

# Canadian Jurisprudence and the Employment Contract

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## ABSTRACT

The jurisprudence of the Canadian Supreme Court has been at the forefront of a judicial conversion to a more progressive view of the employment relationship, which is attuned to key realities such as inequality of bargaining power. The Court's influence can be seen in the decisions of courts in other jurisdictions such as the UK. The change in outlook has had a discernable impact on doctrinal development. In recent years, the Canadian Supreme Court has elevated the importance of good faith in contract law as a whole. In 2020, in a series of key decisions, the Court explored some of the implications for the law of employment contract. This article seeks to explore whether those developments will be of relevance to the development of the employment contract here.

## 1. INTRODUCTION

The Canadian Supreme Court, in their recent decision in *Matthews v Ocean Nutrition (Matthews)*,<sup>1</sup> referred to their earlier 1987 decision in *Reference Re Public Service Employee Relations* and reiterated that 'A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being'.<sup>2</sup> Similarly worded dicta can be found here and elsewhere, but *Matthews* reminds us that the Canadian judiciary were early proponents of the contemporary common law view that the employee's interest in the employment relationship is not purely pecuniary.<sup>3</sup> The Canadian judiciary were also early adopters of the academic analysis in works such as Kahn-Freund's *Labour and the Law* that the employment relationship displays a marked disparity in bargaining power and that, as consequence,

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<sup>1</sup>2020 SCC 26, para 87.

<sup>2</sup>*Reference Re Public Service Employee Relations* [1987] 1 SCR 313, 368.

<sup>3</sup>See G. Demeyere, 'The Contract of Employment at the Supreme Court of Canada: Employee Protection and the Presumption of Employer Freedom' (2015) 38 *Dalhousie Law Journal* 1.

employees are vulnerable to unfair treatment by employers.<sup>4</sup> Dicta to very similar effect can now be found in Supreme Court decisions in the UK, but Canada brought such thinking 'in from the cold'.<sup>5</sup>

*Matthews* was one of three decisions handed down in 2020 by the Court which concerned the employment contract or other forms of contract for the provision of work. The others being *Uber Technologies v Heller (Heller)* and *CM Callow v Zollinger (Callow)*.<sup>6</sup> The wider impact of earlier decisions of the Court in the employment sphere was probably most significant in helping to forge a consensus across similar jurisdictions that the employment contract had key attributes such as involving a personal relationship and being characterised by an imbalance in power. The articulation and recognition of those attributes have been significant in shaping common law reform. The endorsement by the House of Lords of the implied obligation of mutual trust and confidence was prompted in part by the realisation that a power disparity could result in oppressive behaviour.<sup>7</sup> The more recent decisions of the Canadian Supreme Court though may have the potential to be more directly influential on the development of specific aspects of contractual doctrine. It is also important to appreciate that they were preceded in 2014 by a major decision of the Court on the role of good faith in contracts in general. *Bhasin v Hyrnew (Bhasin)* deciding that good faith was a fundamental norm which should be viewed as an 'organising principle'.<sup>8</sup>

What might be expected to be gained from a review of the recent Canadian jurisprudence? Would it simply be a comparative excursus for the sake of it? I would suggest not. The decisions concerned are highly relevant to a number of areas of contention in the UK where the employment contract is concerned. As already discussed, the recognition of the key attributes of the contract has had a discernible impact on doctrine. Awareness of the perils of inequality of bargaining power prompted the UK Supreme Court, for instance, to reform the law of sham contracts to render it more applicable in the employment context.<sup>9</sup> There are currently a number of areas where the law is in something of a state of flux and where comparative jurisprudence might be found helpful. Common law regulation of discretionary provisions

<sup>4</sup>*Slaight Communications v Ron Davidson* [1989] 1 SCR 1038 citing P. Davies and M. Freedland (eds), *Kahn-Freund's Labour and the Law*, 3rd edn (London: Stevens, 1983) 18.

<sup>5</sup>See, eg, *R (Unison) v Lord Chancellor* [2017] UKSC 51, para 6.

<sup>6</sup>*Uber Technologies v Heller* 2020 SCC 16; *CM Callow v Zollinger* 2020 SCC 45.

<sup>7</sup>*Malik v BCCI* [1998] AC 20.

<sup>8</sup>[2014] 3 SCR 494.

<sup>9</sup>*Autoclenz v Belcher* [2011] ICR 1157.

might be one; the extent of control is somewhat uncertain and difficult questions arise including the utterly fundamental one of stipulating when a decision is discretionary in nature. Another area, which is not fully settled, is the impact of mutual trust and confidence, or good faith more widely, on the substantive terms of the bargain. The courts have demonstrated that they are vigilant in requiring adherence to the agreement struck but will the law on unconscionability be expanded to allow the fairness of the terms to be reviewed? This latter point is admittedly more in the realm of an emerging issue but comparative experience may inform how evolution of the law in the UK will play out.

