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# *Unifying European Contract Law: Identifying a European Pre-contractual Obligation to Inform*

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## I. INTRODUCTION

THE MOVEMENT TOWARDS common principles of European contract law has been described as inevitable. In the words of one of its foremost proponents, 'it is a historic law that this unification is going to happen sooner or later'.[1] It has been difficult to ignore in recent years the volume of work discussing developments in this area of law. One might note, in particular, the Private Law in European Context series published by Kluwer Law International and the Cambridge University Press Common Core of European Private Law project. Further, the publication of Communications by the EC Commission in 2001,[2] 2003[3] and 2004[4] has served to promote an ongoing discussion on the nature and quality of the

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[1] O Lando, 'Is Codification needed in Europe?' (1993) 1 *European Review of Private Law* 157.

[2] Commission, Communication from the Commission to the Council and the European Parliament on European Contract Law, COM(2001)398 final (11 July 2001) [2001] OJ C255/1, presenting four non-exclusive options ranging from no EC action in this field (Option I) to the adoption of a uniform European contract law (Option IV). The latter option has received support from the European Parliament (since 1989) and from the European Council (since 1999).

[3] Commission, A more coherent European Contract Law–An Action Plan, COM(2003)68 final, (12 Feb 2003) [2003]OJ C63/1. Comment MW Hesselink, 'The European Commission's Action Plan: Towards a More Coherent European Contract Law' (2004) 12 *ERPL* 397, who notes the increasing influence of the intention to develop a common frame of reference (CFR).

[4] Commission, European Contract Law and the Revision of the *Acquis*: The Way Forward, COM(2004)651 final (11 Oct 2004).

*acquis communautaire* and the 'opportuneness'[5] of any form of non-sector-specific instrument in the area of European contract law.[6] Such intervention, it has been said, forms 'the riggings of a ship which is about to set sail'.[7]

The idea of harmonisation is further advanced by the publication of the now well-known *Principles of European Contract Law* (PECL). Published by the Commission on European Contract Law, which has been working since 1982 to establish a common set of principles, their clear aim is 'to serve as a first draft of a part of a European Civil Code'.[8] To this end, Parts I, II and III of the Principles, published in 2000[9] and in 2003,[10] respectively, provide a fascinating overview across European legal systems of contract law and beyond in an attempt to seek out common principles of liability.

In this essay, I do not criticise such developments. Indeed, as a comparative lawyer, I would welcome the fact that 'the emerging European private law has turned most self-respecting private lawyers into comparative lawyers'.[11] It has forced lawyers to look beyond national boundaries and appreciate the positive need to understand other legal systems and how legal systems in general operate. However, my concern is that advocates of some form of 'European contract law' have not placed sufficient weight on the difficulties that such a project will raise. I do not, as some authors have suggested,[12] accept that harmonisation is not possible, but advocate that one should not, in one's enthusiasm for the project, ignore the fundamental difficulties of establishing core principles of European law. I therefore propose in this essay to examine one particular contractual concept that, in my view, illustrates some of the challenges facing proponents of harmonisation. I have chosen the topic of pre-contractual non-disclosure for a number of reasons. First, it raises a classic debate about the nature of contractual obligations.[13] Further, it is an area of law that is generally recognised as

[5] An interestingly neutral term: see 2003 report, above n 3, 2 and 23.

[6] Yet, whilst the prospect of any core principles of European contract law appears to be postponed, this is still seen as a goal in some shape or form. This may be compared with the support given to an Exclusive Code by the majority of authors in S Grundmann and J Stuyck (eds), *An Academic Green Paper on European Contract Law* (The Hague, Kluwer Law International, 2002).

[7] C von Bar, 'Paving the Way Forward with Principles of European Private Law' in *Ibid*, 138.

[8] O Lando and H Beale (eds), *The Principles of European Contract Law Parts I and II* (The Hague, Kluwer Law International, 2000), p.xxiii.

[9] *Ibid*.

[10] O Lando, E Clive, A Prüm and R Zimmermann (eds), *The Principles of European Contract Law Part III* (The Hague, Kluwer Law International, 2003).

[11] M Hesselink, *The New European Private Law* (The Hague: Kluwer Law International, 2002) 46.

[12] P Legrand famously in 'European Legal Systems are not Converging' (1996) 45 *International and Comparative Law Quarterly* 52 and in 'Against a European Civil Code' (1997) 60 *MLR* 44.

[13] It has become almost a cliché in this context to cite Cicero, *De Officiis III*, 319.

receiving different treatment from the common and civil law. The Harris and Tallon survey of contemporary trends in Anglo-French contract law of 1989 describes as 'beyond question'[14] the divergence between common and civil law systems in this field. As Kessler and Fine stated in 1964, 'an investigation of the scope of the "duty to disclose" on a comparative law basis is most rewarding; it leads us straight to the heart of the philosophy underlying the law of contract'.[15] Moreover, it raises concerns about consumer protection which lie at the heart of the *acquis communautaire*. The right to information has been seen as a means of ensuring the promotion of consumer rights—rights can only be asserted if the consumer is in fact aware of their existence. The obligation to provide information therefore has a direct link with the development of EC contract law.

In examining this topic, I will confine myself to English and French law. These jurisdictions stand at the very edges of a cross-European divide in which other civilian systems such as the German[16] and Italian[17] take an intermediate position. By considering the two extremes, one therefore gains a more accurate picture of the divide and how this may be bridged. What, in modern times, separates these two jurisdictions and can we, notably in the light of current EC directives, see any movement towards a common approach? This is not a negative thesis, but one of inquiry. Any attempt at harmonisation must recognise the difficulties arising from diversity of legal culture and reasoning. It is vital that unification does not represent a mere compromise of written rules, but rather a considered appreciation of the very nature of contract law in Europe. To recognise the difficulties arising from the harmonisation project is therefore not to show weakness, but to reinforce its message and move towards a search for principles capable of finding acceptance within European legal, social and economic culture.

[14] D Harris and D Tallon (eds), *Contract Law Today*: *Anglo-French Comparisons* (Oxford, Clarendon Press, 1989) 187.

[15] F Kessler and E Fine, 'Culpa in contrahendo, Bargaining in Good Faith and Freedom of Contract; a Comparative Study' (1964) *77 Harvard Law Review* 401, 438.

[16] German law, for example, accepts that keeping silent may amount to fraud under para 123 of the BGB or support a claim that the contract be rescinded for a mistake concerning 'such characteristics of a thing . . . which are considered essential in practice' under para 119II (*Eigenschaftsirrtum*). There is, however, no general duty to disclose unless the other party is found to have relied on the knowledge or expertise of its contracting party or where there is already a relationship based on mutual trust and good faith. See H Brox, *Allgemeiner Teil des BGB* (26th edn, Cologne, Heymanns, 2002) 193–4 and 208, BS Markesinis, W Lorenz and G Dannemann, *The German Law of Obligations. Vol. I. The Law of Contracts and Restitution: a Comparative Introduction* (Oxford, Clarendon Press, 1997) 209 and F Ferrand, *Droit privé allemand* (Paris, Dalloz, 1997) No 245—there is no general obligation of disclosure in business contracts: BGH 13 July 1988 NJW 1989 764.

[17] See V Roppo, 'Formation of Contract and Pre-contractual Information from an Italian and Romance Perspective', paper delivered at the SECOLA 2004 conference not yet published.

## II. PECL AND THE DUTY TO DISCLOSE

Our starting point must be to turn to the Principles of European Contract Law themselves, which deal with pre-contractual disclosure in a section entitled 'Fraud', which is set out below:

Article 4:107: Fraud

(1) A party may avoid a contract when it has been led to conclude it by the other party's fraudulent representation, whether by words or conduct, or fraudulent non-disclosure of any information which in accordance with good faith and fair dealing[18] it should have disclosed.
(2) A party's representation or non-disclosure is fraudulent if it was intended to deceive.
(3) In determining whether good faith and fair dealing required that a party disclose particular information, regard should be had to all the circumstances, including:
    (a) whether the party had special expertise;
    (b) the cost to it of acquiring the relevant information;
    (c) whether the other party could reasonably acquire the information for itself; and
    (d) the apparent importance of the information to the other party.

