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WHAT IS A RELATIONAL CONTRACT? DOES COHERENCE LURK AMONGST SHAPESHIFTING INCIDENTS AND GRANDILOQUENT LANGUAGE?

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In recent years the term "relational" to describe a class of contract has gained currency in English Courts. Whereas contract class is usually identifiable by type such as landlord and tenant or employment, "relational" contracts are variable agminates of indeterminate incidents, employing confusing, and inappropriate, epi-fiduciary language.

I explore the incidents in an unsuccessful effort to find machinery which predicts whether a contract is relational. I review cases to determine how existing Contract law deals with each incident. I review the theoretical literature, seeking alignment between theory-based norms and case-embedded incidents. I question why Judges have not made the connection between incidents and norms.

I propose an operable definition of relational contract, proposing four "incidents" using a domestic, new kitchen, contract as a thread. Central to my definition is a claim that implicit or express in such contracts is an obligation to maintain, develop or build a relationship.

I. Introduction

In recent years the term "relational" to describe a "specie", as Sir Peter Fraser described it in *The Post Office Litigation*,[1] or class of contract, has gained currency in English Courts. Classes of contract are usually identifiable by reference to the parties, "such as that between landlord and tenant or between employer and employee".[2] In contrast relational contracts, a concept neither "stable nor definite" according to Paul Davies, are a somewhat variable agminate of indeterminate and apparently breeding incidents, combined with confusing and grandiloquent epi-fiduciary language.[3]

This article explores, in the next section, the various incidents individually and as a whole in an unsuccessful effort to find machinery that might predict whether or not a contract is relational. I say that at least one incident is circular and another

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1 *The Post Office Group Litigation* [2019] EWHC 606 (QB) [*Post Office*] *per* Fraser J – "…there is a specie of contracts … most usefully termed 'relational contracts'" at [711].

2 *Société Générale v Geys* [2012] UKSC 63 at [55]. Hugh Beale, *Chitty on Contracts*, 34th ed (London: Sweet & Maxwell, 2021) [*Chitty on Contracts*] at para 14-015 adds sale of goods and carriage of goods.

3 Paul S Davies, "Bad Bargains" (2019) 72(1) CLP at 271; Paul S Davies & Magda Raczynska, eds, *Contents of Commercial Contracts – Terms Affecting Freedoms* (UK: Bloomsbury Publishing, 2020) [Davies & Raczynska] at 95.

almost incomprehensible. Where possible I review applicable cases to determine whether the law already uses construction techniques appropriate to the incident, and I review the relevant theoretical literature, indicating areas of possible alignment between theory-based norms and case-embedded incidents.

The overblown language, examined in the third section of the article, which I describe as epi-fiduciary to indicate that it seems to descend from language generally found only in contracts where there is a fiduciary element, used to describe some incidents disguises their essentially quotidian nature.

Finally I propose a doctrine derived definition of a relational contract, taking the view that implicit or express in such contracts is an obligation to maintain, develop or build a relationship, claiming that the contract creates the relationship and not vice-versa.

II. The Incidents

The first mention in an English Court of "relational contract" (a steer which came from Dr Catherine Mitchell) seems to have been in 1998 in *Total Gas Marketing Ltd v Arco British Ltd*.[4] The next instance seems to be in New Zealand in 2002.[5] In *Total*, Lord Steyn described a "longterm contract for the sale of gas", with some risk of "changing conditions", the gas being extracted from a field with roughly fourteen years of recoverable reserves, as a "type which is sometimes called a relational contract". In later cases these two incidents have been supplemented by a plenitude including:

(a) a high degree of communication, co-operation and predictable performance[6]
(b) mutual trust and confidence[7]
(c) expectations of loyalty or fidelity to the bargain[8]
(d) requirements of fair dealing, integrity, and/or transparency[9]
(e) collaborating in unspecified and possibly prospectively unspecifiable ways[10]
(f) investment or financial commitment by one party (or both) in the venture.[11]
(g) contract class, for example distributorships, and franchises

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4 *Total Gas Marketing Ltd v Arco British Ltd* [1998] UKHL 22, [1998] 2 Lloyd's Rep 209 [*Total*].

5 *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2002] UKPC 50; [2002] 2 All ER (Comm) 849 [*Dymock*].

6 *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB) [*Yam Seng*]; *Al Nehayan v Kent* [2018] EWHC 333 (Comm) [*Al Nehayan v Kent*] at [167]; *Post Office*, *supra* note 1 at [726].

7 *D&G Cars Ltd v Essex Police Authority* [2015] EWHC 226 (QB) [*D&G Cars*] at [176]; *Al Nehayan v Kent*, *ibid* at [167]; *Post Office*, *ibid* at [726].

8 *Yam Seng*, *supra* note 6; *Al Nehayan v Kent v Kent*, *ibid*; *Post Office*, *ibid* at [725]-[726].

9 *D&G Cars*, *supra* note 7 at [176]; *Post Office*, *ibid* at [711] and [726].

10 *Ibid* at [726].

11 *Ibid*.

The list provided by Fraser J in *Post Office* has been described as a 'useful checklist' by the Court of Appeal.[12] Unfortunately, the Court went no further. Despite a claim that relationality is a "matter of degree",[13] no guidance, either in the academic literature or in the various judgments, is available as to relative weights amongst these incidents, nor as to how many are required, nor which incident is or which are essential, Hugh Collins observing, in what might be fairly described as an understatement, "they do not provide precise guidance on the contours".[14]

Relational contract theory, the creation of Ian R Macneil, and an offshoot of Stewart Macaulay's Grand Narrative in real-world contract and contractant life, proposed fourteen somewhat indigestible, "sometimes impenetrable"[15] norms which govern "exchange relations". These were role integrity, reciprocity, implementation of planning, effectuation of consent, flexibility, contractual solidarity, "linking norms", the power norm, propriety of means, harmonisation with the social matrix, enhancing discreteness and presentiation, preservation of the relation, harmonisation of relational conflict and "supracontract" norms. Richard Austen-Baker presents a considerably simplified model:[16]

Austen-Baker Norm	Macneil analogue	High Court Analogue
Preservation of the relation	Preservation of the relation Harmonisation of relational conflict Contractual solidarity	Loyalty Respecting the spirit and objectives of the venture Active co-operation
Harmonisation with the social matrix	Flexibility Harmonisation with the social matrix Enhancing discreteness and presentiation	Promoting the values and purposes expressed or implicit in the contract Acting with integrity and in a spirit of cooperation Fair/impartial decision-making
Satisfying performance expectations	Flexibility Implementation of planning Effectuation of consent	Co-operation, communication and collaboration Active co-operation
Substantial fairness	Reciprocity Propriety of means The power norm	Fair dealing Fair/impartial decision-making

[12] *Candey Ltd v Bosheh* EWCA Civ 1103, [2022] 4 WLR 84, [2022] All ER (D) 14 (Aug) [*Candey v Bosheh*] at [31].

[13] Sir George Leggatt, "Contractual duties of good faith", lecture to the Commercial Bar Association (18 October 2016) [Leggatt, Commercial Bar lecture] at [28].

[14] Hugh Collins, "Employment as a relational contract" (2021) 137 LQR 426.

