argue that the damages for which they can be held responsible should be limited to those which could have been reasonably foreseeable at the time. Again social policy operates to set some limit upon liability. Metaphysicians and cosmologists would probably agree that everything that happens in the world (and beyond) is connected to everything else. But judges, being pragmatic folk, are not interested in whether the beating of the butterfly's wings in Peru was linked to the earthquake in China. They know that we have to place some limits to social responsibility in a way which can be known and declared in advance, and which applies equally to all. By having some ascertainable principles in

37 See above n 12 at 617-618.
38 *Hudson on Building Contracts*, (7th ed) Sweet and Maxwell, London, (1946) at 343.

accordance with which the rights and responsibilities can be known, then responsible people can act by taking out insurances where the premiums can be calculated in accordance with the associated risks.

Reasonableness To Remedy Defects In Contract Terms

Where the concept of reasonableness is used in contract law, it is in circumstances where there has been some defect in the original arrangements, and some lack of specificity in the original documentation. The agreement has to be remedied by an appeal to what 'reasonable' people would have done in the circumstances. If this particular person has failed to sufficiently specify what is to be done, then a reasonable other has to stand in their place, as the most effective socially ordered substitute.

We can see then that the use of 'reasonableness' in the circumstances outlined above, either sets asocial standard where society demands that there be a minimum standard, or else the parties have failed adequately to determine the standard for themselves. What it cannot and should not be allowed to do is to render more indeterminate specific agreements which the parties have carefully worked out for themselves. Skilled contractors, operating in their area of specialist interest should not need the courts to save them from the consequences of their own actions. If they think it inappropriate to use a certain material which has been specified, then they should say so at the time of the negotiations, rather than to impose a unilateral and cost saving change upon an unwilling party. If they feel that a particular person is being unnecessarily specific in the statement of their requirements, then it would be perfectly reasonable to insert a provision which allows the contractor to provide some alternative. A person who has engaged in commercial negotiations for a specified range of commitments, should not be allowed to come back to the court later and say, in effect, that they did not mean it. Neither should it be open to them to speculate as to the respective values of the various commitments which they have undertaken, and to allege that one or other of them were not of any real or substantial value to the owner. It should not be open to the contractor to pick and choose amongst those commitments which they will comply with, and to argue that they should not be obliged to return to reinstate the missing commitments, because people other than the owner would not have thought them to be very important. It seems strange to even suggest that all of the complex of rights and relationships which make up a person's life should count as naught when set aside the possible extra cost or inconvenience which could be caused to an errant builder.

Contract formation

Clearly one cannot obtain a remedy to support a claimed right which is illegal or immoral - but there is no difficulty, at the time of contract formation, of stating the general principle that you cannot contract for that which is illegal or immoral. Indeed it is clearly stated in all of our textbooks on contract law. But what is one to make at the time of contract formation of the 'economically wasteful' or 'disproportionality' principles? Could we say that one cannot contract for that which is economically wasteful? We do not think so. Some of us may well take the view that travelling the world to play tiddley winks is economically wasteful, but people are free to choose to

do those things if they so wish, and contracts in support of them are clearly enforceable. The travel agent or airline which fails to provide you with a seat on the aeroplane as contracted for, because they thought that your trip to see your granny was 'economically wasteful' will do so at their peril. One may travel, or build for any purpose, or indeed for no purpose at all - and still expect the contracts to be enforceable. So too with swimming pools - if one contracts for the pool to be 10', 20' or even 50' deep - and presumably one is working on the 'more depth more cost' principle, then why should the contractor be allowed to deviate from the specification which has been agreed to, and then claim that conformity to it would be 'wasteful' or 'out of all proportion to the good to be obtained by the owner'? As Lord Mustill said:

> To say that in order to escape unscathed the builder has only to show that to the mind of the average onlooker, or the average potential buyer, the results which he has produced seem just as good as those which he has promised would make a part of the promise illusory and unbalance the bargain.[39]

One of the points which was later raised in the House of Lords, was what would have happened if the contractor had made it clear at the outset that they were not going to perform the contract in accordance with the specification?[40] If the contractor had said that they were not prepared to build the pool any deeper than 6', then it is clear that they would not have been awarded the contract, and that another contractor would have been brought in to do the job. To state at the outset that you *will* perform according to the specification, and then to later claim that to do so would be wasteful, has the same effect as being misleading or deceptive. Had the contractor had it in mind to later adopt the wasteful principle, at the time at which he entered into the contract, without disclosing this intention to the owner, then the activity would clearly be fraudulent. Either way, to bring it in later to protect the contractor against the consequences of their own omissions is to assist the negligent or the inefficient contractor, and may itself be seen to be wasteful, in the wider economic sense. It is surely not the role of the courts to prop up incompetent or inefficient contractors. Nor should they bring about a situation where the contracting party is to be deprived of what they had specifically stipulated for in a manner over which they have no control.