The commentary advises that these are non-exhaustive factors. The central message is that, unless there is a good reason for remaining silent, 'silence is incompatible with good faith'. 'A party should not normally be permitted to remain silent on some point which might influence the other party's decision on whether or not to enter the contract with the deliberate intention of deceiving the other.'[19]

In setting standards for contracting behaviour, however, one notes in (3)(a)–(d) a number of reference points, which, whilst found in many systems of law, reflect different concerns. 'Special expertise' (a) suggests a focus on the professional/consumer relationship and the importance of an informational imbalance between the parties. The 'apparent importance of the information' (d) equally suggests a focus on the parties' subjective needs. In contrast, factors (b) and (c) ('the cost of' and 'ability to acquire' information) raise questions of economic efficiency and self-reliance. One might

[18] 'Good faith and fair dealing' are defined by the Commission at para 1.201 as 'community standards of decency, fairness and reasonableness in commercial transactions', above n 8, 113. 'Good faith' is seen as subjective, meaning honesty and fairness in mind, whilst 'fair dealing' is regarded as objective and indicates the observance of fairness in fact: above n 8, 115–116.

[19] O Lando and H Beale (eds), *The Principles of European Contract Law Parts I and II,* above n 8, 253.

question to what extent these factors lead in a similar direction. In interpreting 'good faith and fair dealing', such factors may indeed be relevant, but they do not indicate what weight should be given to each, sometimes conflicting, factor.

We are left with a question of interpretation. If we accept a common concept of 'good faith and fair dealing', can we also assume that it will be understood and applied in the same way in every Member State? An agreement on terminology may be a first step towards integration, but it will have a common meaning only if it is construed in a similar way in each jurisdiction. In setting cross-border standards of contracting behaviour, can we ensure that the same standards are adopted in each Member State and therefore achieve the goal of breaking down barriers to trade and ensuring consumer protection? This would seem to rely on a number of assumptions. First, that Member States possess a common view of the values of good faith and fair dealing in the general law of contract.[20] Secondly, that states will adopt a similar mechanism for balancing the conflicting policy concerns of consumer-welfarism and market-individualism. Thirdly, that a similar level of awareness of the political arguments of economic efficiency and social solidarity exists across Europe. As Fabre-Magnan has noted, if such standards and principles differ, national judges will continue to interpret such terms according to national, and not European, norms.[21]

While such questions raise fundamental issues in the European law of contract, my concern in this essay is to offer a micro-perspective by examining the way in which English and French law treat the pre-contractual obligation to inform. Whilst the common law has traditionally refused to contemplate any duty of disclosure save *in extremis* (for example, contracts *uberrimae fidei*); in France, we see doctrinal support for a general obligation to disclose based on the principles of good faith. The question thus arises how harmonisation should deal with such disparity. By examining the approaches taken by English and French law and the impact of the *acquis communautaire*, it is possible to identify the true obstacles to a common instrument and the hurdles any such proposals must overcome.

[20] The literature on good faith is voluminous. Whilst some authors have sought to highlight the differences between different states—see, for eg M Bridge, 'Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?' [1984] *Can Bus LJ* 385—other authors have been more optimistic: HLK Lücke, 'Good Faith and Contractual Performance' in PF Finn (ed), *Essays on Contract* (Sydney, The Law Book Company Ltd, 1987). See, generally, R Zimmermann and S Whittaker, *Good Faith in European Contract Law* (Cambridge, Cambridge University Press, 2000).

[21] M Fabre-Magnan, 'Defects of Consent in Contract Law' in A Hartkamp, M Hesselink, E Hondius, E du Perron and C Joustra (eds), *Towards a European Civil Code* (2nd edn, The Hague, Kluwer Law International, 1998).

## III. DIVERGENT APPROACHES: ENGLISH AND FRENCH LAW

### A. English Law

English law has traditionally started from the position that there is generally no duty to disclose:

> Where parties are contracting with one another, each may . . . observe silence even in regard to facts which he believes would be operative upon the mind of the other, and it rests upon those who say that there was a duty to disclose, to shew that the duty existed.[22]

One may see from this quotation that any such duty to disclose is regarded as exceptional, placing the burden on the other party to establish grounds for liability. On this basis, the courts have refused to accept that a failure to give the other contracting party information that would influence his or her decision,[23] or to correct a false assumption on which the other party is relying,[24] may ground liability. In the classic example, A buys B's horse which he thinks is healthy and pays the market price for a healthy horse. He would not have purchased the animal if he had known it to be unhealthy. In the absence of any representation by B as to the health of the horse or any contractual term to this effect, A cannot escape the contract.[25] In the words of Lord Atkin:

> All these cases involve hardship on A and benefit B, as most people would say, unjustly. They can be supported on the ground that it is of paramount importance that contracts should be observed, and that if parties honestly comply with the essentials of the formation of contracts—*i.e.*, agree in the same terms on the same subject matter—they are bound, and must rely on the stipulations of the contract for protection from the effect of facts unknown to them.[26]

[22] *Davies v London & Provincial Marine Insurance Co* (1878) 8 Ch D 469, 474 *per* Fry J. See also *Keates v Cadogan* (1851) 10 CB 591.

[23] See Lord Atkin in *Bell v Lever Bros* [1932] AC 161, 227: 'Ordinarily the failure to disclose a material fact which might affect the mind of a prudent contractor does not give the right to avoid the contract. The principle of *caveat emptor* applies'.

[24] *Smith v Hughes* (1871) LR 6 QB 597, provided, of course, that no representation has been made to induce this assumption.

[25] See Lord Atkin in *Bell v Lever Bros* [1932] AC 161, 224.

[26] *Ibid*. As Halson has remarked, this 'is really no more than an application of the more general disinclination on the part of the common law to recognise a duty to negotiate in good faith' R Halson, *Contract Law* (Harlow, Longman, 2001) 31.

Certainty and security of transactions thus militate against a general duty of disclosure. The fact that this may lead to unjust results is accepted as an unfortunate consequence of such goals.

A more recent example may be seen in the Court of Appeal decision of *Sykes v Taylor-Rose*.[27] A house had been sold to the Sykes in 2000. They subsequently discovered that a horrific murder had been committed there in the early 1980s. The then owner, had killed a young girl and hidden parts of her body around the house. This had been described in graphic detail in a Channel 5 documentary, which inferred that there were still body parts existing within the property. Unsurprisingly, the Sykes' moved out of the house immediately and put the house on the market. The facts of the murder were disclosed to potential purchasers and the house sold six months later for £75,000; a reduction of 25 per cent of its ordinary market value.

Certain specific duties of disclosure are imposed on the vendor of a house in English law, for example to disclose defects relating to title, but these are limited.[28] Parties, in practice, will rely on pre-contract enquiries in which vendors are expected to respond to specific questions relating to the property.[29] In *Sykes*, the vendors had been asked, inter alia, whether there was 'any other information which you think the buyer might have a right to know'[30] and had responded in the negative. The Sykes' brought an action alleging that the vendors had a duty to disclose the murder that they had known to have taken place in the property. This argument was, however, rejected by the Court of Appeal. In adopting a very narrow interpretation of the question asked, the court focussed on what information a buyer *might* have a *right* to know.[31] Assuming that the purpose of the question was to enable a vendor to respond without having to resort to legal advice, the Court took the view that it was enough to respond honestly. The vendor would not be required to point to reasonable grounds for his or her answer. An answer, subjectively believed to be correct, would suffice.

[27] [2004] 2 P & CR 30. See also M Pawlowski, 'Things that Go Bump in the Night' (2000) 144 *Solicitors' Journal* 1166. *cf. Taylor v Hamer* [2003] 1 EGLR 103, CA. This case received much adverse comment in the British press. The *Guardian* newspaper described the decision as one which 'is likely to cause confusion among house-sellers and their legal advisers, and perhaps even encourage dishonesty': *Guardian* (13 March 2004).

[28] HG Beale (ed), *Chitty on Contracts* (29th edn, London, Sweet and Maxwell, 2004) 6–152, GS Spencer Bower, AK Turner and RJ Sutton, *The Law Relating to Actionable Non-Disclosure* (2nd edn, London, Butterworths, 1990) paras 7.06–7.16, although GH Treitel, *Law of Contract* (11th edn, London, Sweet and Maxwell, 2003) 398, finds that it is confined to unusual defects of title which a reasonably prudent purchaser could not be expected to discover: see *Molyneux v Harvey* [1903] 2 KB 487.

[29] The so-called 'Sellers Property Information Form'. See RM Abbey and MB Richards, *A Practical Approach to Conveyancing* (6th edn, Oxford, Oxford University Press, 2004).

[30] Question 13 of the standard Law Society form, which has since been withdrawn.

[31] Adopting the reasoning of the Court of Appeal in *Economides v Commercial Assurance Co plc* [1998] QB 587.