[15] R Austen-Baker, "Comprehensive Contract Theory – A Four Norm Model of Contract Relations" (2009) 25(3) JCL 216 at 217.

[16] *Ibid*.

Catherine Mitchell provides a list similar to Richard Austen-Baker's describing many of the solutions proposed for contractual relationships at risk in the recent pandemic as relational and listing them as "preservation of the relationship, maintaining values of mutuality, flexibility, contractual solidarity and propriety of means".[17]

III. In the Long Run all Contracts are Dead[18]

"Long-term", an outwardly simple concept, covers several different contract models, even in the limited case law in relational contracting. It includes contracts with an expressed longer term duration,[19] contracts inferentially intended to have a longer term duration,[20] contracts with no expressed term but which have subsisted over a longer term[21] (therefore, probably terminable on reasonable notice),[22] contracts terminable on defined notice,[23] and contracts which are not long term but are renewed.[24]

The Courts have dealt with lengthier commercial contracts for over a century.[25] In one example, *Martin-Baker Aircraft Co LD and Another v Canadian Flight Equipment LD*,[26] an evergreen licence for the manufacture of ejector seats, in existence for three years, silent as to termination, was held to be subject to an implied term that it was terminable on 12 months' notice, term and financial commitment being taken into account by McNair J. In *Schuler (L) AG v Wickman Machine Tool Sales Ltd*,[27] a case involving an "elaborate" and "obscure" distribution agreement concerning panel presses for use in car manufacturing made on May 1, 1963, to "continue in force … until December 31, 1967" (a "long period"), thence determinable by at least 12 months' notice, Lord Reid interpreted an apparently broad

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17 Catherine Mitchell, *Vanishing Contract Law: Common Law in the Age of Contracts* (Cambridge: Cambridge University Press 2022) [Mitchell, *Vanishing Contract Law*] at 7.1 and C Haward Soper, "Contractant behaviour in the pandemic: A real-world survey" (2022) Journal of Strategic Contracting and Negotiation supports this analysis.

18 I stole this from John Maynard Keynes's 1923 *Tract on Monetary Reform*, a discussion about the economic long and short run. If a factory closes you can say that in the long run its workers will find jobs somewhere else but in the short run there may be considerable unemployment. Thus, the full quote is: "But this long run is a misleading guide to current affairs. In the long run we are all dead. Economists set themselves too easy, too useless a task if in tempestuous seasons they can only tell us that when the storm is past the ocean is flat again." – see Manchester Liberal, "John Maynard Keynes, in the long run", *Manchester Liberal* (4 June 2013) <https://manchesterliberal.wordpress.com/2013/06/04/john-maynard-keynes-in-the-long-run/>.

19 *D&G Cars*, *supra* note 7.

20 *Total*, *supra* note 4.

21 *Bristol Groundschool Ltd v Intelligent Data Capture* [2014] EWHC 2145 (Ch) [*Bristol Groundschool*].

22 *Martin-Baker Aircraft Co LD and Another v Canadian Flight Equipment LD* [1955] 2 QB 556 [*Martin-Baker*]. See also *Jackson Distribution Ltd v Tum Yeto Inc* [2009] EWHC 982 (QB), 7BH91181, (Transcript) [*Jackson Distribution*].

23 See *Post Office*, *supra* note 1 at [888]–[889] on 3 months or 6 months' notice.

24 *Yam Seng*, *supra* note 6.

25 See for example the four year contract in *Ogdens Ltd v Nelson* [1905] AC 109 (HL).

26 *Martin-Baker*, *supra* note 22.

27 [1973] 2 All ER (HL) [*Schuler*].

and untrammelled termination for breach provision as covering only material breaches.[28] A similar decision was arrived at in *Rice (t/a Garden Guardian) v Great Yarmouth Borough Council* in the interpretation of a four-year deal for the maintenance of Council sports grounds and lawns described by Lady Hale as a 'long running contract to provide public services'.[29] In a case involving the long-term leasing of aircraft Blair J declined to ascribe relationality to the contract, the lease calling for 'practically no cooperation'.[30]

The length of those contracts so far characterised as relational is variable. *Total* was clearly intended to last around fourteen years, that being the potential field life. Curiously, *Yam Seng,* the seminal relational contract, a contract for the distribution of perfumes branded "Manchester United" (really), can hardly be described as a long-term contract. It was entered into in May 2009, valid until April 2010, then extended to December 2011.[31] *Bristol Groundschool*, a collaboration for the production of pilot training manuals, was an "ongoing relationship". One might question at what point an "ongoing relationship" becomes long-term given that subsequent conduct is usually not taken into account in interpreting a contract.[32] The *D&G Cars* car recovery and crushing contract was awarded, under public procurement rules, for five years from 1st April 2006, with an option to extend for one year.[33] Jackson LJ observed of a highway maintenance contract, in *Amey Birmingham Highways Ltd v Birmingham City Council* [*Amey*],[34] that a "PFI contract intended to run for 25 years … may therefore be classified as a relational contract".[35] In an article on the topic Ian Macneil, who thought almost all contracts relational,[36] showed that treatment of termination issues in long term contracts was similar in the US. He does not provide a definition of long-term, but he includes "blanket" or "requirements" contracts in the category (which might catch *Yam Seng* and *D&G Cars*).[37]

Elsewhere in academia, views vary. In an early survey (1992) Russell Weintraub chose a one-year horizon in questions to in-house Counsel for their reaction to a request for price adjustment in a long-term contract.[38] Goetz and Scott

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28 *Ibid* at 45.

29 *Rice (t/a Garden Guardian) v Great Yarmouth Borough Council* [2000] All ER (D) 902 (AC) [*Rice*] citing Lord Diplock in *The Antaios* [1984] 3 All ER 229 describing a three year charter as long-term.

30 *National Private Air Transport Services Company (National Air Services) Limited v Credittrade LLP* [2016] EWHC 2144 (Comm) distinguishing *Yam Seng* at [134].

31 *Yam Seng*, *supra* note 6 at [1]–[2].

32 *Schuler*, *supra* note 27; *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, [1973] 2 All ER 39 (HL); Sir Kim Lewison *The Interpretation of Contracts; First Supplement to the Sixth Edition* (London: Sweet & Maxwell, 2017) at 3.19.

33 *D&G Cars Ltd v Essex Police Authority*, *supra* note 7 at [13].

34 [2018] EWCA Civ 264.

35 *Ibid* at [92].