## 2. REGULATING THE EMPLOYER'S DISCRETION

Case law on the appropriate exercise of an employer's discretionary powers constituted a key element of the formative jurisprudence of the implied obligation of mutual trust and confidence. *United Bank v Akthar*, where a mobility clause was held subject to implied constraint, offers a very well-known example.<sup>10</sup> It is now trite law that the employer must exercise any discretion in line with the obligation of mutual trust. The degree of scrutiny will vary depending upon the nature of the employer's decision; a clause concerning bonus payments will be more difficult to challenge than one in respect of mobility. Lord Hodge remarking in the Supreme Court in *Braganza v BP Shipping* that 'the courts have reviewed contractual decisions on the grant of performance-related bonuses where there were no specific criteria of performance or established formulae for calculating a bonus. In such cases, the employee is entitled to a bona fide and rational exercise by the employer of its discretion. The courts are charged with enforcing that entitlement, but there is little scope for intensive scrutiny of the decision-making process.'<sup>11</sup> This line of case law has had an impact beyond the employment contract and contributed to a modification of the approach in contract law as a whole; a point acknowledged by Arden LJ (as she then was) writing extra-judicially.<sup>12</sup> The Court of Appeal in *Socimer International Bank v Standard Bank London* made clear that in contract law at large 'a decision-maker's discretion will be limited, as a matter of necessary implication, by concepts

<sup>10</sup>[1989] IRLR 507.

<sup>11</sup>[2015] UKSC 17, para 57.

<sup>12</sup>Arden (2013) 30 *JCL* 199.

of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality.’<sup>13</sup>

The position described in the preceding paragraph would seem to offer both comfort and clarity to employees but something of a shadow may have been cast by a number of recent decisions in the commercial context. Cross-fertilisation has led to the law of the employment contract impacting on contractual doctrine more widely but the process can work in reverse. It is perfectly conceivable that employers will argue that refinements to the common law approach to the regulation of discretion in the commercial arena are relevant to the employment contract. This is particularly so as, while recent commercial cases have elaborated on the boundaries of judicial control of discretion in a variety of ways, they are unified by desire to restrict the extent of intervention and respect the autonomy of the parties. The courts have gone as far as holding that the exercise of a term which is expressed as an absolute right is not seen as involving a discretionary decision at all. As a corollary, the controls set out in *Socimer* are no longer applicable: ‘When a contract gives one of the parties an absolute right, a court will not usually imply any restrictions on it, even restrictions preventing the right from being exercised in an arbitrary, capricious or irrational manner.’<sup>14</sup> It may be said, by way of objection, that a party possessing such a right still has a choice over whether it should be exercised which is surely in the nature of a discretion.<sup>15</sup>

Judicial disavowal of control is particularly acute should a termination clause be in issue. *Monde Petroleum SA v Westernzagros* concerned a consultancy agreement; it was argued that the right of termination should be restricted on the basis of good faith given decisions such as *Socimer*.<sup>16</sup> This contention was rejected though other jurisdictions may take a broader view: ‘a contractual right to terminate is a right which may be exercised irrespective of the exercising party’s reasons for doing so.’<sup>17</sup> This involves treating a discretion over termination as qualitatively different to decisions

<sup>13</sup>[2008] EWCA Civ 116, para 66.

<sup>14</sup>*Greenclose v National Westminster* [2014] EWHC 1156, para 145.

<sup>15</sup>M. Bridge, ‘The Exercise of Contractual Discretion’ (2019) 135 *LQR* 227, 237 has said that ‘Contracts, besides in some cases containing discretions, also contain unqualified rights that can freely be waived. Does that mean that the right is a discretionary one? If that were the case, then the enforcement of all contracts and all contract remedies would be discretionary and would have to be policed by the courts.’

<sup>16</sup>[2016] EWHC 1472. And see *Lomas v JB Firth Rixon* [2012] EWCA Civ 419.