Disproportionality And The 'Indian Marble' Test

The idea of the cost of reinstatement being 'disproportionate' in some way suggests that we can weigh in the scales the specified right (which by common admission had no *value* as such) against some monetary value. It is our argument that two such different entities cannot be evaluated against each other in the absence of a common standard. Let us think of the 'Indian Marble' test.

Suppose that I have struck a bargain with a contractor to spend a large sum of money on the refurbishment of my kitchen floor using Indian marble. It is later found that the builder had used Australian Marble which others thought 'looked just as good' - and in fact may have cost just as much if not more. But I had insisted on Indian marble because my grandfather had been an Indian marble worker, and knowing that I would

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39 See above n 10 at 360.

40 Jacob I, *'Is Near Enough Good Enough?'* (1995) *Solicitors Journal* 676. Mr Jacob was counsel for Mr Forsyth in the House of Lords.

have around me the materials of the sort on which he had worked, would be emotionally and aesthetically pleasing to me. It was very important to me, in emotional terms, to have Indian marble although it would have been a matter of indifference to the 'reasonable' person and, for all I know, everyone else. But that is no concern of mine- this was a very personal matter - and if I had been told that it would not add anything to the market value of the house, I would not be in the least bit concerned. Houses are often very much about 'personal' issues. Indeed, if I were to be told that I was being 'unreasonable' I would have been equally unconcerned. The fact of the matter is that I am sufficiently well-off to be able to indulge myself, and I have chosen to spend my money in this particular way. Indeed, I take the view that once it is determined that the particular choices I have exercised are neither illegal nor immoral, then it is not the concern of anyone else, let alone the courts, to tell me that they consider my choices to be reasonable, rational, a matter of good taste or anything else.

And yet the court may deny me the opportunity to remedy the defect by an award of replacement costs as they regard that as an unreasonable remedy for me to seek. According to the court, there placement cost would be 'wholly disproportionate' to what they perceive to be 'the good to be obtained' - my non-monetary loss or consumer surplus.[41] They will apply the test of 'reasonableness' (even though the reasonable person would not understand my particular concerns when it comes to marble floors) in determining my non-monetary loss and therefore my remedy. This approach has elements of paternalism and social policy in it, in ways which are inappropriate. These views are defective for a number of reasons which amount to a failure to have appropriate respect for persons.

The Second-Hand Bricks Example

In the 7th Australian Edition of *Cheshire and Fifoot*, reference is made - without further comment - to the suggestion in *Bellgrove v Eldridge* that:

> Where pursuant to a contract calling for second hand bricks the builder has constructed walls of new bricks the owner would not be entitled to the cost of demolishing the walls and re-erecting them in second hand bricks.[42]

Our response would be 'why not?' It is obviously thought that if you are getting something equivalent to, or better than what you have stipulated for, then who are you to complain. But one might equally reply that you cannot judge what is 'equal to' or 'better than' something else, unless you are informed of factors which go beyond the terms of the contract. Yet those factors might well involve issues which are part of my personal or economic reasoning which I am entitled to keep as confidential. So, before we all nod wisely, in agreement with each other, endeavouring to substantiate our superficial position, based upon our desire to avoid absurdities, we should examine a little more carefully the supposed situation which is so patently absurd, and the implications to which it could give rise.

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41 For an argument that to give full compensation for non-pecuniary loss may be economically inefficient, see Rea, 'Non-pecuniary Loss and Breach of Contract' (1982) 11 *J Leg Stud* 35.

42 Seddon N, and Ellinghaus M,*Cheshire and Fifoot's Law of Contract*, (7th Australian ed), Butterworths, Sydney in para 23.19 referring to *Bellgrove v Eldridge* (1954) 90 CLR 613at 618.