36 Ian R Macneil, "Values in Contract: Internal and External" (1983) 78(2) NWULR 340 [Macneil, "Values in Contract"] at 341–342: "*all* contracts are relational. Nevertheless, some contracts … are far more relational than others". [emphasis in original]

37 Ian R Macneil, "Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law" (1978) 72(6) NWULR 854 at 882, 856–858.

38 Russell J Weintraub, "A Survey of Contract Practice and Policy" (1992) Wis L Rev 1 at 1.

consider that "long term contracts" are more likely to be relational.[39] Kanaga Dharmananda,[40] writing in 2013, says long term and relational are "closely related but distinct" and Professor Daintith settles on more than five years but excludes "evergreen" from the definition. He notes that "in the iron ore market in the nineteen sixties and early seventies 'long' generally connoted a span of at least ten years; now the consensus in the industry is rather for five".[41] He also asserts that (at the time) in the oil industry one year was long which, I suspect, might be right when applied to some, non-spot, oil trading but not to upstream activity and infrastructure. In considering how a Court might react to one long-term contract problem, a dramatic and unanticipated increase in cost, Richard Speidel uses as a paradigm a 20-year term.[42] Robert Hillman declines to define length referring to it as "backdrop".[43] Gillian K Hadfield notes that circa 4% of franchise contracts have a duration of under five years.[44]Arighetti *et al* found that formal length of contract was less important than the length and depth of the relationship, a common view being "we don't have long-term contracts. We do have long-term relationships".[45] Melvin Eisenberg suggests that "long duration", without defining the term, might be treated as an "independent variable", which seems to me simply to mean as part of the matrix, but, as I have shown above, the law already uses analogous techniques.[46]

If pressed for an operationable definition, I would hazard that long-term means definite (perhaps inferred) formal commitment of at least four years, terminable only for material breach or "force majeure".[47] Although term may be a factor in whether a contract is relational or not it does not seem to provide any guidance on the construction of the contract except at the point of its destruction. And, at that stage, Courts know how to deal with it, punishing parties for failing to preserve the relationship as implicitly envisaged.

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39 Charles J Goetz & Robert E Scott, "Principles of Relational Contracts" (1981) 67 Va L Rev 1089 [Goetz & Scott] at 1091.

40 Kanaga Dharmananda (ed) *Long Term Contracts* (Sydney: The Federation Press, 2013) at 5.

41 Terence Daintith & Gunther Teubner, eds, *Contract and Organisation: Legal Analysis in the Light of Economic and Social Theory* (Berlin: De Gruyter, 2011) at 175, which is cited by David Campbell & Donald Harris, "Flexibility in Long-Term Contractual Relationships: The Role of Co-operation" (1993) 20(2) Brit J Law & Soc 167 at 172 who do not otherwise attempt to define length.

42 Richard E Speidel, "Court-Imposed Price Adjustments under Long-Term Supply Contracts" (1981) 76 NWULR 369 at 370. He also says that long term coal supply contracts might last 20–30 years at 373.

43 Robert A Hillman, "Court Adjustment of Long-Term Contracts: An Analysis under Modern Contract Law" (1987) 1987(1) Duke L J 1 at 2 in footnotes.

44 Gillian K Hadfield, "Problematic Relations: Franchising and the Law of Incomplete Contracts" (1990) 42 Stan L Rev 927.

45 Alessandro Arrighetti, Richard Bachmann & Simon Deakin, "Contract Law, Social Norms and Inter-firm Cooperation" (1997) 21 Camb J Econ 171 at 182.

46 Melvin A Eisenberg, "Relational Contracts" in Jack Beatson & Daniel Friedman, eds, *Good Faith and Fault in Contract Law* (Oxford: Oxford University Press, 1997) 291 [Eisenberg] at 292.

47 Jane M Wiggins, *Facilities Manager's Desk Reference* (New York: Wiley, 2010) [Wiggins]; Mintel, at page 39, cited as estimating that 50% of contracts are for over 4 years.

IV. Cooperation, Communication and Collaboration Requirements

On the 31st of October 2012 Leggatt J, as he then was, began to hear a mundane case between Yam Seng Pte Ltd, and International Trade Corporation Ltd involving exclusive rights to distribute fragrances branded "Manchester United", under a "skeletal" agreement consisting of eight clauses drawn up by the parties themselves, saying that such "relational" contracts:[48]

> may require a high degree of communication, co-operation and predictable performance … implicit in the parties' understanding and necessary to give business efficacy to the arrangements.[49]

The construction of contracts to include obligations to communication and cooperate is long-standing, Lord Blackburn having made clear such obligations in 1881.[50] Many contracts are subjected to these requirements.[51]

The trajectory of co-operation/collaboration requirements extends from the seminal and pithy Judgment of Lord Blackburn in *Mackay v Dick,* in which an innovative steam driven excavating machine, valued at £1115, was procured from Dick and Stevenson of Airdrie by Mr John Mackay and one condition required that the machine be tested in a cutting at Carfin:[52]

> …where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect…

to the more current context of an IT system contract in which special needs, or detailed requirements tend to emerge during contract execution, in which Judge Toulmin QC ruled:

> It is well understood that the design and installation of a computer system requires the active co-operation of both parties … There would be aspects of the system which did not immediately fulfil the customer's needs and there would have to be a period of discussion between customer and supplier to see how the problems could be resolved. The duty of co-operation in my view extends to the customer accepting where possible reasonable solutions to problems that have arisen.[53]

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48 *Yam Seng*, *supra* note 6 at [26] and [161].

49 *Ibid* at [142]. Pepperall J refers to "the high level of communication and cooperation it required" in *Essex County Council v UBB Waste (Essex) Ltd* [2020] EWHC 1581 (TCC) [*Essex v UBB*] at [112.3].

50 *Mackay v Dick* (1881) 6 App Cas 251 (HL) [*Mackay v Dick*].

51 See generally C Haward Soper, *Commercial Expectations and Cooperation in Symbiotic Contracts – A Legal and Empirical Analysis* (Milton Park: Routledge, 2020) [Soper, *Symbiotic Contracts*].

52 *Mackay v Dick*, *supra* note 50 at 263–264.

53 *Anglo Group plc v Winther Brown & Co Ltd* [2000] EWHC Technology 127 (TCC) [*Anglo Group*] at [125]–[127]. Approved in *Yam Seng*, *supra* note 6. Cited by Steyn J in *Micron Computers v Wang (UK) Ltd* (1990) unreported, 9 May.

His comment that 'it is well understood' derived from an examination of expert evidence of normal practice in such environments. In *Hillas v Arcos* Lord Wright ruled:

> …in contracts for future performance over a period, the parties may not be able nor may they desire to specify many matters of detail, but leave them to be adjusted in the working out of the contract…[54]

In a complex long-term facilities management contract (seven years with a three-year extension option), facilities management contract context, Cranston J ruled:

> … the duty to cooperate necessarily required the parties to work together constantly, at all levels of the relationship, otherwise performance of the contract would inevitably be impaired.
>
> The duty … necessarily encompassed the duty to work together to resolve the problems which would almost certainly occur from time to time in a long-term contract of this nature"[55]

This contract was not characterised as relational, although, as I argue, there are elements which align closely with relational norms. It is not difficult to draw a parallel between particularly the requirement of active co-operation, a term which could have been deployed in *Yam Seng* and *Medirest,* and the relational norms of preservation of the relation and satisfying performance expectations.