<sup>17</sup>*Ibid.*, para 261 but see, for instance, the Australian case of *Garry Rogers Motors v Subaru* [1999] *FCA* 903.

of a different nature. The contemporary desire to regulate discretionary provisions may be running up against a more traditional view that questions going to the continuance of the relationship are very much ones for the parties. It was also said that 'Contractual discretions arise where there are a range of options from which to choose. A contractual right to terminate involves a binary choice'. One might cavil over the significance of the distinction between a 'binary choice' and a choice over a wider range of options. There is still a discretion to be exercised though it may be a relatively limited or straightforward one. The approach in *Monde* was followed by the Court of Appeal in *Mid Essex Hospital Services NHS Trust v Compass Group* where it was observed that 'An important feature of the above line of authorities is that in each case the discretion did not involve a simple decision whether or not to exercise an absolute contractual right. The discretion involved making an assessment or choosing from a range of options, taking into account the interests of both parties'.<sup>18</sup>

All of these developments, were they to be found relevant to the employment contract, are problematic from the point of view of the employee. The employer who, inevitably, will be the drafter of the contract would have the incentive of structuring obligations as unqualified rights and thereby avoid implied constraint; any clause limited to a binary choice is similarly removed from control. The reluctance to restrict the exercise of termination clauses might seem irrelevant given *Johnson v Unisys*, but those in analogous contractual arrangements will also be denied protection.<sup>19</sup> There may well be a concern for arrangements such as franchise which share the same element of disparity in bargaining power. Against that backdrop, *Callow* helps indicate that the employment relationship need not be impacted by commercial law developments. In *Callow*, the underpinning norm of good faith served to constrain the employer's right of termination. Employment contracts too contain a central obligation of good faith in the shape of mutual trust and confidence and that is also likely to support a more protective stance.

### 3. FAIR DEALING AND DISCRETION: *CALLOW*

In *Callow v Zollinger*, the claimant was a contractor who provided services under a fixed-term contract. The employer was entitled to terminate the

<sup>18</sup> *Mid Essex Hospital Services NHS Trust v Compass Group* [2013] EWCA Civ 200, para 83.

<sup>19</sup> [2003] 1 AC 518.

contract unilaterally, without cause, by giving 10 days' notice. The contractor claimed damages when the power of termination was exercised on the basis that the employer had not acted in good faith. A crucial finding of fact was that the employer had '...decided to terminate the winter contract and chose not to inform the respondent until some months later, in order not to jeopardize the respondent's performance...Not only did the appellants fail to inform the respondent of their decision to terminate, but they actively deceived Callow as to their intentions and accepted the "freebie" work he performed, in the knowledge that this extra work was performed with the intention/hope of persuading them to award the respondent additional contracts once the present contracts expired'.<sup>20</sup> The Supreme Court found for the contractor: 'active deception' was inconsistent with the requirement of honest performance that sits below, and is a specific instance of, the overarching obligation of good faith. The employer had breached that duty by knowingly misleading Callow into believing the contract would not be terminated. The employer had provided the length of notice required contractually but had put themselves in breach by exercising the clause dishonestly: 'If someone is led to believe that their counterparty is content with their work and their ongoing contract is likely to be renewed, it is reasonable for that person to infer that the ongoing contract is in good standing and will not be terminated early'.<sup>21</sup> Having found for the claimant on the basis that they did, the Court saw no reason to go on to explore whether good faith would otherwise restrict the right of termination. In particular, they chose not to consider whether the case law requiring discretionary powers to be exercised in good faith applied to unqualified rights of termination. It had been confirmed in *Bhasin* that such a common law constraint did exist in Canada where an obligation is expressed as an explicitly discretionary clause. It is though difficult to see that an absolute clause would not be similarly constrained given that *Matthews* holds that it is subject to the overarching obligation of good faith. The duty of honest performance is simply one manifestation of that duty; as is the obligation to exercise discretionary clauses in a manner consonant with fair dealing. It would be surprising if there was a differential impact and, in the subsequent commercial case of *Wastech Services v Greater Vancouver (Wastech)*, a majority of the Supreme Court confirmed that there was not: 'Like the duty of honest

<sup>20</sup> *CM Callow v Zollinger* 2018 ONCA 896, para 15.

<sup>21</sup> *Callow*, n.6 above, para 37

performance considered in *Bhasin* and *Callow*, the duty to exercise discretionary power in good faith places limits on how one can exercise facially unfettered contractual rights.<sup>22</sup>

What does the decision tell us that might inform litigation in the UK? *Callow* makes clear that an utterly unqualified and unambiguous termination clause can be restricted by the operation of good faith; on this occasion by the requirement of honest performance. This, as we have seen, is in contrast to the position taken in a number of commercial cases in the UK. Treitel explains that the view is taken ‘that the right to terminate is in the nature of an “absolute right” which is not subject to the implied term in question.’<sup>23</sup> Treitel regards this as the ‘better view’ though no explanation is offered. It may be noted that Collins has viewed such clauses as giving the holder a discretionary power.<sup>24</sup> *Callow* suggests that a key differentiator between competing lines of case law may be the significance that good faith is held to play in the contractual relationship. Commercial contracts in the UK display elements of fair dealing, but they are not contracts of good faith and are not at all likely to become so. The organising principle set out in *Bhasin* means that Canadian courts approach matters differently. One would expect this to be in broad alignment with the employment contract here given the central role allocated to the obligation of trust and confidence.