On this basis, the Taylor-Roses could not be found to be liable. In the words of Peter Gibson LJ, 'it is for the buyer to decide what enquiries to raise and in what form. It cannot be doubted that a more specific and less subjective question going to the value of the property or to the ability of the purchaser to enjoy the property could have been asked'.[32]

*Sykes* is nevertheless helpful in identifying a number of important characteristics of English law. Parties are expected to protect their own interests. Liability may arise for misrepresentation or in the law of tort where one party has given an incorrect answer or misled the other party, but the onus is on the buyer to formulate the questions in such a way that liability may arise. The view of the Sykes that they could not in conscience dispose of the property without disclosing its grisly past received no legal recognition; the court refused to place this 'moral' view within a legal framework. A general duty of disclosure was not even argued before the court.[33] Success would thus depend on the ability of the claimant to establish liability under one of the exceptions to the general rule.

The courts' reasoning is therefore essentially that of freedom of contract: market individualism tempered with limited protectionism. The English courts recognised at a very early stage that there would be, even in an era of freedom of contract, the need to require disclosure, for example where only one party had access to the relevant information or could access it with greater ease or where the very nature of the contract was predicated on open disclosure of the facts. Hence, contracts *uberrimae fidei*, such as the insurance contract,[34] require full disclosure of all facts that a reasonable or prudent insurer would regard as material[35] to his decision to enter into the particular contract of insurance.[36] Fiduciary relationships will additionally give rise to an equitable obligation to disclose all material facts that may affect the contemplated transaction.[37] Statutory intervention has been limited. The classic example is that of section 18(1) of the Marine Insurance Act 1906, although this in fact amounted to no more than a formulation of the pre-existing common law position.[38] Most significantly, the courts

[32] Para 50.

[33] A general duty of disclosure had been argued at first instance before HH Judge Langan QC, but was rejected and this finding was not appealed.

[34] See MA Clarke, *The Law of Insurance Contracts* (4th edn London, Lloyd's of London Press, 2002).

[35] Identifying which terms are material has proven to be an ongoing problem in insurance law: see, recently, *Drake Insurance plc v Provident Insurance plc* [2004] 1 Lloyd's Rep 268,

[36] See *London Assurance v Mansel* (1879) LR 11 Ch D 363; *Lambert v Co-operative Insurance Society* [1975] 2 Lloyd's Rep 485. Contracts for family settlements are also treated as contracts *uberrimae fidei*: *Gordon v Gordon* (1816) 3 Swan 400; *Greenwood v Greenwood* (1863) 1 DJ & S 28.

[37] See JE Martin, *Hanbury & Martin's Modern Equity* (16th edn, London, Sweet and Maxwell, 2001) ch 21.

[38] See also the Financial Services and Markets Act 2000, which places a duty on those responsible for producing listing particulars to ensure that they contain, at the very least,

emphasise the isolated nature of these exceptions, and are careful to avoid any suggestion that they may collectively support a wider principle.

Yet, consumer-welfarism has made some impact on English law. Contractual warranties, for example, have proved to be a useful tool by which the court may attempt to regulate contracting behaviour. By implying a term that one party warrants performance unless the other party is told otherwise, the onus will be on the contracting party to protect him- or herself by ensuring that the other party is fully informed. The most well known illustration of this technique may be found in the Sale of Goods Act 1979.[39] Section 14(2), for example, provides that where the seller sells goods in the course of a business, there is an implied term that they are of satisfactory quality *unless* any defect is specifically drawn to the buyer's attention before the contract is made.[40] Such provisions indirectly impose a duty to disclose prior to contract and set a high standard for sellers. They are *presumed* to know the information in question, irrespective of their ability to acquire it. Liability will thus arise unless the seller provides full details of the goods in question. Contractual terms are thereby used as a means to encourage pre-contractual disclosure. As Barry Nicholas has commented, 'the characteristic Common Law instrument for the judicial development of the law of contract is the implied term'.[41]

Such provisions serve to protect ignorant or unwary consumers. This appears to be a common concern. The French *Code civil*, for example, also provides liability for latent defects (*vices cachés*) in Articles 1626 and 1641–1648. Article 1641 similarly provides that 'a seller[42] is bound to a warranty on account of the latent defects of the thing sold which render it unfit for the use for which it was intended, or which so impair that use that the buyer would not have acquired it, or would only have given a lesser price for it, had he known of them'. However, 'a seller is not liable for defects which are patent and which the buyer could ascertain for himself'.[43]

adequate information to enable investors and their professional advisers to make informed decisions about the issuer and securities in question: see ss 80 and 82. There is also some authority that a duty to disclose may arise by virtue of trade custom. For example, in *Jones v Bowden* (1813) 4 Taunt 847, 128 ER 565, the court held that it was usual in a sale by auction of drugs to state in the broker's catalogue if any damage had been suffered after transport by sea.

[39] In this Act, terms are implied as to title (s 12), sale by description (s 13), quality or fitness for purpose (s 14) and sale by sample (s 15). See also the Supply of Goods and Services Act 1982.

[40] s 14 (2C)(a). The seller is equally not liable for defects which ought to have been revealed by an examination by the buyer before the contract is made: s 14(2C)(b).

[41] See B Nicholas, The Pre-contractual Obligation to Disclose information in D Harris and D Tallon (eds), *Contract Law Today* (Oxford: Clarendon Press, 1989) 170. For criticism of this approach, see EA Farnsworth, 'Comments on Professor Waddams' "Precontractual Duties of Disclose" (1991) 19 *Can Bus LJ* 351.

[42] Note that, in contrast to the Sale of Goods Act 1979, the seller does not have to be acting 'in the course of a business.'

[43] Art 1642.

These provisions are reinforced by case law which presumes that the professional seller knows of the defects in the object sold and will thus be found liable for consequential damage.[44]

In the absence of such terms, intervention in English contract law is limited. As we will see, whilst French law was prepared to generalise from broad concepts of mistake and fraud, English law has confined itself to the law of misrepresentation.[45] Only limited assistance may be gathered from implied terms, the law of tort and the law of special contracts. This reflects a number of concerns: an unwillingness to impose liability for omissions; concern that casual statements might give rise to liability and a reluctance to place contractual negotiations within a strict legal framework. This extends to the law of tort that will generally respect freedom of contract arguments in this context[46], unless the parties are able to identify such a high degree of proximity that the defendant may be said to have assumed responsibility to ensure that the claimant is properly informed. A rare example may be found in the tragic circumstances of *Al-Kandari v JR Brown & Co*.[47] Here solicitors were found liable for failing to inform a wife in a custody battle that they had, contrary to agreement, released the husband's passport, which ultimately enabled him to kidnap his children and seriously assault his wife.[48]

Liability for misrepresentation is thus triggered by a positive misstatement of fact, although, unlike in other civilian jurisdictions, damages may be available for innocent misrepresentation. It thus illustrates the fundamental characteristic of English law mentioned above: liability will not arise unless the defendant actively intervenes.

Some flexibility may be found. The courts have been willing to adopt a broad view of what is meant by a statement of fact.[49] Further, the courts have been willing to infer a fraudulent misrepresentation of fact where

[44] See Art 1645; J Ghestin, *Conformité et garanties dans la vente* (Paris, LGDJ, 1983); Cass civ, 24 Nov 1954 JCP 1955.8565; Cass civ, 21 Nov 1972 Bull civ I No 257 224, JCP 1974 II 17890 note J Ghestin; Cass com, 15 Nov 1973 D 1972.211. Similar provisions exist also for contracts of lease, lease and hire of services, and loan (Arts 1721, 1792, 2270, 1891 and 1898).

[45] In addition to other protective concepts such as duress and undue influence which target abuse of the contracting process. Liability for misrepresentation, in contrast, focuses on the active conduct by the defendant in making an unambiguous false statement of existing or past fact which is addressed to the claimant and on which the claimant has reasonably relied.

[46] See *Van Oppen v Trustees of Bedford College* [1990] 1 WLR 235.

[47] [1988] QB 665.

[48] As Bingham LJ stated, 'She was entitled to know from the defendants that the safeguard, subject to which access [to the children] had been ordered, was no longer effective' [1988] QB at 677.