The same is true of communication obligations. In 1892, for example, in *Harris v Best*,[56] Lord Esher referred to shiploading activity as "joint" and obliging each party "to do whatever is reasonable to enable the other to do his part", including obligations which are sequential and clearly require some communication:

> …the shipper has to bring the cargo alongside so as to enable the shipowner to load the ship within the time stipulated by the charterparty, and to lift that cargo to the rail of the ship. It is then the duty of the shipowner to be ready to take such cargo on board'.[57]

A 1915 dispute, *Terry v Moss's Empires*,[58] between a music hall artist, Victoria Vesta, and an impresario was resolved by Eady LJ ruling that the parties should act reasonably in making efforts to agree performance dates.[59]

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[54] *WN Hillas & Co Ltd v Arcos Ltd* (1932) 38 Com Cas 23, [1932] All ER Rep (HL) [*Hillas v Arcos*] at 504. He referred to *Dominion Coal Co Ltd v Dominion Iron and Steel Co Ltd and National Trust Co Ltd* [1909] AC 293 in which the obligation, upheld as workable, was to supply "all the coal that the steel company may require for use in its works as hereinafter described".

[55] *Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust* [2012] EWHC 781 (QB) at [27]. A similar duty to *Anglo Group*, *supra* note 53. Although the Court of Appeal later emasculated an express duty to co-operate it did not overrule this language.

[56] *Harris v Best* (1892) 68 LT 76 at 78.

[57] *Ibid* at 78.

[58] (1915) 32 TLR 92.

[59] See also *Wood v Lucy, Lady Duff-Gordon* 118 NE 214 (NY 1917).

We can see that some contracts which require significant communication and cooperation are characterised as relational and others are not, and that the Courts have recognised and given force to such requirements for a long time, without reaching for novel taxonomy but we can also see that certain relational norms seem to be in play and it is worth wondering why the High Court did not try to align their relational concept with the academic literature.

V. I must do such things; I know not what they are[60]

Goetz and Scott say a contract is "… relational to the extent that the parties are incapable of reducing important terms … to well defined obligations"[61] (a very wide definition which would, for example, catch clearly non-relational contracts such as *Hillas v Arcos*).

In one particularly opaque passage Leggatt J says of relational contracts:

> … the parties are committed to collaborating with each other, … in ways which respect the spirit and objectives of their venture which they have not tried to specify, and which it may be impossible to specify, exhaustively, in a written contract.[62]

The recherché language is confusing. It may mean where gaps appear in "relational" contracts, these gaps may be filled by purposive interpretation. If that is what it means then it is conventional enough, particularly when decision-making is under review.[63] The observation appears to me, however, to parallel Lord Wright's comment that in some contracts points of detail may be left "to be adjusted in the working out of the contract". The relevant relational norms appear to me to be flexibility, contractual solidarity, and propriety of means, in essence making sure that the contract works, that it is effectual.

Leggatt J may have described the point more clearly in *Yam Seng*:

> … contracts can never be complete in the sense of expressly providing for every event that may happen. To apply a contract to circumstances not specifically provided for, the language must accordingly be given a reasonable construction which promotes the values and purposes expressed or implicit in the contract.[64]

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60 Apologies to Shakespeare for the elastic use of King Lear.

61 Goetz & Scott, *supra* note 39 at 1091.

62 *Al Nehayan v Kent*, *supra* note 6 at [167].

63 *Braganza v BP Shipping Ltd (The "British Unity")* [2015] UKSC 17 Lady Hale emphasising that consistency of decisions making with "contractual purpose" is essential at [30] citing Leggatt LJ in *Abu Dhabi National Tanker Co v Product Star Shipping Ltd, The Product Star (No 2)* [1993] 1 Lloyd's Rep 397, (1992) Times, 29 December – "[t]he essential question is always whether the relevant power has been abused" at 404. And see Kasirer J in *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District* 2021 SCC 7.

64 *Yam Seng*, *supra* note 6 at [139].

In each of these "relational" contracts the objectives of the ventures are tolerably clear. For example, in *Yam Seng*, the parties wish to effect the distribution of certain perfumes in defined territories. In *Bristol Groundschool,* in Leggatt J's words, "the parties agreed to collaborate to produce training manuals for pilots".[65]

Andrew Robertson says that Court investigation into business efficacy means "posing the question whether the term is needed to prevent a primary purpose of the contract from being defeated".[66] A solid review of the "genesis of the transaction, the background, the context, the market" should, as Lord Wilberforce explained in *The Diana Prosperity,* a case concerning a newbuild ship which was to be "built by Osaka Shipbuilding Co. Ltd", who arranged to have the vessel built in a new yard by a joint venture in which they had an interest, allow the purpose of the transaction to be divined.[67]

VI. Contract Class

In an early attempt to populate the class "relational" Goetz and Scott include "most generic agency relationships, including distributorships, franchises, joint ventures, and employment contracts".[68] Hugh Collins suggests the addition of commercial agents to the list,[69] and Helen Pugh suggests that confining the *Yam Seng* principles to joint ventures, franchises and distributorship agreements would limit uncertainty.[70] Jackson LJ, unhelpfully, refers in *Medirest* to "certain categories of contract".[71] In *Yam Seng* Leggatt J created a notable double nebulous exception[72] when he says that the class "**might** include **some** joint venture agreements, franchise agreements and long term distributorship agreements".[73]

He was correct that "some" joint ventures might be relational. *Bristol Groundschool*[74] and *Al Nehayan*[75] were characterised as relational as was the oil and gas *Total* contract. In *Al Nehayan* Sheikh Tahnoon became an equal shareholder in a travel business owned by Mr Kent, increasing his shareholding to 70% as the business ran into financial difficulties and required injections of cash. This

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65 *Al Nehayan v Kent*, *supra* note 6 at [168].

66 Andrew Robertson, "Purposive Contractual Interpretation" (2019) Legal Studies 1 especially at 12–17. See also Neil Andrews, "Interpretation Of Contracts And 'Commercial Common Sense': Do Not Overplay This Useful Criterion" (2017) 76 CLJ 36 section B.

67 *Reardon Smith Line Ltd v Hansen-Tangen; The Diana Prosperity* [1976] 2 Lloyd's L Rep 621 at 624.

68 Goetz & Scott, *supra* note 39 at 1091.

69 Hugh Collins, "Is Relational Contract a Legal Concept?" in Simone Degeling, James Edelman & James Goudkamp, eds, *Contract in Commercial Law* (Toronto: Thomson Reuters, 2016) [Collins] at 68.

70 Helen Pugh, "An implied term of good faith: a watershed or a damp squib?" (2013) JIBFL 347 at 348.

71 *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200 at [105].

72 Rex Ahdar, "Contract Doctrine, Predictability and the Nebulous Exception" (2014) CLJ 39.

73 *Yam Seng*, *supra note* 6 at [142].

74 See *Bristol Groundschool*, *supra* note 21 at [12] listing various joint activities including marketing and profit sharing.