Writing extra-judicially, Beatson has said that ‘[i]n a contractual context, discretion is often taken to mean that a matter is remitted to the unrestricted choice of a person.’<sup>25</sup> Deciding whether or not to exercise a contractual right involves a choice; as does exercising a discretion over a binary issue. Recent judgments in commercial cases adopt a narrower view than that espoused by Beatson. It is important to recognise that such a restrictive approach to the nature of a discretionary clause is founded in policy rather than linguistics. It may be justifiable in commercial cases as the parties are, in principle, capable of inserting any safeguards that they see as necessary. In the employment context, there would appear to be every need to reject a restricted approach to the issue. Employees cannot protect themselves at the stage of formation of the contract as drafting, in reality, is a unilateral act on the part of the employer. To allow an employer to avoid scrutiny through devices

<sup>22</sup>2021 SCC 7, para 62.

<sup>23</sup>E. Peel, *The Law of Contract*, 15th edn (London: Sweet and Maxwell, 2020), para 18–088.

<sup>24</sup>H. Collins, ‘Discretionary Powers in Contracts’ in D. Campbell et al. (eds), *Implicit Dimensions of Contract* (Oxford: Hart, 2003) 24.

<sup>25</sup>J. Beatson, ‘Public Law Influences in Contract Law’ in J. Beatson and D. Friedman (eds), *Good Faith and Fault in Contract Law* (Oxford: OUP, 1995) 267.



such as the creation of absolute rights (which can be waived at his discretion) constitutes a form of contracting-out of common law regulation. As a corollary, mutual trust is prevented from fulfilling its purpose of rendering oppressive conduct unlawful. In my view, all exercises of discretion should be subject to judicial overview and this necessitates looking to the substance of a term rather than its form.

As has been discussed, the fact that *Callow* strikes at the process of termination might be thought to be irrelevant to UK employment lawyers as the possibility of an implied restraint on a termination clause has been denied by *Johnson v Unisys*.<sup>26</sup> The outcome might though still be relevant to individuals providing work under a wide variety of contractual arrangements. Between employment cases and purely commercial ones lie many others involving individuals such as workers (as defined by statute) and those who might be said to be in a position ‘akin’ to employees (to borrow from the world of tort).<sup>27</sup> Such individuals enter into working relationships exhibiting the same disparity of power that is to be found in the employment relationship and are equally vulnerable should the employer decide to act badly. The absence of statutory protection in respect of termination might allow the common law to develop unhindered as the constitutional concerns expressed in *Johnson* are absent. Collins has observed that ‘the House of Lords in *Johnson v Unisys* carefully did not reject the wider possibility that in long-term contracts containing termination clauses, apart from contracts of employment, the courts might in some cases insert a good faith standard to control the exercise of the power.’<sup>28</sup> Should common law constraints emerge, we would be faced with the slightly odd consequence that non-employees would have rights on termination that employees did not possess.

*Callow* also brings into focus the question of control of the dimensions of an employer’s prerogative which do not find expression in specific clauses: contract renewal would be an excellent example. A contract for fixed-term employment will often not contain an express term dealing with extension, but an employer is perfectly at liberty to elect to make such an offer. *Callow* reminds us that in *Bhasin* the Supreme Court found that the obligation of

<sup>26</sup>*Johnson*, n.19 above.

<sup>27</sup>Section 230(3b) of the Employment Rights Act 1996 extends a number of employment rights to those who are not employees but who work under a contract ‘whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual’.

<sup>28</sup>H. Collins, n.24 above, 248.



honest performance encompassed the question of renewal. The point is an important one as the employer's capacity to act in an oppressive way can be realised in all manner of ways. *Callow* lends support to decisions in the UK which hold that the employer's prerogative will be reviewed in a broad range of situations. In *IBM v Dalglish* the approach in *Transco v O'Brien* to the offer of new or revised terms was reaffirmed: 'the test of arbitrariness or capriciousness, as an aspect of the duty of trust and confidence, has been applied to that type of situation, so as to impose on an employer an obligation either to offer to the particular employee or group of employees the same or a similar pay increase as that offered to others who are comparable, or at least to justify not having done so on some basis which is not arbitrary or capricious.'<sup>29</sup> In *Transco*, it was accepted that the employer was not exercising an express or implicit discretion under the employment contract but was still constrained when it came to offering revised terms. Where employment law is concerned, the employer's 'freedom of operation' under the contract is still subject to implied obligations.

#### 4. THE FAIRNESS OF THE BARGAIN

In *Heller*, the parties were at issue over a clause which provided that drivers resolve any dispute with Uber through mediation and arbitration in the Netherlands. The claimant (who earned between \$400 and \$600 a week) was understandably anxious to avoid dispute resolution being conducted in this way; not least because the mediation and arbitration process requires up-front administrative and filing fees of US\$14,500, plus legal fees and other costs of participation. The claimant argued that the arbitration clause was invalid because it was unconscionable but also because it contracted out of mandatory provisions of Canadian employment protection legislation. The Supreme Court found for the claimant on the former ground.