It is not uncommon in the interpretation of a contractual term to look at the term in the light of the interests it was meant to protect. If the stipulation in favour of second hand bricks had been inserted by the builder, so as to reduce costs, and thereafter it was found that due to unavailability of such supply, or the costs of cleaning them, it was more cost effective to use new bricks, then what interest of the owner could be said to have been damaged? In no respect could the interests of the owner have been impaired and our initial assumption might well hold. But if the clause had in fact been included by the owner, then it would be necessary to understand the possible motivations which could have been behind such a requirement. It might be that the owner found something aesthetically pleasing about the older bricks - maybe they came from the old abbey or pub down the road, and brought something with them of their history which the owner found appealing. But should any of these explanations or motivations form part of the rationality which *entitles* such an owner to have what was stipulated for? Cannot an owner say that it is not the contractor's business, nor indeed should it be any of the court's business as to *why* a particular feature was stipulated for? The mere fact that it was sufficiently important to me to stipulate for it at the contracting stage, and the fact that it was not questioned or queried at that time, should be sufficient in its own right. Nobody should require me to state why it is important, in my particular scheme of things, in order that they can, perhaps, attempt to place some financial value upon it - or even worse - to ask some other 'reasonable' people whether they think that I should be entitled to have that aspect of my contract enforced, or whether it is 'proportionate' to the rest of the contract.

My *motivations* in stipulating for it - whether aesthetic or utilitarian - are of no concern to anybody but myself, and if the builder wants to ask me why it should be so, I am equally entitled to say that if that question was not asked at the contract formation stage, why should it be of any relevance at the contract completion stage. It may well concern aspects of my private life or of my personal psychology which I do not wish to divulge. I might well regard requests for such information as an invasion of my privacy or an undermining of my human rights. And yet, without information of this sort, how can any other person judge the 'proportionality' of the completed aspects of the contract with those yet uncompleted? How indeed can they assess the 'consumer surplus' by attributing a financial value to these aspects of my rights which I have been denied? Indeed, how can the concept of 'value' be used at all in the context of something, which by definition, has no commercial value.

Value And Markets

One of the difficulties facing us in the evaluation of the right which has not been fulfilled, is the placement of some 'value' upon it. We would argue that by definition, we are concerned with something which 'has no value' (in the commercial sense) and the factors which give rise to its sense of value (in the personal sense) are not matters which can or should be put before the court. It is accepted on all sides that the there is no difference in value between the property with the contractual defect and the property without it. Another way to look at it would be to say that the 'value' of something is the price for which it can be sold on the open market. But as soon as we begin to consider this aspect, we can see that the ideas of 'value' and of 'market' are inextricably linked. By 'market', we obviously mean some mechanism by which buyers and sellers can be linked for the purpose of exchange. Such a 'mechanism', of

course, directs our attention to the social element of both markets and value. The mechanism must operate between different persons – not necessarily a multiplicity, but at least one buyer and one seller. However, the situation which we are examining suggests that these elements do not exist in these situations. We are here concerned with something which is of importance to the individual concerned, but which has no exchange-value in the sense that it would be attractive to others. There may well be a cost in bringing it into existence, but once it has been brought into existence, it has no value in the sense that it could be sold to others. A right, which is of importance to me, may be an inherently private right – and there may be no-one else who would want to buy it from me. There is no market for the right - there is no value to the right. The 'value' of a 'private right' might be as conceptually infelicitous as is the notion of a 'private language', in that the former suggests some social mechanism for exchange which is manifestly not present in the right itself.