75 Leggatt J at [172], citing Ian Hewitt, Simon Howley & James Parkes, eds, *Hewitt on Joint Ventures*, 7th ed (London: Sweet & Maxwell, 2020) in the Preface at xix. (I am grateful to Sweet and Maxwell for providing me with a copy of the Preface).

is described as a "joint venture" by Leggatt J, seemingly because the collaboration was based on "personal friendship" involving "much greater mutual trust" than is usual between shareholders, despite the limitations set out in *Hewitt on Joint Ventures* which describes JVs as "collaborative arrangements by which two or more companies jointly and directly participate in an integrated business venture" which is not a perfect description of either *Al Nehayan* or *Bristol Groundschool*. Recently, however, two major oil and gas joint ventures were not described as relational, in each case the Judge taking the view that such a description would make no difference to the way the contract would be interpreted.[76] In an interesting decision in Singapore, *Ngee Ann Development Pte Ltd v Takashimaya Singapore Ltd* (*Ngee Ann*), Debbie Ong JC found that a commercial long lease (a 20 year initial term with 5 potential 10 year renewals) was, in context, a "symbiotic" joint venture, but did not characterise it as relational.[77] Many joint ventures depend for their success on relationship building and cooperation,[78] which means, it is suggested, that the parties must engage constructively and cooperate. In New Zealand case the Privy Council described a franchise agreement as part of a joint venture, but did not follow the first instance characterisation as relational.[79] There are multiple recent examples of franchising agreements which were not categorised as relational.[80] In franchise cases, Judges have often dealt with problems by implying terms, for example, that the franchisor supply services using reasonable skill or care or within a reasonable time, which might fit into the relational norms of flexibility and implementation of planning.[81]

Of the other cases in which contracts were described as relational, *Post Office* contracts could be described as franchises, or joint ventures, and *Yam Seng* is clearly

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[76] *Taqa Bratani Ltd and Others v RockRose UKSC8 LLC* [2020] EWHC 58 (Comm) [*Taqa Bratani v RockRose*] at [7]: "The parties operate each Block as an unincorporated joint venture" saying that the contract was "arguably" relational at [56]; see also *Apache North Sea Ltd v INEOS FPS Ltd* [2020] EWHC 2081 (Comm) and *Forum Services International LtD v OOS International BV* [2020] EWHC 170 (Comm); [2020] Lloyd's Rep Plus 104.

[77] *Ngee Ann Development Pte Ltd v Takashimaya Singapore Ltd* [2016] SGHC 194 [*Ngee Ann v Takashimaya*]. See [61] for symbiotic and [35]. The conduct of the landlord, who had tried to undermine the independence of valuers probably didn't help – Samantha Tang & Alan Koh, "Contractual Interpretation Of Long-Term Leases: An Intuitive "Hop" To Joint Ventures" (2017) LMCLQ 13 [Tang & Koh] at 14.

[78] See *eg* Yadong Luo, "Contract, Cooperation, and Performance in International Joint Ventures" (2002) 23 Strategic Management Journal 903 and Peter Killing, *Strategies for Joint Venture Success (RLE International Business)* (Milton Park: Taylor & Francis Group, 2012). See also Norton Rose, *Market analysis on success factors behind joint ventures and the outlook for 2021* (2021) in which they record that one key indicator of success was "trusted communication and collaboration at management level".

[79] *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* – "In a non-technical sense the franchisor and all the franchisees are engaged in a joint venture." At [16] and see [40] and [62]–[64].

[80] See Warren J in *General Nutrition Investment Company v Holland and Barrett International Ltd* [2017] EWHC 746 (Ch) at [315] citing *Carewatch Care Services Ltd v Focus Caring Services Ltd* [2014] EWHC 2313 (Ch), Henderson J expressing his approval of an earlier franchise decision of the High Court in *Jani-King Ltd v Pula Enterprises Ltd and Others* [2007] EWHC 2433 (QBD) – a franchise is much closer to an ordinary commercial relationship than to a contract of employment and *Acer Investment Management Ltd and another v Mansion Group Ltd* [2014] EWHC 3011 (QB), HQ13X00939, (Transcript).

[81] See *MGB Printing v KallKwik* 2010 EWHC 624 and *Stream Healthcare v Pitman* [2010] EWHC 216 (Ch).

a distribution agreement. *D&G Cars,* a fairly standard service contract, does not appear to fit into any of these categories, nor do *Amey,* (a long-term maintenance contract), or *Essex CC v UBC* (a waste management plant contract).

VII. Mutual Trust and Confidence

The Courts have dealt with contracts in which there is implicit trust and confidence. For example, the late Queen's dressmaker, Norman Hartnell, "sponsored and approved" dress designs made by Berker Sportcraft, Jenkins J upholding the express termination terms while noting that the relationship required a degree of trust and confidence.[82] In *Martin-Baker* McNair J, citing Jenkins J, implied a right to determine on reasonable notice "bearing in mind that the relationship created here is essentially one of confidence and trust **and** is essentially a commercial relationship…".[83]

In *J&H Ritchie v Lloyd Ltd* the undermining of a farmer's trust and confidence, which resulted in the rejection of a harrow, in a product was caused by an 'egregious' refusal to explain what had gone wrong and in another like case a distributor offered a renewal of a breached distribution agreement was held not to have failed to mitigate damage as the conduct of the supplier had resulted in the loss of "the trust and confidence in Nicholls necessary to underpin a five to ten year agreement".[84] In this cases trust and confidence operated as a crisis management tool, providing an exit route for a party who might otherwise be obliged to mitigate.

In *Ngee Ann* Ong JC described mutual trust and confidence between (unusually) a lessee and a lessor. This finding is based on evidence (the leased space was occupied for five years before a final rent was agreed), expert evidence of the market and a review of the pre-contract negotiations; a classic contextual approach, obviating any need to describe the contract as relational.[85]

Mutual trust and confidence is a term of art in employment relationships, perhaps a "quintessentially relational norm",[86] requiring that neither party conduct themselves in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between them, perhaps calling preservation of the relation to mind.[87] One could be forgiven for thinking that its use in commercial contract law might infer something similar; Hugh Collins prophesying that one

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82 *In Re Berker Sportcraft, Limited's Agreements: Hartnell v Berker Sportcraft, Limited* 177 LT 420 (Ch), the late Queen meaning Elizabeth II of England and Elizabeth I of Scots.

83 *Martin-Baker Aircraft*, *supra* note 22 at 578–579.

84 *Gul Bottlers (PVT) Ltd v Nichols Plc* [2014] EWHC 2173 (Comm), see also *Signet Partners Ltd v Signet Research & Advisory SA* [2007] EWHC 1263 (QB).

85 *Ngee Ann v Takashimaya*, *supra* note 77 at [47], [53] and [56]–[57] and see Tang & Koh, supra note 77.

86 Matthew Boyle, "The Relational Principle of Trust and Confidence" (2007) OJLS 633 – abstract.

87 See Lord Hoffmann in *Johnson v Unisys Ltd* [2000] UKHL 13, [2001] IRLR 279 [*Johnson v Unisys*] at [32] and Lord Steyn at [11] citing *Mahmud v Bank of Credit and Commerce International SA (In Liquidation)* [1998] AC 20; [1997] 3 WLR 95 (HL) at [45]. See also *Post Office*, *supra* note 1 at [45] term (p) pleaded by the Claimants being very similar to this.

feature of relational contracts is "the avoidance of actions likely to destroy mutual trust and confidence between the parties".[88]

The employment contract term is policy based. As Lord Hoffmann put it, as the nature of employment changed to connote "occupation, an identity and a sense of self-esteem" the law recognised this change in "social reality",[89] and it can be argued that but for the term an employee has no remedy against an employer who behaves badly.[90] Harvey argues that the term mutualises the duty of loyalty.[91]

If those contracts so far described as relational represented a change in commercial reality sufficient to import a term of mutual trust and confidence this should be clear from the Judgments. Instead, we have the 'all too familiar' story recounted by Leggatt J in *Al Nehayan*,[92] and quotidian contract types and models in others. In a recent lecture Lord Leggatt appears to expand his understanding of the role of trust in contract, maintaining that

> Trade takes place within a system of norms and expectations of honesty, reliability and fair dealing. For commerce to function effectively, people need to be able to trust each other to comply with those norms.[93]

Although he goes on to note that law is one mechanism by which such trust can be created it seems a better argument that what contract law does is underwrite reliance and expectation.