The claimant faced a fundamental difficulty as there had been no procedural defect as such in the formation of the contract. While it could be said that the substance of the bargain was markedly disadvantageous precedent was clear that did not suffice.<sup>30</sup> Such a position has been commonly held

<sup>29</sup>[2018] ICR 1681 reaffirming [2002] ICR 444.

<sup>30</sup>Brown J noted in *Heller*, n.6 above, para 156 that 'There is little support in the jurisprudence for the view that unconscionability operates solely, or even primarily, on the basis of substantive unfairness'. For commentary on *Heller*, see M. McInnes, 'Uber and Unconscionability in the Supreme Court of Canada' (2021) 137 *LQR* 30.

in comparable jurisdictions.<sup>31</sup> In a bold decision, the view was taken that the substantive unfairness of the bargain sufficed to allow the conclusion to be reached that the clause was unconscionable and thereby unenforceable. The views of a leading Canadian academic writer proved influential: ‘Unconscionability is an equitable doctrine that is used to set aside “unfair agreements [that] resulted from an inequality of bargaining power”’.<sup>32</sup> The decision is a radical one. The existence of inequality of bargaining power allows a claimant to succeed where none of the traditional categories of procedural defect are present. The question then becomes ‘whether the potential for undue advantage or disadvantage created by the inequality of bargaining power has been realized’.<sup>33</sup> It is worthy of note that the disparity of imbalance in power in the relationship does not appear to have been more pronounced than is the case with employment relations (or analogous ones) in general: ‘The arbitration agreement was part of a standard form contract. Mr. Heller was powerless to negotiate any of its terms. His only contractual option was to accept or reject it’.<sup>34</sup> The fact that the contract was standard form was highlighted but, again, that is a common feature of employment relations.<sup>35</sup>

The fact that the employment contract is now underpinned by the obligation of trust and confidence and is also viewed as relational might be thought to raise the potential relevance of *Heller* to litigation in the UK. A relationship informed by mutual trust sits uneasily with contractual terms which might be thought to be the product of ‘snatching a bargain’. Relational contract theory also stresses the importance of reciprocity in exchange lest the relationship be damaged by exploitative conduct.<sup>36</sup> A significant disparity in exchange is unlikely to be conducive to a relationship flourishing.

The outcome in *Heller* may therefore seem appropriate at a certain level of generality but the wisdom of transforming the common law so radically is another question entirely. Were *Heller* to be followed here the courts would have to decide what gave rise to an unconscionable outcome and that would be no easy task.<sup>37</sup> It would also be likely to be viewed as an unwelcome one

<sup>31</sup>G. Anderson et al., *The Common Law Employment Relationship*, Chapter Six.

<sup>32</sup>*Heller*, n.6 above, para 54, approving John D. McCamus, *The Law of Contracts*, 2nd edn (Toronto: Irwin, 2012) 424.

<sup>33</sup>*Heller*, n.6 above, para 75.

<sup>34</sup>*Heller*, n.6 above, para 93

<sup>35</sup>H. Collins, ‘Legal Responses to the Standard Form Contract’ (2007) 36 *ILJ* 2.

<sup>36</sup>I. Macneil, *The New Social Contract* (New Haven, CT: Yale UP, 1980), 103.

<sup>37</sup>See D. Brodie, ‘The Employment Contract and Unfair Contracts Legislation’ (2007) 27 *LS* 95.

given the tendentious nature of the exercise in an area such as employment relations. This is borne out by the views of Sir Patrick Elias who, writing extra-judicially, has stated that ‘There is a limit to how far the courts can legitimately interfere with the express terms of the contract in the absence of legislation conferring that power.’<sup>38</sup> More recently still, Richards LJ in *Times Travel v Pakistan International Airlines* offered a view very much at odds with that in *Heller*: ‘The common law and equity have not countenanced as grounds for setting aside contracts factors such as inequality of bargaining power or the exploitation of a monopoly position. Intervention in relation to these and other factors seen as going to the fairness of contractual terms and the relative positions of the parties has been through legislation, directed principally to consumer contracts and consumer credit.’<sup>39</sup> It is striking that the Court of Appeal in *Times Travel* rejected the opportunity to endorse an expanded concept of economic duress which would have made it easier to challenge unreasonable exercises of economic power.<sup>40</sup>