[49] See *Smith v Land and House Property Corpn* (1884) 28 Ch D 7 (statement of opinion by someone with superior knowledge interpreted as statement of fact) and *Edgington v Fitzmaurice* (1885) 29 Ch D 459 (statement of intention treated as a statement of fact as to the present state of one's mind).

the defendant has committed some positive act, for example, by actively concealing a defect or by uttering a half-truth that gives an incorrect impression of the facts.[50] Although there is no duty to correct a known mistaken assumption,[51] the courts have been prepared to view as fraudulent a statement previously made which is now known to be incorrect. To avoid liability, the defendant is thus forced to correct the statement prior to contract. The leading example is that of *With v O'Flanagan,*[52] where the vendor of a medical practice, whose takings had been reduced due to his illness, was found to be liable in misrepresentation for failing to correct his earlier statement before the contract was signed. Such a decision was justified as being 'so obviously consistent with the plainest principles of equity'.[53] These cases evidence indirect support for a pre-contractual duty to inform, and the scope for such provision may be seen in the Court of Appeal decision in *Esso Petroleum Co Ltd v Mardon*.[54] Here a representative of Esso of some 40 years' experience in the trade had estimated the annual throughput of a newly built filling station to be 200,000 gallons by the third year of operation. Mr Mardon had relied on this figure in taking a lease of the station. Unfortunately, this figure was unduly optimistic and Mardon, despite his best endeavours, was unable to achieve any figure near this estimate. The Court found Esso liable for breach of a contractual warranty and negligent misrepresentation. A factual statement on a crucial matter made by a person who had special knowledge and skill with the intention of inducing the other party to enter into the contract would amount to both a contractual warranty and misrepresentation, entitling Mr Mardon to damages.

The key characteristics may be identified: positive conduct by the Esso representative, a close relationship between the parties and an informational disparity between the stronger and weaker parties. Contractual warranties[55] and misrepresentation may thus serve to limit the influence of freedom of contract reasoning and indirectly impose a pre-contractual duty to inform, but it is within strict bounds. These heads of liability remain exceptions to the general rule against intervention and the courts in general remain opposed to the development of any broader principle.

[50] See, eg, *Horsfall v Thomas* (1862) 1 H & C 90, 158 ER 813 (although because the buyer had not examined the gun, it could not be said to have induced him to enter the contract) and *Dimmock v Hallett* (1866) LR 2 Ch App 21.

[51] See *Smith v Hughes* (1871) LR 6 QB 597.

[52] [1936] Ch 575. See also *Davies v London & Provincial Marine Insurance Co* (1878) 8 Ch D 469, 475 and AH Hudson, 'Making Misrepresentations' (1969) 85 *LQR* 524.

[53] Romer LJ at [1936] Ch at 586.

[54] [1976] QB 801. Contrast *Howard Marine and Dredging Co Ltd v Ogden & Sons (Excavations) Ltd* [1978] QB 574, CA.

[55] Note also the use of the collateral warranty to circumvent the strict rules of privity: *Shanklin Pier v Detel Products Ltd* [1951] 2 KB 854.

## B. French Law

Modern French law adopts a very different approach. As Lando and Beale have commented, '[a] major difference between the systems is that in most of the continental systems, there can be fraud when a party deliberately does not point out some relevant fact to the other party, who is ignorant of it'.[56] Yet, from a nineteenth century perspective, there was little to choose between the two systems. Portalis in his *Discours préliminaire* to the *Code civil* had stated that 'a person who contracts with another must be alert and wise; he must protect his own interests, use any relevant information and not disregard any useful information'.[57] Both systems therefore advocated that contracting parties should demonstrate self-reliance and not look to the law of contract for protection. Even until the mid-twentieth century, one finds the adage '*emptor debet esse curiosus*' (let the buyer be curious) operating in parallel to the English '*caveat emptor*'.

This did not prevent increasing criticism of the harshness of this approach.[58] From 1958,[59] however, the courts began to adopt a more interventionist approach towards contract law. Juglart, in his ground-breaking article of 1945, identifies a 'spirit of solidarity which characterises our generation in reaction to the excessive individualism of the nineteenth century'.[60] This was taken further by writers such as Ghestin,[61] who argued that a distinct obligation to inform had developed, based on existing broad duties identified in the Code and by statute. Whilst such arguments have been raised in other civil law countries, for example Italy, the French courts have been more willing than their Italian counterparts to accept the arguments of *doctrine*. Such piecemeal foundations, not unlike those existing in English law, laid the foundation for a generalised duty based on good faith. Such a duty reflected a '*solidariste*' approach to law. Here morality could not be divorced from the contracting process and if the line between the contractual and pre-contractual obligation to inform was not carefully drawn, it reflected a view that such obligations attach to the life of a

[56] Above n 8, 256.

[57] *Recueil Fenet* I, 463f: '*[u]n homme qui traite avec un autre homme doit être attentive et sage; il doit veiller à son intérêt, prendre les informations convenables et ne pas négliger ce qui est utile*'. The translations in the text are my own.

[58] See, eg, Breton's note to Cass civ, 30 May 1927 Gaz Pal 1927.2.338; S 1928.1.105.

[59] See Cass civ, 19 May 1958, Bull civ I, 198. Until this date, concealment had not amounted to *dol*: see Cass civ, 17 Feb 1874 S 1874.1.248.

[60] M Juglart, 'L'obligation de renseignements dans les contrats' [1945] *Revue trimestrielle de droit civil* 1: '*cet esprit de solidarité qui caractérise notre époque, par réaction contre l'individualisme excessif du XIXe siècle*'.

[61] See, eg , J Ghestin, *Traité de droit civil: La formation du contrat* (3rd edn Paris, LGDJ, 1993) No 566 et ff, '*La réticence, le dol et l'erreur sur les qualités substantielles*' D 1971 Chr 247, note to Civ, 3 Feb 1981, D 1984 Jur 457 and, notably, in *Contract Law Today*, above n 41.

contract—from formation to performance. On this basis, statute that had long provided specific requirements to inform (for example, under the law of insurance contracts[62]), together with the law of latent defects, mistake and fraud, could be taken to establish a pre-contractual obligation to inform. In particular, the provisions gathered together in the *Code de la consommation* demonstrate the clear will of the legislator to utilise disclosure as a means of consumer protection. For example, Article L 111–1 provides that 'all business suppliers of goods or services must, prior to conclusion of the contract, ensure that the consumer is made aware of the essential characteristics of the goods or services'.[63] As has been stated, '*cette protection du "consommateur", rangé parmi les faibles du droit contemporain, a trouvé sa bible dans le Code de la consommation*'.[64]

Nevertheless, cases today will still refer to mistake (*erreur*) or the extremely broad doctrine of *dol par réticence*. Under both heads of liability, the contract will be annulled[65] and give a right to delictual damages under Article 1382 which compensates for reliance loss.[66] Generous interpretation of mistake[67] and, in particular, of fraudulent behaviour, which has a far broader meaning than its English counterpart, has permitted the courts to impose standards of contracting behaviour. For example, in the *Villa Jacqueline* decision of 1931,[68] a villa that had been advertised as having

[62] See *Loi* 13 July 1930, s15, which forms part of Insurance Code: see now Art L112–2, L112–3, L113–2, L 113–4 of the Insurance Code. Note also Art 348 in the original version of the *Code de commerce*: liability for false declarations in contracts of marine insurance, which was interpreted to cover non-disclosure.

[63] '*Tout professionnel vendeur de biens ou prestataire de services doit, avant la conclusion du contrat, mettre le consommateur en mesure de connaître les caractéristiques essentielles du bien ou du service*'. See also Art L113–3 on price and other conditions of sale: '[a]ll product vendors or service providers must, by means of marking, labelling, bill-posting or by any other appropriate procedure, inform the consumer of prices, any limitations of contractual liability and special terms of sale, in accordance with the procedures laid down by orders issued by the *ministre chargé de l'économie*, subsequent to consultation with the *Conseil national de la consommation*'. Note also Art L141–1 (seller of a *cessions de fonds de commerce* must give the buyer certain information without which the buyer will be able to annul the contract) [originally *décret-loi* 29 June 1935] and *loi* 10 Jan 1978 and *loi* 13 July 1979, now Titre 1 of Livre III, *Code de la consommation* (information to be included in consumer credit agreements). Regulations extend to loan agreements (Art L 311–10, C.com.), and distribution/franchise agreements (Art L330–3, C.com).

[64] P Delebecque and F-J Pansier, *Droit des obligations: Contrat et quasi-contrat* (3rd edn, Paris, Litec, 2003) No 136.

[65] Art 1117 provides for relative nullity: '*La convention contractée par erreur, violence ou dol, n'est point nulle de plein droit; elle donne seulement lieu à une action en nullité ou en rescision, dans les cas et de la manière expliqués à la section VII du chapitre V du présent titre*'.