In *D&G Cars Ltd v Essex Police Authority (D&G Cars)* Dove J ruled that that the act of absorbing a car which should have been crushed would "compromise the mutual trust and confidence required in this operation", going on to imply a term of "honesty and integrity".[94] This begs the question; what does integrity connote in this context? We have assistance. Fraser J expressly approves Dove J's formulation of a meaning for integrity that acts which breach the integrity requirement are those which "would compromise the mutual trust and confidence between the parties in this long-term relationship…".[95] Hugh Collins conflates it with fair dealing, which, I suggest, is not helpful.[96]

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88 Collins, *supra* note 69 at 63. See also Degeling, Edelman & Goudkamp, *supra* note 69 generally.

89 Lord Hoffmann in *Johnson v Unisys*, *supra* note 87 at [35].

90 Frederic Reynold, "Bad Behaviour and the Implied Term of Mutual Trust and Confidence: Is there a Problem?" (2015) ILJ 262.

91 R J Harvey & Bryn Perrins, Industrial relations and employment law (Oxford: Butterworths, 1978) [Harvey & Perrins]: "…taking one step towards acknowledging that the idea of loyalty cuts both ways: just as an employee has always been under a duty of loyalty to his employer, now an employer has a limited duty not to betray his employee" at [159].

92 *Al Nehayan v Kent*, *supra* note 6 at [10].

93 Lord Leggatt, *What is the point of commercial law?*, The Fourth Jonathan Hirst Commercial Law Lecture (2 November 2021) at [33].

94 *D&G Cars*, *supra* note 7 at [205].

95 *Ibid* at [175] and *Post Office*, *supra* note 1 at [707] and [708] ruling that "The Post Office itself submits that it is essential that it can repose trust in its SPMs. …it is similarly essential that SPMs can repose trust in the Post Office, and I find as a fact that all six of the Lead Claimants did so" at [738] "trust and confidence are, in my judgment, implicit within the implied obligation of good faith".

96 Collins, *supra* note 14 at 450.

The judges emphasise that the trust and confidence in High Court relational contracts is of a "different kind from that involved in fiduciary relationships"[97] and the term turns out to enjoy a fundamentally different meaning, that "the other party will act with integrity and in a spirit of cooperation" which is arguably even more vague than Chitty's 33rd Edition reference to "…a demand which goes substantially beyond what is normal or legitimate in commercial arrangements" and likely likewise to be disparaged in the Supreme Court.[98]

VIII. Loyalty

Loyalty is mentioned in several judgments.[99] There is a negative attempt at definition in *Al Nehayan* in which Leggatt J rules that the parties did not owe duties of loyalty but that "it would be contrary to the obligation to act in good faith for either party to use his position … to obtain a financial benefit for himself…" In *Pakistan International Airline Corporation v Times Travel (UK) Ltd* the Supreme Court approved a passage in Anson saying that "as a general rule the determination of when socially objectionable conduct which is not in itself unlawful should be penalized is for the legislature rather than the judiciary", perhaps portending disapproval of *Al Nehayan,* amongst others.[100]

In a lecture Leggatt J provided some detail of the meaning saying that such loyalty is "…not to the other party, but to the agreement itself". Construing an express good faith obligation Vos J concludes that it includes adherence to "the spirit of the contract … and to act consistently with the justified expectations of the parties".[101] He considers similar characterisations of a good faith duty including Elisabeth Peden's:

> …the courts are merely required to ensure that the parties have genuinely adhered to the bargain which they entered into. … the implied obligation of good faith underwrites the spirit of the contract and supports the integrity of its character.[102]

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97 *Al Nehayan v Kent*, *supra* note 6 at [176], *Post Office*, *supra* note 1 at [726].

98 Hugh Beale, *Chitty on Contracts*, 33rd ed (London: Sweet & Maxwell, 2019) at 8-046. Note that in the 34th Edition this point has been revised: see 10-056–057.

99 *Yam Seng*, *supra* note 6 at [142], *Post Office*, *supra* note 1 at [725], *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396 [*Globe Motors*] at [67] and *Al Nehayan v Kent*, *supra* note 6 at [176].

100 *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40 [*Pakistan International*] at [29] mischievously citing an edition of Anson of which Lord Burrows had been an editor, although it is worth noting that William Day considers that *Times Travel* itself may be destabilising – William Day, 'Duress and uncertainty' (2022) 138 Law Quarterly Review 194 [William Day, "Duress and Uncertainty"] at 198.

101 *CPC Group Limited v Qatari Diar Real Estate Investment Company* [2010] EWHC 1535 (Ch) at [246].

102 Elisabeth Peden, "Incorporating terms of good faith in contract law in Australia" (2001) 23 Sydney Law Review 222 at 238.

Fraser J refers to "expectations of loyalty" and that parties intend to perform with "fidelity to their bargain", which sounds similar to loyalty to the contract.[103] Paul Davies comments that "If this is what the parties intend then the relevant term is likely to satisfy the officious bystander test".[104] In other words, it is unlikely that there is any need either for a new category of contracts to be created to deal with such a question.

In a lecture, Leggatt J cites Norris J's analysis that "there will generally be an implied term not to do anything to frustrate the purpose of the contract",[105] maintaining that this is a good faith term.[106] Norris J's comment seems, however, to be a gloss on the universal prevention principle, articulated by Vaughan-Williams J in *Quilpué (Barque) Ltd v Brown* which means that each party to a contract is obliged not do anything to "prevent the other party from performing a contract or to delay him in performing"[107] and, as Lord Alverstone CJ added the following year, in *Ogdens Ltd v Nelson,* to "abstain from doing anything which will prevent him from fulfilling [his] obligations".[108]

If this is what is meant by loyalty then it is a good gloss on existing principle, which could be adequately explained by a minor gloss (in bold) on Sir Kim Lewison's exposition:

> In general, a term is necessarily implied in a contract that neither party will prevent the other from performing it, **including by actions or omissions which would frustrate its purpose**.[109]

IX. Fair Dealing

In High Court relational contracts fair dealing "does no more than require a party to refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people",[110] arguably the sort of language has been the subject of the Supreme Court's disapproval. Fair dealing seems to equate to the substantial fairness Austen-Baker norm and it is arguable that English judges do try, at least to some extent, to ensure fair dealing when this seems

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[103] *Post Office*, *supra* note 1 at [725.3/725.6].

[104] Davies & Raczynska, *supra* note 3 at 98.

[105] *Hamsard 3147 Ltd (t/a Mini Mode Childrenswear) v Boots UK Ltd* [2013] EWHC 3251 (Pat) at [86].

[106] Leggatt, Commercial Bar lecture, *supra* note 13 at [40].