The position set out by Richards LJ is one that would be likely to be shared by the judiciary in the UK more widely. Particularly since *Johnson* a change of this magnitude would be seen as one for the legislature. I would also suggest that there are a number of weaknesses in the judgment of the majority in *Heller* that would confirm judicial scepticism about the wisdom of abandoning the current approach here. It should be said that, in some ways, *Heller* very much follows in the footsteps of recent decisions. It pinpoints that adverse consequences may well result from an imbalance in power in a working relationship and that judicial intervention is called for. However, by going on to expose the substance of the agreement to judicial scrutiny, it requires that judges articulate what constitutes an unacceptable bargain. *Heller* offers little that is insightful in this regard: a bargain ‘is improvident if it unduly advantages the stronger party or unduly disadvantages the more vulnerable.’<sup>41</sup> This provides very little by way of guidance for judges in future cases. In a powerful judgment Brown J (concurring in the result but not the reasoning) stated that ‘judges applying unconscionability are to mete out justice as they deem fair and appropriate, thereby returning unconscionability to a time when equity was measured by the length of the

<sup>38</sup>P. Elias, ‘Changes and Challenges to the Contract of Employment’ (2018) 38 *OJLS* 869,872.

<sup>39</sup>[2019] EWCA Civ 828, para 41.

<sup>40</sup>See D. Brodie, ‘The Irrepressible Common Law: The Economic Torts and the Right to Strike’ in A. Bogg et al. (eds), *The Constitution of Social Democracy* (Oxford: Hart, 2020).

<sup>41</sup>*Heller*, n.6 above, para 74.

Chancellor's foot'.<sup>42</sup> This criticism strikes me as well founded; subjectivity and consequent inconsistency is a threat here.

*Heller* also takes the view that a specific clause can be regarded as unconscionable without regard to whether the bargain as a whole can be viewed as fair. This strikes me as unsound and I would suggest that it only makes sense to assess matters in the round. Brown J observing that the 'overall exchange of value and assumption of risk...may very well justify what appears to be substantial "improvidence" solely from Mr. Heller's perspective'.<sup>43</sup> I suspect that the majority were content to focus upon the individual term in dispute to avoid the complexities that would need to be tackled by a more holistic analysis. This approach was facilitated by the extreme nature of the clause in issue: 'Effectively, the arbitration clause makes the substantive rights given by the contract unenforceable by a driver against Uber'.<sup>44</sup>

## 5. CHANGE IN CIRCUMSTANCES

What seems a fair bargain at the outset may appear less so over time. The common law tends to be unsympathetic should a change of circumstances mean that the contract has become far more onerous, or even commercially impracticable, for one side. In *Fish v Dresdner Bank*, the claimants brought actions to recover bonus and severance payments.<sup>45</sup> The defendant had been adversely affected by the 2008 banking crisis and sought to avoid payment of bonus on the basis that 'the claimants have, with others, been responsible for the management of a business which has suffered a disaster and that they should not receive very large sums by way of bonus and severance which were agreed when the scale of the disaster was not known'. This contention was rejected. Again, for instance, the law of contract does not imply any obligation of renegotiation.<sup>46</sup> Good faith might be thought to point towards the need to bring about a change in doctrine and ensure that the consequences of unforeseen adverse events were shared more equitably.

In Canada, the opportunity to do so presented itself in *Churchill Falls v Hydro-Québec (Churchill Falls)* where the Supreme Court had to decide whether the common law should be moved into a more interventionist

<sup>42</sup>*Heller*, n.6 above, 153

<sup>43</sup>*Heller*, n.6 above. 172.

<sup>44</sup>*Heller*, n.6 above 95.

<sup>45</sup>[2009] IRLR 1035.

<sup>46</sup>See J. Carter, 'The Renegotiation of Contracts' (1998) 13 *JCL* 185.

stance.<sup>47</sup> The parties had signed a contract that set out a legal and financial framework for the construction and operation of a hydroelectric plant. Hydro-Québec undertook to purchase, over a 65-year period, most of the electricity produced by the plant, whether it needed it or not, which allowed Churchill Falls to use debt financing for the construction of the plant. In exchange, Hydro-Québec obtained the right to purchase electricity at fixed prices for the entire term of the contract. After the contract was signed, there were changes in the electricity market, and the purchase price for electricity set in the contract fell below market prices. The owners of the plant argued that Hydro-Québec had a duty to renegotiate the contract when it proved to be an unanticipated source of substantial profits for it. It was said that renegotiation was required to allocate the profits more equitably between the parties. It was submitted that the contract was a relational one akin to a joint venture and that pointed towards the outcome sought. The claimant maintained that ‘the parties always intended to prioritize cooperation and the equitable sharing of the risks and benefits associated with the project, but a number of unforeseen events fundamentally altered the nature of the electricity market and, as a result, the equilibrium of the parties’ prestations. CFLCo adds that the Contract cannot be considered to have dealt with the risk of electricity price fluctuations as radical as the ones that have occurred since the 1980s: such fluctuations were impossible to foresee in 1969.<sup>48</sup>