[66] See Cass civ, 29 Nov 1968, Gaz Pal 1969 I 63; Cass com, 14 Mar 1972, D 1972.653 note J Ghestin.

[67] Art 1110 (*erreur*): '[e]rror is a ground for annulment of an agreement only where it rests on the very substance of the thing which is the object thereof'.

[68] Cass civ, 23 Nov 1931, DP 1932.1.129 note L Josserand; Gaz Pal 1932.1.96. *Erreur sur la substance* has been extended to cover a failure to inform adequately a co-contractor: see

grounds of 7,800 square metres was bought by the claimants who, as the seller was aware, intended to divide the grounds into separate lots and re-sell them. The buyers discovered that the true area was only 5,119 square metres, which was too small for the scheme to be practical. The contract was annulled for mistake. The Cour de cassation approved the finding of the lower court that the mistake related to an essential characteristic of the thing sold. Mr and Mrs Corzillac had purchased the property for the sole purpose of dividing it into lots and so the stated area was an essential condition of the contract.[69]

By such means an obligation to inform arises. Notably, the extension of fraud (*dol*)[70] to *dol par réticence* has opened up a wide range of liability premised on the intentional non-disclosure of information known to be material to the other party's decision to enter the contract on the terms agreed.[71] On this basis, in a case in 1974,[72] the Cour de cassation was able to use *dol* to set aside a contract where Mr and Mrs Jacob had purchased a country house, subject to all easements that might encumber the land. The Jacobs had paid 10,000 FF on account, but, on finding that a piggery containing 400 pigs was about to be built some 100 metres from the house, refused to proceed. The Cour de cassation characterised the vendors' behaviour as fraudulent. They had not only known of the pig farm, but had inserted in the contract a clause excluding guarantees to protect themselves against any subsequent claim by the Jacobs. As recognised by Ghestin, '*la réticence dolosive* as sanctioned by the case law constitutes, at least indirectly, the recognition of an obligation to inform'.[73]

Trib gr inst Paris, 4 Mar 1980, D 1980 IR 262 note J Ghestin; Civ, 29 Nov 1968, Gaz Pal 1969 I 63.

[69] See also the famous *Poussin* case, which allowed the original sellers of a painting which they had been told was of the school of Carachi to annul the sale 15 years later when it was later exhibited at the Louvre as a Poussin. Their mistake was not that they had mistakenly sold the Poussin as work of a minor school (experts were still unclear whether it was really a Poussin), but that they had mistakenly thought that it was definitely not a Poussin when it might have been: Civ, 13 Dec 1983, D 1984.940 and Versailles, 7 Jan 1987 JCP 1988 II 21121 note J Ghestin (contrast *Fragonard* case of TGI de Paris, 6 Mar 1985 (*inédit*)).

[70] Art 1116 (*dol*): '[d]eception is a ground for annulment of a contract where the schemes used by one of the parties are such that it is obvious that, without them, the other party would not have entered into the contract. It may not be presumed, and must be proved'.

[71] See, eg, Civ, 7 May 1974, D 1974 IR 176 (water supply), Civ, 6 Oct 1982, D 1982 IR 526 (permit for caravan), Civ, 19 June 1985, Bull civ I, No 210, 181, JCP 1985 IV 305 (real age of engine), Civ, 12 Nov 1987, Bull civ I No 293, 211, RTDC 1988.339 obs J Mestre (second hand lorry in poor state of repair) and Civ, 25 Feb 1987, Bull civ III No 36, 21, JCP 1987 IV 154, RTDC 1988.336 (appeal pending against administrative order).

[72] Civ, 2 Oct 1974, D 1974 IR 252; Bull civ III 330.

[73] J Ghestin, *Traité de droit civil: La formation du contrat* (3rd edn, Paris, LGDJ, 1993) No 622. See also Com, 13 Oct 1980, D 1981.IR.309 obs J Ghestin; Civ, 3 Feb 1981, D 1984 Jur 457 note J Ghestin, Com, 23 Nov 1982, JCP 1983 IV 47. See, generally, J Mestre RTDC 1995.352.

### *1. A General Duty of Disclosure*[74]

This has been the most significant step. Utilising provisions of the *Code civil* dealing with mistake and fraudulent behaviour[75], the case law (with the strong support of academics such as Ghestin) has developed a broad *obligation de renseignement*, based on an *esprit de solidarité*.[76] As Nicholas notes, 'the duty to inform enables the courts to sidestep the need, in a claim based on *dol*, to find an intention to deceive',[77] although this remains contentious. An obligation to inform will arise where one party knows of a fact which would affect the other's decision to enter the contract and the other party is ignorant due to his or her inability to discover the fact or due to the confidence placed in the other.[78] In her leading text, *De l'obligation d'information dans les contrats. Essai d'une théorie,* Fabre-Magnan helpfully identifies a number of characteristics, which she divides into 'material' and 'moral':[79]

#### *The information is relevant*[80]

The facts in question must relate to the object of the contract and be known, or ought to be known, to be material to the claimant's decision to enter the contract. Relevance may be inferred by the court, or the claimant may bring proof that its importance was brought to the defendant's attention.

#### *The information is known to the other party*

This goes beyond actual knowledge one is expected to possess. Thus, professionals are expected to be informed of their own field of expertise, which may require positive efforts to keep themselves informed (*s'informer pour informer*[81]), though this does not extend to facts beyond their own specialism.

[74] See J Ghestin and B Nicholas, 'The Pre-contractual Obligation to Disclose Information' in D Tallon and J Harris (eds), *Contract Law Today* (Oxford, Clarendon Press, 1989), G Cornu, 'Du devoir de conseil' [1972] *RTDC* 418, and P Le Tourneau, 'De l'allégement de l'obligation de renseignements ou de conseil', D 1987. Chron 101.

[75] See P Jourdain, Juris-Classeur Contrat-Distrib fasc 35, V Responsabilité précontractuelle.

[76] See P Legrand, 'Pre-contractual Disclosure and Information: English and French Law Compared' (1986) 6 *Oxford Journal of Legal Studies* 322, 341.

[77] 'The pre-contractual obligation to disclose information' in *Contract Law Today*, above n 41, ch 4. See also J Ghestin, note to Civ, 3 Feb 1981 n 73 above who recognises that recognition of the pre-contractual obligation to inform will alter the nature of *dol*, notably the interpretation of 'intentional' conduct.

[78] F Terré, P Simler and Y Lequette, *Droit civil: Les obligations* (8th edn, Paris, Dalloz, 2002) No 233.

[79] M Fabre-Magnan, *De l'obligation d'information dans les contrats. Essai d'une théorie* (Paris, LGDJ, 1992). See also Legrand, n 76 above, 338.

[80] Fabre-Magnan uses the term '*pertinente*', above n 79 No 157. Ghestin prefers '*déterminant*': note to Civ, 3 Feb 1981.

[81] See Civ, 19 Jan 1977, Bull civ I No 40, 30.

*In circumstances where it was legitimate to depend on the other*[82]

This will exist where the information is not available to the other party or he or she is incapable of obtaining it. Where the party has special or unusual needs, dependence will only be legitimate where these have been communicated to the other party.

These three factors demonstrate a view of the contracting process as a collaborative, rather than adversarial, exercise that is governed by the principles of good faith. A pre-contractual duty to inform will appear most commonly in relation to a professional/consumer relationship,[83] although it is important to recognise that the real question is one of information disparity. Therefore, there is no reason why a professional inexperienced in the field should not be able to benefit.[84] Equally, such a duty may also be imposed on a layman,[85] even towards a professional—the Cour de cassation finding in 1976 that a layman contracting with a professional is not permitted to retain relevant information in his possession which would influence the other's negotiation of the contract.[86] In contrast, a professional buyer would be expected to seek out the information himself and check any information given to him by the other party.[87]

The duty of disclosure will also vary in content. It may be confined to a duty to inform,[88] or extend to one of advice in which a professional will be expected to explain the advantages and disadvantages of the potential contract (*conseil*).[89] For example, where a businessman, such as the retailer of computer software possesses particular knowledge or expertise, he will be

[82] Which she terms '*ignorance illégitime*': above n 79, No 237.

[83] Here, the relationship itself may be deemed to suggest a disparity. See, eg, Civ, 19 Jan 1965, D 1965.389, RTDC 1965.665 note G Cornu, Com, 27 Nov 1973, JCP 1974 II 17887, Com, 3 May 1983, Bull No 131 and Cass civ, 18 Apr 1989, Bull civ I No 150.