[107] *Quilpué (Barque) Ltd v Brown* [1904] 2 KB 264, 73 LJKB 596 (KB) at 271, saying that the principle was "implied in every contract".

[108] [1903] 2 KB 287 at 295 (*per* Lord Alverstone CJ at trial) – approved in the House of Lords in *Ogdens Ltd v Nelson* [1905] UKHL 857.

[109] Kim Lewison, *The Interpretation of Contracts*, 3d ed (London: Sweet & Maxwell, 2004). See *eg Sparks v Biden* [2017] EWHC 1994 (Ch) where purpose is taken into account in analysing a case on prevention. This is similar to the position in New Jersey, where in *Wood v New Jersey Mfrs Ins Co* 21 A 3d 1131, 1140 (NJ SC 2011) the Court emphasized that "every contract in New Jersey contains an implied covenant of good faith and fair dealing, [t]hat is, neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract".

[110] *Post Office*, *supra* note 1 at [706] and [711], *Al Nehayan v Kent*, *supra* note 6 at [175].

appropriate. For example, in the leading construction case, *Sutcliffe v Thackrah*, Lord Reid said that the contract is made:

> on the understanding that … the architect will act in a fair and unbiased manner and it must therefore be implicit in the owner's contract with the architect that he shall … reach such decisions fairly, holding the balance between his client and the contractor.[111]

This principle, of the way one party with a certain amount of decision-making power should use that power, was developed by Fraser J in *Post Office*, the consequences of which continue to reverberate in political circles and which have essentially left the Post Office almost insolvent, requiring a taxpayer bailout.[112] Fraser J implied numerous terms into the contracts, some which effectively controlled the Post Office's ability to impose its will in the recovery of alleged shortfalls. These included obligations in respect of apparent shortfalls to properly and accurately to produce all relevant records, to explain all relevant transactions, to co-operate in seeking to identify causes, to make reasonable enquiry, undertake reasonable analysis and even-handed investigation, and give fair consideration to the facts and information available as to the possible causes, not to conceal its ability to alter remotely data or transactions, properly, fully and fairly to investigate any alleged or apparent shortfalls and, critically, not to seek recovery from Claimants unless and until they had carried out a reasonable and fair investigation as to the cause and reason for the alleged shortfall. Astonishingly, this is quite radical and was resisted to and beyond reasonable limits by the Post Office. One could think of some of these as mutual active cooperation duties essential to the proper working of the Post Office quasi-franchise, and rephrase Toulmin J by extending the customer's duty to accept reasonable solutions to both parties being required to do so, akin to, or subsets of, Cranston J's formulation of the duty to cooperate in *Medirest*, a facilities management contract, which, he said, required parties to "work together constantly, at all levels of the relationship [and] work together to resolve the problems which would almost certainly occur".[113]

One could argue that these terms, the Fraser omnibus/blunderbuss, and the fair and impartial requirement align well with the relational norms of substantial fairness and harmonisation with the social matrix.

In another context Courts may consider "broad commercial purpose" of, in one case a performance bond when considering whether the bond issuer had a right to recoup an overpayment. Potter LJ took account of this in finding that this right of recovery was a "necessary corrective if a balance of commercial fairness is to be maintained between the parties".[114] In the High Court and unhelpfully, however,

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[111] *Sutcliffe v Thackrah* [1974] AC at 727, [1974] 1 All ER 859 737. Lord Morris – the architect must be "fair and honest", "he is not employed…to be unfair" at 740–741. Lord Salmon – the architect "must act fairly and impartially" at 759.

[112] See Zoe Wood, "UK taxpayer to foot bill for Post Office staff wrongly convicted of theft", *The Guardian* (15 December 2021).

[113] *Medirest* in the High Court [2012] EWHC 781 (QB) at [27].

[114] *Cargill International SA v Bangladesh Sugar and Food Industries Corp* [1998] 2 All ER 406 CA (Civ Div) Potter LJ at 413e–h. And see the discussion on the interpretation of Conclusive Evidence

Dove J explains that integrity captures "the requirements of fair dealing and transparency",[115] which is a circular proposition.

In the *Al Nehayan* context fair dealing may mean that there are situations in which the interests of the counterparty must be considered. That would make sense. It might, at a stretch, explain the obligation on Sheikh Tahnoon to advise Mr Kent of the decision to sell his interest in the JV. Indeed, an implied term in that case that, in context, the Sheikh had an obligation, in consideration of the overall relationship, to advise Mr Kent of his decision, would have been, in my opinion, more polite and palatable than the rather extreme description of the Sheikh's conduct as "furtive".[116]

X. Financial Commitment

The distinguishing feature of this incident, described as the "most prominent feature of relational contracts" by Anthony Ogus,[117] is that it is based on evidence. And, like "long term" contracts, Courts take such commitment into account as a background matter and have done since at least the year in which I was born; 1955. There appears to me, however, to be no relevant relational norm.

Fraser J (rightly) interrogated pre-contract negotiations in *Post Office* showing that Mrs Stockdale, an SPM (SubPostMaster), expended "considerable sums to invest in opening the branch" and, that "[f]or many (if not all) SPMs, this investment would represent the most significant investment they would make" and that "Claimants who purchased property … and who, literally, lived 'above the shop' … obviously made an expensive commitment".[118] In *Martin-Baker* the ejector seat licensee was described by McNair J as having "put up money [for] plant …" observing, against an argument that short or no notice was required for termination that "it is really extremely difficult to believe that anyone in their senses would put up money … unless they had the assurance of some degree of security".[119] Similarly in *Rice*, the fact that the garden and park maintenance contractor "had to borrow substantial sums to make the necessary investment in equipment and material and to increase his workforce very considerably…" was used as background by Lady Hale and Mellor J in analysing the termination provision.[120] In a case between the French manufacturer of decorative tiles and its UK distributor, Salmon LJ observed that "…[*Practitioners*] had spent some £30,000 on advertising … [and] engaged at

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Certificates in Sandra Booysen, "'Pay Now, Argue Later': Conclusive Evidence Clauses in Commercial Loan Contracts" (2014) 1 JBL 31.

115 See *D&G Cars*, *supra* note 7 at [175].

116 *Al Nehayan v Kent*, *supra* note 6 at [176].

117 Anthony Ogus, "Remedies, English Report" (Ch 6) in Donald Harris & Denis Tallon, eds, *Contract Law Today: Anglo-French Comparisons* (Oxford: Clarendon, 1989) at 253. He suggests that the best remedy for breach of such contracts is specific performance, since conventional damages, he argues, may "seriously undercompensate".

118 *Post Office*, *supra* note 1 at [297] and [728]. Fraser J noted that "The Claimants did make long term and expensive commitments … Even those who did not obtain residential accommodation as part of their acquisition of any branch made long term and expensive commitments." at [26].

119 *Martin-Baker*, *supra* note 22 at 580–581.