The Supreme Court did not regard the contract as one that was either relational or a joint venture. More fundamentally, it was held that the organising norm of good faith did not require a party to renegotiate a contract. Admittedly, ‘good faith...serves as a basis for courts to intervene and to impose on contracting parties obligations based on a notion of contractual fairness.’<sup>49</sup> However, the emphasis was very much on ensuring that the parties performed their obligations that they agreed to under the contract entered into. The Court was not attracted by the notion that good faith might be a route through which revision of the substantive terms would come about. It would not be surprising if the courts in this country adopted the same approach. It is one thing to dissolve a contract by reason of frustration but quite another to say that commercial impracticability requires the court to supply new terms. There is also the prior difficulty of deciding the nature of the event that what would trigger an obligation to renegotiate.

<sup>47</sup>2018 SSC 46.

<sup>48</sup>Ibid., para 41.

<sup>49</sup>*Churchill Falls*, n.47, para 103.

The courts do have at their disposal a variety of devices to mitigate the consequences of obligations working in a fashion that was not foreseen and are likely to be content with this; implication and interpretation can achieve a good deal.

Rowe J dissented and absolutely pivotal to his decision was the conclusion that the contract should be viewed as a relational one. A 'heightened' form of good faith would be appropriate where such a contract was involved. The conclusion that the contract was relational was seen as flowing from the co-operative nature of the agreement that the parties had entered into. The application of the heightened duty resulted in an obligation to adapt the terms of the bargain so that it would reflect a more equitable division of profits: 'This obligation flows not from the fact that any profit imbalance between the parties was unforeseen. Rather, it is premised on the fact that an imbalance of this nature and magnitude is beyond what the parties intended when they concluded their agreement.'<sup>50</sup> Had the dissenting view prevailed there might well have been significant consequences in Canada for other relational contracts such as employment. I would not though have thought that would have made adoption in the UK more likely; recasting the substance of the bargain would remain a step too far.

## 6. HONOURING THE BARGAIN STRUCK

The jurisprudence in the UK sees fair dealing as a means of compelling the parties to remain faithful to the bargain struck; as did the majority of the Supreme Court in *Churchill Falls*. This is particularly true where the remuneration package is concerned. *Matthews* is very much of that ilk and can be seen as fully supportive of the position taken here. Financial packages to incentivise the employee such as bonus schemes may make provision to allow the employer to vary the terms of the scheme. Issues arise not only around the exercise of contractual powers but also over construction of the terms of the bargain. Some schemes also involve an element of delay between time of performance and date of entitlement to payment. Particular challenges can then arise as the employer may no longer be inclined to bestow a benefit at the later date.

In *Matthews*, the Supreme Court construed the remuneration package in dispute in a way which prevented the employer expropriating benefits

<sup>50</sup> *Churchill Falls*, n.47, para 180.

which had accrued. The claimant had been wrongfully dismissed and sought by way of damages a sum of money which had accrued under a long-term incentive plan. The employer argued that entitlement had been lost as he was no longer an employee at the date when entitlement to payment would otherwise arise. The clause in dispute provided that this 'Agreement shall be of no force and effect if the employee ceases to be an employee... regardless of whether the Employee resigns or is terminated, with or without cause'. A literal reading of the clause would have given the employer cause for optimism and the Court of Appeal had indeed found for them. The Court had held that the wording was unambiguous and an employee's right to recover under the plan ceased the moment he left employment.<sup>51</sup> The Supreme Court disagreed and held that the clearest of wording was required to achieve forfeiture: 'where a clause purports to remove an employee's common law right to damages upon termination "with or without cause"; such as clause 2.03, this language will not suffice. Here, Mr Matthews suffered an *unlawful* termination since he was constructively dismissed without notice.'<sup>52</sup> It was emphasised that 'exclusion clauses "must clearly cover the exact circumstances which have arisen"'.

In the UK, any suggestion of expropriation will also face intense judicial scrutiny. Reasonable expectations that payment has been earned for work performed should be not be denied and any retrospective 'snatching of the bargain' will be guarded against. In *Mallone v BPB*, it was argued that the employer possessed an absolute discretion with respect to a scheme for share options.<sup>53</sup> Such a submission was unattractive and the court had no difficulty in rejecting this interpretation: 'Considerations such as these, however, are not, it seems to me, a valid reason for treating the whole scheme as a sort of mirage: whereby the executive is welcomed as a participant, encouraged to perform well in return for reward, granted options in recognition of his good performance, led on to further acts of good performance and loyalty, only to learn at the end of his possibly many years of employment, when perhaps the tide has turned and his powers are waning, that his options, matured and vested as they may have become, are removed from him without explanation.'<sup>54</sup>

<sup>51</sup> (2018) NSCA 44.