[84] Cass com, 4 July 1989, Bull civ IV No 213, 143; RTDC 1989.737 obs J Mestre; Com, 4 May 1993, Bull civ IV No 163, 113, RTDC 1994.93 obs J Mestre (dealt with in English law by a half truth amounting to a misrepresentation, see *Notts Patent Brick and Tile Co v Butler* (1886) 16 QBD 778); Com, 25 May 1993, Bull civ IV No 211, 151; RTDC 1994.94 obs J Mestre.

[85] See Civ, 21 July 1993, D 1994 Somm 237 note O Tournafond; Cass civ, 30 June 1992, Bull civ IV No 213, 145, Cass civ, 7 Nov 1984, JCP 1985 IV 27, Cass civ, 9 Feb 1982, JCP IV 154.

[86] Cass civ, 24 Nov 1976, Bull civ I No 370, 291, D 1977 IR 88.

[87] J Schmidt [1990] RIDC 545 at 553. See also Cass com, 25 Feb 1986, JCP 1988 II 20995 note G Virassamy; RTDC 1987.85 note J Mestre. As Durry remarked in 1972, '*c'est la loyauté dans les affaires, en tout cas dans celles qui mettent en cause un professional et un particulier, que, de cette façon, on cherche à promouvoir*': G Durry RTDC 1972.410, 412.

[88] See Rennes, 9 July 1975, D 1976.417 note J Schmidt; Civ, 23 Apr 1985, D 1985.558 note S Dion, RTDC 1986.340 note J Mestre; Civ, 28 Feb 1989, D 1989 IR 96; Civ, 4 May 1994, D 1994 IR 166.

[89] See Civ, 27 Feb 1985, JCP 1985 IV 174 and Civ, 27 Feb 1985, JCP 1985 IV 320. Both use the same formula: there is an obligation on the professional to advise, to inform and to attract to the layperson's attention any inherent disadvantages in the quality of the product chosen by

expected to advise his client as to his needs.[90] A more onerous duty is to seek out information actively to assist the other (*obligation de s'informer pour informer*).[91] As Carbonnier notes, parties such as sellers will find, in such circumstances, that it is no answer that they did not possess the information in question—the court will expect them to seek it out to ensure the consumer is fully informed.[92]

This willingness to infer knowledge of professionals, particularly when it is within their own area of expertise, indirectly requires professionals to keep themselves fully informed, and closely resembles the regime under the Sale of Goods Act 1979. This has been criticised by economic theorists as requiring too much of sellers, in that it imposes not an obligation to inform, but a duty to investigate the product in question.[93] Legrand has defended such obligations due to the increasing complexity of the contracting process, which 'necessarily forced the *profanes* (laymen) into a relationship of dependence or reliance on the *professionnels* (businessmen)'.[94] Such dependence is deemed to establish a relationship of confidence in which it is accepted that the layperson will rely on the professional and will require protection.

### 2. *The limits of the duty*[95]

In recent years, some French academics have questioned such a stereotypical view of the contracting process. Can every consumer be viewed as vulnerable? Should a professional be expected to inform a potential customer of every characteristic of the product in question? This leads one to the third condition for liability: the obligation will arise only where it is legitimate for

the client. See also Rouen, 18 May 1973, JCP 1974 II 17867; Civ, 20 June 1979, D 1980 IR 38; Com, 7 July 1983, D 1983 IR 476; Civ, 22 Feb 1984, D 1984.386 note J Berr and H Groutel; Com, 18 May 1993, D 1994.142 note I Najjar (duty on bank to advise student investor).

[90] Paris, 12 July 1972, Gaz Pal 1972.804 note J Megret. See also Cass civ, 16 Apr 1975, D 1976.514 note A Chirez, where the organiser of a motor rally was obliged to inform drivers of the limitations of its insurance cover (contrast *Reid v Rush and Tompkins Ltd* [1990] 1 WLR 212). Generally, P Le Tourneau, 'De l'allégement de l'obligation de renseignements ou de conseil', D 1987 Chron 101.

[91] Civ, 3 Feb 1981, D 1984. 457 note J Ghestin (duty on company and its professional agents to inform buyers lacking expertise in this field), Com, 10 Feb 1987, Bull civ IV No 41, Com, 1 Dec 1992, D 1993 Somm 237 obs O Tournafond and Civ, 18 Oct 1994, D 1995.499 note A-M Gavard-Gilles (duty to inform in absence of contractual relationship).

[92] J Carbonnier, *Droit civil: Les obligations* (22nd edn, Paris, PUF, 2000) No 82.

[93] A Duggan, M Bryan and F Hanks, *Contractual Non-disclosure: an Applied Study in Modern Contract Theory* (Melbourne, Longman, 1994) 38.

[94] P Legrand, 'Information in Formation of Contracts: a Civilian Perspective' (1991) 19 *Can Bus LJ* 318, 332. Jourdain also sees this as the motivation for much intervention: D 1983 chron 139.

[95] P Jourdain, 'Le devoir de se renseigner', D 1983 Chron XXV 139.

the claimant to depend on the defendant.[96] As Fabre-Magnan states, 'the unwarranted ignorance of the claimant can result in the limitation, nay abolition, of the defendant's obligation to inform'.[97] In practice, the courts' treatment of this latter condition determines the scope of the obligation. Reliance will be legitimate where the other party cannot obtain the information, though the courts have been prepared to *infer* that information is unobtainable simply by virtue of the professional/consumer relationship. In contrast, if the party has special or unusual needs that have not been communicated to the other party, dependence will not be legitimate. Equally, the courts will not impose liability where the claimant has proven himself gullible or careless. In such cases, the claimant has only himself to blame: *erreur inexcusable*. Only where such information is not available to the claimant or it is legitimate for him to rely on the other should he be able to rely on the obligation to inform.[98] The burden is on the complainant to prove that all the conditions for a duty of disclosure exist.

Yet the question of 'legitimate' dependence is a difficult one. One's perception of legitimacy will depend on one's view of how much self-reliance may be expected of a particular individual. A judge supporting market individualism would clearly expect more than one supporting a policy of protectionism. The extension of the obligation to a duty *de s'informer pour informer* imposed on professionals has led some authors to question the existing *moraliste* view of the contracting process.[99] A recent decision has raised considerable discussion in France.

In the *Baldus* case, Mme Boucher had sold 50 photographs by the photographer Baldus at auction for 1,000 FF each in 1986. Three years later, she sought out the purchaser, M Clin, and sold him a further 85 photographs by Baldus at the same price. Discovering later that Baldus was now considered a leading photographer and therefore that the photographs would have been worth about 2 million FF, she brought an action for fraud. Evidence showed that M Clin was well aware of the real value of the photographs, but had said nothing. Nevertheless, the Cour de cassation found no obligation on M Clin to disclose the real value of the photographs. Although the Cour de cassation gave little indication of its reasoning, in his note Professor Jamin suggests that the court focused on the fact that Mme Boucher had taken the initiative[100] and, when making her offer, should have

[96] See J Mestre, 'Les limites de l'obligation de renseignement' [1985] *RTDC* 399. Note the limits identified in Civ, 8 Apr 1986, D 1986 IR 311, Civ, 14 June 1989, JCP 1991 2 21632 and Com, 9 Jan 1990, D 1990.173 (limit of bank's duty to keep customers informed).

[97] *Essai d'une théorie de l'obligation d'information dans les contrats*, (Paris, LGDJ 1992) No 256: '*l'ignorance illégitime du créancier peut conduire à limiter, voire à supprimer, l'obligation d'information du débiteur*'.

[98] Above n 97, No 253.

[99] Above n 97, No 274.

[100] See also Mestre, RTDC 2001.356.

attempted to ascertain the current market price. He contrasts this individualistic approach with the moral approach of the Court of Appeal based on the concept of '*solidarité*'. By refusing to impose an obligation to inform on the buyer, the first chamber of the Cour de Cassation appears to favour a more market-orientated view of disclosure, in which Mme Boucher is not permitted to escape a bad bargain.[101]

Unsurprisingly, this decision has not brought a sea-change to the underlying current in French law. The third chamber of the Cour de cassation in February 2001 immediately responded with a confirmation of the *moraliste* approach.[102] Here, the Plessis had bought a hotel, only to discover subsequently that it did not have authorisation to open, that certain safety measures were required and that it was not two-star as promised. They sought to overturn the contract for fraud (*dol*). Who, one might ask, would consider purchasing a future business without checking these basic facts? Indeed, the Court of Appeal had rejected the claim on the basis that there was an obligation to take some precautions when entering a professional agreement and that a few elementary checks would have revealed such problems. This was overturned by the Court de cassation which found that fraudulent non-disclosure, if established, would always excuse any mistake which results: *'la réticence dolosive, à la supposer établie, rend toujours excusable l'erreur provoquée'*.

