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## Obligations to do business in good faith: What is a “relational contract”?

Disputes

Richard Harrison looks at whether the ability to classify a contract as “relational” provides tactical advantages to dispute resolution lawyers. It is based on issues determined in a current piece of very interesting, and very substantial, litigation.



## The Post Office litigation

One of the most intriguing cases currently passing through the English legal system is the litigation involving claims by a large group of sub-postmasters against the Post Office.

In very brief and simplified summary, the case involves claims for compensation following the experiences of sub-postmasters at the hands of a computer system called Horizon. The contracts entered into provided for any cash discrepancies and shortfalls to be covered by the sub-postmasters. The Post Office pursued such cases rigorously and there were criminal convictions, bankruptcies and even reported suicides. The core of the claims is that it was bugs in Horizon which caused the problems, not the negligence of the sub-postmasters.

The full facts and history are exceedingly complex, the logistics daunting and the costs stratospheric. The litigation has been managed by Mr Justice Fraser who has given a number of interim judgments on procedural matters and even survived an application to force him to step down.

Well, he decided it in his own favour in a substantial judgment but was roundly supported

by Lord Justice Coulson who dismissed an application for permission to appeal to the Court of Appeal.

The Post Office's disgruntlement with the performance of the judge followed a substantial trial of preliminary contractual issues which were decided predominantly in favour of the claimants. The judge was critical of a number of witnesses called on behalf of the Post Office.

A follow-up trial using the evidence of IT experts to review the operation of the Horizon system is currently on foot. It is the view of one commentator who attended court every day that it was impossible for either expert to understand the operation of, and problems caused by, Horizon (a comprehensive and fascinating crowdfunded blog by the journalist, Nick Wallis (@nickwallis) can be found here [www.postofficetrial.com](http://www.postofficetrial.com)). The judge will have to.

There will be a third series of hearings to determine individual issues of breach of contract, causation and loss. There may be further appeals, and the question of costs will loom large.

## General lessons

The overall impression gained from reading the various judgments and comments is that the litigation illustrates how far participants will go to defend the assumption that their clients are right and that the other side is being obstructive.

As the judge commented in one of the earlier judgments "*The legal advisers for the parties regularly give the appearance of taking turns to outdo their opponents in terms of lack of co-operation.*" He concluded in a later passage: "*An aggressive and dismissive approach to such major group litigation (or indeed any litigation) is entirely misplaced*".

There is a syndrome which might be called "institutional self-validation": those that represent a large and historic organisation find it easy to convince themselves that the body is bound to be right and any challenges to its position are heresy.

The Post Office, referred to by insiders for some reason as "Post Office", possibly as a

way of demonstrating insider status, appears from the course of the litigation to have provided a prime example of this. The judge's comments on some of the witnesses called by this state-owned entity are rather telling.

## Relational contracts

One of the most interesting aspects of the issues decided was the judge's review of whether the sub-postmaster contracts could be viewed as "relational contracts" and, if so, what were the consequences of this.

It is clear that English law recognises such a concept: they are contracts into which is implied an obligation of good faith. Mr Justice Fraser explained:

*"This means that the parties must refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people. An implied duty of good faith does not mean solely that the parties must be honest."*

The judge made it clear that a contract is not classed as "relational" simply because there is an imbalance of power at the outset. He identified the following characteristics as being relevant as to whether a contract is a relational one or not:

1. There must be no specific express terms in the contract that prevents a duty of good faith being implied into the contract.
2. The contract will be a long-term one, with the mutual intention of the parties being that there will be a long-term relationship.
3. The parties must intend that their respective roles be performed with integrity, and with fidelity to their bargain.
4. The parties will be committed to collaborating with one another in the performance of the contract.
5. The spirits and objectives of their venture may not be capable of being expressed

exhaustively in a written contract.

- 6.They will each repose trust and confidence in one another, but of a different kind to that involved in fiduciary relationships.
- 7.The contract in question will involve a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty.
- 8.There may be a degree of significant investment by one party (or both) in the venture. This significant investment may be, in some cases, more accurately described as substantial financial commitment.
- 9.Exclusivity of the relationship may also be present.

The list was stated to be non-exhaustive.

### Consequences of a relational finding: the specific implied terms

The judgment is lengthy, amounting to over 1,000 substantive paragraphs. This is intended to be an observational note only. However, as an example of the sort of issues that will be considered in the follow-on hearings, a number of very detailed specific terms were analysed held to be implied as a result of a finding that the contracts were relational. This made it very clear that each factual situation is different and there can never be a simple explanation of what a “relational contract” entails.

As mentioned, the action continues, there are further hearings and appeals to be expected and the ultimate resolution may be a long way away.

### Conclusions on use of the “relational” concept

Deployment of an assertion of a general obligation to act in good faith and “play nice” can only go so far.

In answer to the question as to whether asserting that a contract is “relational” might provide tactical advantage, the answer is “possibly” but it all depends on the precise detail of the answers to three questions:

- Is the contract “relational”?
- What are the consequences in terms of the substance of the terms to be implied?
- Have those terms been breached?

Mere assertion will not do...



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