<sup>52</sup> *Matthews*, n.1 above, para 66.

<sup>53</sup> *Mallone v BPB Industries* [2002] EWCA Civ 126.

<sup>54</sup> *Ibid.*, para 44.



In *Mallone*, a decision had been made under a share option scheme which was found to be invalid when regard was had to the aims of the scheme. Those were said to be to ‘Provide a means of rewarding and motivating certain selected executives through the grant of share options should the performance of participants merit it. The scheme was structured in such a way that the options would not vest, in normal circumstances, until the third anniversary of the date of grant, thereby encouraging the executive’s loyalty to the Defendant’. The employee was dismissed and the employer exercised his discretion under a clause, which empowered him to reduce or withdraw share options to cancel options which had vested. This decision was held to be irrational. Notwithstanding the aims of the scheme, there was no sign that any regard was had to the fact that the share options were granted at a time when the employer’s performance was clearly regarded as excellent. In addition, it was noted that where an employee was dismissed for misconduct his share options would lapse. The employer’s decision had the effect of putting the claimant in the same position and this could not be justified on rational grounds. The more recent decision in *Daniels v Lloyds Bank* provides an example of the contemporary approach to interpretation that is protective of the employee’s interests.<sup>55</sup> In *Daniels* it was held that a bank had not been entitled to amend the terms of a long-term share incentive plan for its employees to introduce a ‘malus’ clause, giving it the discretion to adjust awards under the plan to nil. A power to act retrospectively to the detriment of one party could only be conferred by clear language. *Daniels* demonstrates that the courts will police not just the way in which discretion is exercised but also determine whether discretion exists and, if so, what is its scope. *Matthews* may encourage the formulation of a sub-principle which would declare that expropriation of accrued earnings will constitute a breach of the overarching term of mutual trust. The case law here would be consistent with that position.

## 7. CONCLUSION

Good faith has come to inform the law of contract much more cogently than has been the case historically: ‘there is now a greater push towards an inwards-facing view of good faith as intrinsic to the very essence of contract and inherent in all contracts. It is notable that debates concerning good

<sup>55</sup>[2018] EWHC 660.

faith are of increasing prominence in all major common law jurisdictions.<sup>56</sup> In the UK, good faith is more evident in the law of contract but it does not seem likely that a general principle in the *Bhasin* fashion will emerge in the foreseeable future. This makes it less likely that the law of contract will be enriched by the sorts of radical developments that an obligation of good faith might be expected to prompt in the general principles of contract. This is not to suggest that the Canadian law should be set to one side. The law of the employment contract is already impacted by good faith in the form of mutual trust and Canadian cases may well assist in shaping further incremental development. I would suggest that the recent Canadian jurisprudence is helpful in allowing an assessment of how a number of specific issues might be resolved in the UK.

The radical outcome in *Heller* is, however, unlikely to be replicated and the views of Brown J (dissenting) would seem much more attuned to judicial thinking in the UK.<sup>57</sup> It may be that, even in Canada, Brown J's view will prevail over time. While unconscionability was not in issue in *Wastech*, the majority observed that the 'measure of fairness is what is reasonable according to the parties' own bargain'.<sup>58</sup> The minority were also at pains to deny that a purpose of good faith was 'to alter the express terms of the contract reached by the parties'.<sup>59</sup> On a related note, I do not think that the common law is likely to move in the direction of the creation of a new doctrine of commercial impracticability that might require a revision of terms. Fair dealing will continue to guard against expropriation and promote allegiance to the bargain struck. *Matthews* lends support on this front. It may seem a little surprising that the nature of a discretionary decision is contested but, on a reassuring note, the UK courts in employment cases have been taking a much broader view than has been seen in commercial law. *Callow* offers support at the highest level for this differentiation and may serve as a shield should there be any attempt to invoke the commercial cases in this country by way of defence to an employee's claims.

<sup>56</sup>P. S. Davies, 'The Basis of Contractual Duties of Good Faith' (2019) 1 *Journal of Commonwealth Law* 1, 3.

<sup>57</sup>In Australia, Allsop J has observed, extra-judicially, that good faith 'is a doctrine that is in support of the contract as struck. If one has a contract made through inequality of bargaining power, oppressive conduct or other vulnerability, good faith may not be the vehicle or technique for the vindication of the weaker party...': (Justice James Allsop, 'Conscience, Fair-Dealing and Commerce – Parliaments and the Courts' (FCA) [2015] *FedJSchol* 15)

<sup>58</sup>*Wastech*, n.22 above, para 71.

<sup>59</sup>*Wastech*, n.22 above, para 130.