We see here two contrasting views present in France: the liberal view of the *Baldus* case and the more subjective social view of the *Plessis* case.[103] In the former, one examines the question of risk and accepts that a duty exists on some occasions to protect one's own interests. The latter concentrates on the intentional conduct of the defendant, who is perfectly aware that the claimants are being misled and is thus acting in bad faith. The courts have thus not completely divorced the obligation to inform from its roots in *dol*. Yet, both concepts serve, to a greater or lesser extent, to demonstrate the

[101] (*Clin v Mme Natali*) Cass civ, 3 May 2000, JCP 2001 II 10510 note C Jamin; RTDC 2000.566 obs J Mestre and B Fagès and JCP 2000 I 272 note G Loiseau; P Delebecque, Def 2000.114; D Mazeaud Def 2000.1110. Contrast Civ 3e, 15 Nov 2000, JCP 2001.1.301 obs Y-M Serinet; RTDC 2001.355 obs J Mestre and B Fages.

[102] Cass 3e civ, 21 Feb 2001 (*Epx Plessis v Errera et al*) JCP I 330 note A Constantin; RTDC 2001.353 obs J Mestre.

[103] The recent decision of the Commercial chamber on 12 May 2004 (D 2004.1599 note A Lienhard; RTDC 2004.500 obs J Mestre and B Fagès) highlights this conflict. Here, the company director of a company had persuaded two members of his family to sell their shares in the business without revealing negotiations with a third party for sale of the shares at a higher rate. The court did not find the company liable for *dol par réticence* even though it had failed to inform the shareholders of the negotiations with a third party. Mestre and Fagès suggest that '*un rapprochement s'impose avec l'arrêt Baldus*'. Nevertheless, the Court did find that the company director owed a fiduciary duty towards the shareholders, imposing on him an *obligation de loyauté*: a more limited solution, but still one which places a protective duty on one party towards another.

court's continued adherence to duty to inform. Views may differ as to its scope and content, but not as to its existence.

## IV. RECONCILING THE IRRECONCILABLE

Reviewing the treatment of the duty of disclosure in English and French law, one notes certain obvious structural differences, but also finds a surprising degree of similarity. The use of contractual warranties may be compared with the concept of *vices cachés*; misrepresentation with *erreur* and *dol*. One sees similar forms of statutory intervention, for example in the field of insurance contracts and comparable treatment of fiduciary contracts. This is taken a step further by the *acquis communautaire*. Certain core European principles of disclosure have been introduced to Member States by virtue of EC directives, notably in the field of consumer law. Amongst the numerous examples, one might note, for example, the impact of the Sale of Consumer Goods Directive of 1999,[104] which protects parties who have relied upon advertising and public statements in purchasing the goods. Equally, Directive 90/314/EEC on Package Travel, Package Holidays, and Package Tours provides a detailed set of rules that seek to ensure that consumers are fully informed of their rights when entering such contracts.[105] Consumer credit agreements also benefit from the protection given to parties under Directive 87/102/EEC concerning Consumer Credit.[106] Such provisions affect every Member State and ensure a minimum level of disclosure regardless of pre-existing national law.

Can we therefore assume that just as French law in 1958 rejected individualism in favour of a more interventionist approach, English law may ultimately also seek to generalise the exceptions to form a positive rule of fair dealing? The cases do, in fact, contain some references to good faith and fair dealing.[107] Equally, despite the basic rule stated above, it may be seen that English law is prepared to derogate from this position on certain specified occasions. Whilst insurance contracts (and other contracts *uberrimae fidei*) have always been regarded as exceptional, misrepresentation and contractual warranties provide English lawyers with limited means to

[104] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees [1999] OJ L171/12.

[105] [1990] OJ L58/59.

[106] Council Directive 87/102/EEC of 22 Dec 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit [1987] OJ L42/48.

[107] One may note the references in a number of cases to 'equity' or 'good faith' when choosing to intervene: see *With v O'Flanagan* [1936] Ch 575 and *Dimmock v Hallett* (1866) LR 2 Ch App 21.

enforce 'fair dealing' or 'good faith' in contractual negotiations. In the light of the *acquis communautaire*, we may argue that it is possible to identify an emerging common law pre-contractual obligation to inform. In terms of legal reasoning, the common law position may be interpreted as one representing an earlier stage of legal development, gaining maturity by virtue of European initiatives for common legal principles. This is exactly what PECL attempts to do. In view of the steps taken by EC Directives and the clear statement in Article 4:107 of PECL, can we say that there is a 'European obligation to disclose'?

My study reveals no structural obstacle to such an obligation. It is important not to be distracted by the different legal framework. If this is the sole difficulty, then a mutually-agreed framework such as that set out in PECL forms a viable basis with which to resolve such problems. There is a divide, but boundaries may be overcome. In a system that is capable of generalising a 'duty of care' from specific examples of negligence-based liability, there is no reason why such a step cannot be possible.[108] However, an obstacle does exist that, I submit, provides a real barrier to harmonisation, namely the disparate reasoning of the national courts. Only if the proposals can overcome this particular hurdle will the proposals progress beyond a mere compromise of values to an understanding of the true nature of a European private law of contract.

Let me illustrate. For the French courts, with limited exceptions, liability is seen in terms of contractual morality or, if one prefers, a duty of good faith.[109] Ghestin, for example, highlights the inequality of the parties to which good faith requires a response.[110] To take advantage of one's position and allow the other party to enter a contract *knowing* that he or she has a material misunderstanding of the situation is seen as an unfair advantage that the courts should undo. One is thus left with a regime which is openly protective and where the *solidarité* of contract law is seen as a necessary part of any contracting culture.

In contrast, English law manifests a clear reluctance to impose a duty on a party to intervene. A relationship is required—either that of contract or extremely close proximity—before such a step could be contemplated. One notes a continuing regard for the doctrine of freedom of contract, certainty and political liberalism. This may, as has been suggested, derive to a certain extent from the commercial character of much of the litigation that reaches

[108] See PH Winfield, 'The History of Negligence in the Law of Torts' (1926) 42 *LQR* 184.
[109] See P Jourdain, 'La bonne foi dans la formation du contrat' (1992) 43 *Travaux de l'Association Henri Capitant des Amis de la Culture Juridique Française* 121 ff.
[110] J Ghestin, *Traité de droit civil: La formation du contrat* (3rd edn, Paris, LGDJ, 1993) No 599. Carbonnier prefers to view the duty in terms of transparency which forces each party to act with sincerity towards each other: J Carbonnier, *Droit civil: Les obligations* (22nd edn, Paris, PUF, 2000) No 82.

the higher courts,[111] but these values continue to influence the courts' general interpretation of basic contractual concepts. Such analysis has been supported in recent years by economic theory that provides a justification for non-disclosure based on the cost of information acquisition and the social utility of incentives which promote the efficient generation of information.[112] Where one party has invested time and money in gathering information, on what basis, it is asked, should he or she be required to disclose this information gratuitously? If full disclosure is required, one may question what incentives exist to seek or utilise information, perhaps of great utility to society. In such circumstances, equal access to information supported by a duty to inform will not necessarily lead to the most economically efficient result.[113]

Such economic arguments have, until very recently, had limited impact in France. The courts' motivation, as we have seen, is to prevent exploitation. It is *morale,*[114] not economic. Such arguments have also been regarded as 'Anglo-Saxon' and based on the prevalent right wing, market-orientated values of the United States. Fabre-Magnan noted in 1995 that 'the question of the economic efficiency or inefficiency of duties of disclosure has never been methodically addressed in France'.[115] Bernard Rudden's 1985 article in the *Revue Trimestrielle de Droit Civil* which openly criticised French lawyers for ignoring such arguments in the interest of *équité* was described by Carbonnier as *'la thèse anglaise et qui en France a surpris'*.[116] Fabre-Magnan indeed is one of the few authors to address economic theory.[117] She

[111] See most recently, H Kötz, 'The Trento Project and its Contribution to the Europeanization of Private Law' in M Bussani and U Mattei (eds), *The Common Core of European Private Law* (The Hague, Kluwer Law International, 2003) 211, and H Beale, 'The Europeanisation of Contract Law' in R Halson (ed), *Exploring the Boundaries of Contract Law* (Aldershot, Dartmouth, 1996) 38.