Risk Management - and Risk Allocation

Really what we have been considering here, is the aspect of risk management. In torts, the courts help to adjust the social responsibilities between citizens so that the burdens are shared fairly. In other circumstances, where the parties are knowledgeable and fully informed, they can deal with the allocation of responsibilities between themselves, which is an inherent part of contract law. In the absence of vitiating factors such as fraud or undue influence, it is assumed that people of full age and responsibility can determine for themselves and in negotiations with others the cost of obtaining certain outcomes. The whole point of contracting is to fix at some point in time the costs associated with those outcomes, and to allocate the responsibilities attached to them. But the costs only become fixed at that point in time for one of the contracting parties. For the party undertaking to fulfil the contract, the costs of doing so are often uncertain and maybe indeed attendant with substantial risks. The costs of materials or labour might rise, the currency might be devalued, war might break out at home or abroad and make certain components unavailable or more costly. But the accurate assessment, management and allocation of those risks is all part and parcel of being a player in the modern economy. I may buy coffee beans on the futures market because I want to engage in forward planning for investment and expansion, and this means that I prefer to work with known costs over the next few years. If the supply should increase and the cost plummet, then I may suffer from the necessity of having to buy the commodity at the agreed price whilst my competitors can buy it cheaper on the spot market. On the other hand, a new coffee bean bug might emerge to decimate the crops and the fortunes of those who had agreed to supply at a price which is now much less than that for which they can obtain them. In all of this the fortunes of the companies involved in commercial activities might ebb and flow, and indeed the companies themselves might come and go - but to none of these commercial players, is it open to them to go to the court to be asked to be relieved of their contractual obligations, because it now appears too costly to them to fulfil them.

They cannot say that the present cost of fulfilling the contract is disproportionate to the original price of the contract, or to the overall price of the contract. Nor can they go to the court to say that they do not have to fulfil the contract for coffee beans because they have just found out that I do not drink coffee, or perhaps a recent report has been published to say that coffee is bad for your health. Nor can they provide me

with cocoa beans or cabbages because it is thought they will help me to sleep better. If all of this is true with coffee beans, then why should it be any different with seven foot pools, or yellow brick roads? What I get should be what I paid for - and once I have my contract in place, that is precisely what I expect to be provided with - irrespective of the cost to the contractor.

The risk on the part of the builder is a failure to perform the contract, or non-fulfilment of certain conditions of the contract. These eventualities can be managed by way of insurance, or they may be reflected in the price charged by the builder.

On the owner's side, the risk of non-compliance can only be controlled, ultimately byway of legal action. If the court removes this sanction, then they are in effect, rendering the requirements which relate to apparently individual aesthetic needs unenforceable. In regard to these provisions, the owner has no way of managing or controlling non-compliance by the builder. Obligations of this nature then become no more than voluntary obligations. If there is some additional cost associated with the completion of the obligation - and even if the owner has paid additional amounts to cover that cost - then it still need not be complied with. This is to strike at the very basis of the 'bargain' and 'promise' theories of contract.

Conclusion – Personal Preferences Should Not Be Sacrificed to the Inefficient

It may be said that there are both social costs and benefits connected with the requirement for contractors to perform their contracts according to the specifications. If you as a contractor regularly fail to perform to the agreed standard, but are still required by the courts to pay the cost of non performance, then you may eventually be made bankrupt or your insurance premiums might be increased. It may be argued that this is no bad thing - this is how the market deals with an ineffective or inefficient performance. Indeed, it is interesting to note that in *Ruxley,* this was not the first time that this builder had run into problems. Initially the builder installed a pool which had subsequently cracked, and which then had to be replaced.[43] The replacement pool was then built to an incorrect depth. Perhaps we can understand why Mr Forsyth was less than happy. His garden must have looked like a building site for much longer than had been intended.

On this view, it may be said that the courts, by not requiring the contractor to pay the full costs of non performance are protecting the inefficient or incompetent builders, from the consequences of their actions. It might even be said that this would lead to some hidden social subsidy for the inefficient builders who are otherwise protected from the costs of full performance. That subsidy is, of course, to be paid by the individual owners who are forced to live with something for which they had not bargained.

This is yet another example of the tension running through the law of contract. On the one hand, there is the idea of the freedom to negotiate contractual terms.[44] On the

43 See above n 10 at 362.
44 See Jessel MR in *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 at 465.

other hand it may be said that this freedom disappears once you want something that is a matter of personal preference. Your right to insist on that becomes subject to the tests of whether it is thought to be reasonable, proportionate and not wasteful.

If you have attempted to achieve a certain outcome - in relation to your property which is important to you and which cannot be exchanged or disposed of, then a shortcoming in those contractual obligations could leave the ‘aggrieved’ party with a permanent sense of dissatisfaction, long after the contractor has gone on to other jobs. To be given something which is not ‘valued’ by the contracting party in return for that loss, is an enforced substitution and fails to respect that person’s prior legal rights, and their moral and political rights to be dealt with fairly and in accordance with publicly declared procedures which are known in advance.