[112] See, generally, SM Waddams, 'Pre-contractual Duties of Disclosure' in P Cane and J Stapleton (eds), *Essays for Patrick Atiyah* (Oxford, Clarendon Press, 1991). For analysis of the basis of law and economics, see A Kronman, 'Mistake, Disclosure, Information and the Law of Contracts' (1979) 7 *Journal of Legal Studies* 1, A Kronman, 'Contract Law and Distributive Justice' (1980) 89 *Yale LJ* 472, MJ Trebilock, *The Limits of Freedom of Contract* (Cambridge, Mass, Harvard University Press, 1993) 106–18, and A Duggan, M Bryan and F Hanks, *Contractual Non-Disclosure* (Harlow, Longman, 1994).

[113] See B Nicholas, 'The Pre-contractual Obligation to Disclose Information' in D Harris and D Tallon (eds), *Contract Law Today* 185.

[114] P Legrand, 'Pre-contractual Disclosure and Information: English and French Law Compared' (1986) 6 *OJLS* 322 at 332: 'It was appropriate, in other words, that the moral obligation of information should be made an actionable civil obligation.'

[115] M Fabre-Magnan, 'Duties of Disclosure and French Contract Law: Contribution to an Economic Analysis' in J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford, Clarendon Press, 1995) 108. See also P Legrand, 'De l'obligation précontractuelle de renseignement: Aspects d'une réflexion métajuridique (et paraciviliste)' (1989) 21 *Ottawa L Rev* 585.

[116] J. Carbonnier, 'Le juste et l'inefficace pour un non-devoir de renseignements' [1985] *RTDC* 91, especially No 83.

[117] Notably in her work, *De l'obligation d'information dans les contrats. Essai d'une théorie*, above n 97. There seems, however, to be a growing awareness of economic literature in France.

nevertheless concludes that, whilst helpful, it can only be part of any theory of law and that analysis cannot be undertaken in isolation from the moral context. Fontaine, reviewing formation of contract in 2002, agrees that 'our legal system prefers other values'.[118]

Such arguments have, however, been taken up by authors concerned at the extent of recovery in French law. Le Tourneau in 1987 argued that political movements towards economic liberalism should be reflected by an increasing awareness of the ability of the parties to obtain knowledge for themselves. Such analysis has been used to review the concept of legitimate ignorance: should the uninformed party always be regarded as incapable of self-protection? Should not the cost of information assist in determining who should bear the burden of information? Other authors have invoked the security of transactions argument. While it is useful for the courts to regulate commercial morality, it should not be at the cost of transactional certainty and the binding nature of the contractual process. Such a step might in fact encourage dishonesty and induce litigants to resort to various tricks to win the litigation in question.[119] Such arguments reveal the tensions behind the general view of recovery. Professor Jamin has noted the divide between those who see the *obligation d'information* as a means of regulating pre-contractual behaviour and 'moralising' the contractual process and those who are conscious of disquiet expressed overseas and concerned about the negative consequences of such protection.[120] Whilst defending the *solidariste* approach, he notes that the debate remains *'avant tout politique'*.[121]

Such tensions are indeed encapsulated in the different terminology used by the common and civil law courts. English lawyers use the term 'non-disclosure' and discussion will arise in the context of the law of misrepresentation.[122] In contrast, French law talks of an '*obligation de renseignement*' and '*d'information*' which stands in its own right. An 'obligation to inform' rather than a 'right of non-disclosure' thus reflects a more positive view of this concept within the legal system and acceptance of a generic rather than exceptional status.

One may note, for example, the inclusion of Brousseau's essay 'L'économiste, le juriste et le contrat' in the recent tribute to Professor Ghestin: G Goubeaux *et al, Le contrat au début du XX1e siècle: Etudes offertes à Jacques Ghestin* (Paris, LGDJ, 2001) 153 ff.

[118] M Fontaine, *Le processus de formation du contrat* (Paris, LGDJ, 2002) 856. See also 'Fertilisations croisées du droit des contrats' in *Le contrat au début du XX1e siècle*, above n 117.

[119] See P Malaurie, note on Cass com, 27 Feb 1996, D 1996.518 and D Mazeaud on Civ 1, 17 July 2001, D 2002.71.

[120] See C Jamin, 'Plaidoyer pour le solidarisme contractuel' in Goubeaux et al, above n 117.

[121] Cass civ, 3 May 2000, JCP 2001 II 10510 note C Jamin.

[122] See GH Treitel, *Law of Contract* (11th edn, London, Sweet and Maxwell, 2003) ch 9; J Beatson, *Anson's Law of Contract* (28th edn, Oxford, OUP, 2002) ch 6.

Such a fundamental distinction provides an explanation for why the English courts have not interpreted existing concepts as broadly as the French concepts of '*erreur*' and '*dol*'. There remains widespread opposition to a general theory of liability. As we have asserted, this cannot be blamed on the apparent inflexibility of the common law. We must thus conclude that it does not want to take this step. French law, in contrast, has in the last 50 years embraced such a concept, and only recently have the ideas of economic liberalism been resurrected in debate.

## V. BRIDGING DIVERSITY: A 'EUROPEAN' DUTY TO DISCLOSE?

One notes therefore an ideological gulf between a moral view of contract and that of the market place. *Ad hoc* EC directives have brought limited consistency, notably in relation to consumers where the common law has long conceded that greater protection is justified, but one sees no long-term alteration of the general mindset of each particular state. As the Commission has noted, work is still needed to reconcile such disparate provisions within one coherent policy objective.

Looking again at paragraph 4:107 of the Principles of European Contract Law, the very breadth of paragraph (1)—'A party may avoid a contract when it has been led to conclude it by the other party's fraudulent representation, whether by words or conduct, or fraudulent non-disclosure of any information which in accordance with good faith and fair dealing it should have disclosed'—gives an indication of the problems which exist. Whilst each system may agree on the wording of 'good faith' and 'fair dealing', its interpretation will differ according to the values held by the system. Whilst paragraph 3 attempts to list a number of concerns which appear to influence the imposition of liability in European legal systems—(a) whether the party had special expertise; (b) the cost to it of acquiring the relevant information; (c) whether the other party could reasonably acquire the information for itself; and (d) the apparent importance of the information to the other party—the weight given to them will reflect the national court's reasoning. Thus a common law court will place emphasis on factors (b) and (c) as consistent with an economic interpretation of law, whilst a French court would focus on factors (a) and (d) with natural preference to a subjective approach to law with minimal attention to economic factors.[123] The nature of each state's reasoning will dictate its response. Disparate values may bring disparate results.

[123] Grégoire Loiseau has thus recognised that a true acceptance of the Principles may have to lead to change to the nature of French contract law: 'La qualité du consentement' in P Rémy-Corlay and D Fenouillet (eds), *Les concepts contractuels français à l'heure des Principes du droit européen du contrats* (Paris, Dalloz, 2003) 69.

This is the key challenge facing those attempting to draft a European law of contract. In essence, the structural differences can be surmounted and a form of law drafted which is able to overcome the historical barriers between common and civil law. One is left, however, with a more difficult problem: how to overcome different economic, social and political values.[124] As Atiyah famously noted in *The Rise and Fall of Freedom of Contract,*[125] contract law is by its nature a political animal. Harmonisation therefore, if it is to be achieved, must seek to approach the law on a more fundamental level. Superficial distinctions between concepts such as 'cause' and 'consideration'; 'good faith' and 'reasonableness' take us nowhere. Harmonisation may only be achieved if the courts, not only in relation to consumers, but also towards commercial transactions, accept a common political philosophy. As this paper has illustrated, fundamental differences exist between how the courts approach such contracts—the pre-contractual obligation to inform is but one example. Until such problems are accepted and addressed, harmonisation can only be a dream. Commonality will require distinct political choices and necessitate a review of the philosophical basis of contract law and the values protected by the courts. Whilst it is undoubtedly politically contentious, recognition of this fact is a vital first step before such *core* principles of European contract law can develop from an aspiration to some form of reality.

[124] See S van Erp, 'The Pre-contractual Stage' in A Hartkamp, M Hesselink, E Hondius, E du Perron and C Joustra (eds), *Towards a European Civil Code* (2nd edn, The Hague, Kluwer Law International, 1998) who stresses the need for comparative research to overcome social, economic and political obstacles to harmonisation.

[125] (Oxford, Clarendon Press, 1979).