120 *Rice*, *supra* note 29 at [18] quoting Mellor J describing the contract as "involving substantial investment …".

least six extra salesmen and acquired new premises".[121] In this case, involving the UK distributor of "Dekline" brand skateboard apparel and its US manufacturer, the distributorship had been terminated after two-and-a-half years. Royce J took into account Mr Jackson's investment of a "very considerable amount of time, effort and money" in ruling that a reasonable notice period would have been nine months.[122] Accepting that it appears that there was little evidence of substantial financial commitment in either *Yam Seng* or *D&G Cars*, Hugh Collins suggests rightly that this may not be a useful descriptive criterion, partly because it is a feature of many long-term contracts.[123] Since Courts are plainly able to make decisions which limit the ability of one party to dilute or wreck investments made in pursuit of agreed goals, it is hard to see that more is required.

XI. Is there a Cunning Pattern of Excelling Nature?[124]

I use the following box models[125] to create a visual exploration of the characteristics of relational contracts. I have excluded those incidents which are simply too vague from consideration, leaving me with four which are susceptible to objective definition. These are term, whether change is likely, whether cooperation is required, and whether there is a requirement for substantial investment. Accordingly, I excluded inexpressible collaboration requirements, mutual trust and confidence, and loyalty.

Key LT = Long-term CL = Change likely CR = Cooperation required SI = Substantial Investment					
Generic Contracts					
	LT	CL	CR	SI	Comment
Domestic long lease	✓	✓	✓	✓	
Commercial long Lease	✓	✓	✓	✓	
Facilities Management	✓	✓	✓	✓	See *eg*, *Medirest*.
Complex Maintenance	✓	✓	✓	?	See *eg*, *Medirest.*
Bespoke IT	?	✓	✓	✓	See *Anglo Group*

[121] *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 2 All ER 216, [1971] 1 WLR 361 at 219.

[122] *Jackson Distribution*, *supra* note 22.

[123] Collins, *supra* note 69 at 72–73. Mr Tuli of Yam Seng is, however, recorded as emailing ITC – "'Roy … We have also invested a lot in the brand": *Yam Seng* at [47], Leggatt J seeming to accept this – "Yam Seng … was incurring expense in marketing" at [143].

[124] More apologies to Shakespeare.

[125] A typical procurement/commercial tool of which the seminal is the four box model from Peter Kraljic, "Purchasing must become supply management" (1983) Harvard Business Review 109.

Plant Construction	?	✓	✓	?	
Distribution	✓	?	✓	?	See *Yam Seng*
Franchise	✓	?	✓	✓	

From this, one sees that between two and four of the incidents are present.

Key LT = Long-term CL = Change likely CR = Cooperation required SI = Substantial Investment					
"Relational" Contracts					
	LT	CL	CR	SI	Comment
Yam Seng	☒	?	✓	☒	See above.
Bristol Gr'ndschool	?	✓	✓	?	This contract became long term.
D&G Cars	✓	☒	✓	☒	
Al Nehayan	✓	✓	✓	✓	
Post Office	✓	✓	✓	✓	The contracts were terminable on 3-6 months' notice.
Essex v UBC	✓	✓	✓	✓	
Amey	✓	?	✓	✓	

From this one can see that between one and four of the four incidents are present.

Key LT = Long-term CL = Change likely CR = Cooperation required SI = Substantial Investment					
Other contracts					
	LT	CL	CR	SI	Comment
Medirest	✓	✓	✓	?	
TSG	✓	?	✓	✓	
Schuler	✓	?	✓	?	
Decro Wall	✓	?	✓	✓	See above on investment.
Taqa	✓	✓	✓	✓	"arguably" relational.
Rice	✓	☒	✓	✓	

Because an element of fair dealing seems likely to be an obligation in each of these contracts I have not listed it separately but it can be seen that between three and five of the incidents are present. This means, I suggest, that even trying to treat the

incidents as what Eisenberg describes as a "multi-factorial list"[126] or employing Hugh Collins' suggestion that Courts 'must use a multi-factor approach'[127] does not provide any sensible guidance.

This tabulation showing no discernible difference between relational contracts and similar non-relational contracts points up the need for Courts, if the class "relational" survives, to provide some realistic guidance as to how many of the incidents are required, and which, if any, are vital.

A. *Quasi-Relational Judgments and Their Possibilities*

In the High Court one can find many Judgments which can be described as almost relational in their language and in their approach. Some relational language would be hard to envisage in an English Law Judgment. Harmonisation with the social matrix, even as an analogue to context or reasonable expectation (which it is), seems more to belong in the realm of the politician or sociologist. But others such as preservation of the relation do not jar and this, an analogue to Toulmin J's active co-operation requirements and Fraser 's insistence on fair dealing through a fair and thorough and impartial approach to decision making especially where the interests of the decision taker are adversely affected, say by recovery of shortfalls or deduction of service points or liquidated damages appear legitimate legal concepts.

To avoid perceived or potential uncertainty engendered by the High Court's relational jurisprudence a drafter might propose a clause to say that the contract is not a relational contract. The Courts might, however, as they almost certainly would in employment, commercial or residential leases or insurance contracts, take the view that characterisation is for them.[128] One way around this may be to include drafting which includes obligations that parties will act reasonably, play fair, communicate, solve problems and make the deal work. The drafting would be complex, but not impossible.[129]

However, The Supreme Court has recently considered the question of restraining conduct in contract in the context of duress and has concluded, in general terms, of a contract in which one party had undertaken 'hard-nosed exercise of monopoly power:[130]

(a) Parties are free, whether their conduct is "socially objectionable" or not, to do those things which they are permitted (or not forbidden) to do without

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[126] Eisenberg, *supra* note 46 at 293.

[127] Collins, *supra* note 69 at 429.

[128] See *eg* E Simpson & M Stewart, eds, *Sham Transactions,* (Oxford: Oxford University Press, 2013) and Pauline Bomball, "Intention, Pretence and the Contract of Employment" (2019) 35 JCL 243 at 261–262.

[129] See Soper, *Symbiotic Contracts*, *supra* note 51, ch 2. See Holly Stebbing, Mark Berry & Philippa Hook, "Good faith in project finance" (2020) 10 JIBFL 394 who say that attempts to exclude good faith, coupled with express behavioural obligations are "simply a mechanism for preserving contractual certainty…".

[130] *Pakistan International*, *supra* note 100 at [57].

motive-based limits.[131] This may make the rule in *Al Nehayan* hard to repeat.

(b) Citing with approval Lord Bingham in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*; there is "no general principle of good faith in contracting in English law" and "English law has relied on piecemeal solutions in response to demonstrated problems of unfairness"[132]

(c) Testing conduct by reference to vague notions such as Chitty's earlier, now revised, suggestion of "… a demand which goes substantially beyond what is normal or legitimate in commercial arrangements"[133] risks, observed Lord Burrows, "rendering the law on lawful act duress too uncertain and would potentially jeopardise the stability of the English law of contract".[134]

If these observations are written across to contract performance it seems highly likely that many of the incidents discussed above will fall foul of Lord Burrows' animadversion on Chitty, and that "piecemeal" existing solutions will be preferred to overriding and vague good faith terms.[135]

XII. Epi-Fiduciary Language

Fiduciaries "act for or on behalf of another in some particular matter or matters"[136] and duties arise because there exists a potential for abuse of those powers, Paul B Miller describing a fiduciary as exercising "discretionary power over the significant practical interests of another".[137] Obligations, writes Martin Day, are "prophylactic" in nature, with a "strong deterrent purpose".[138] Leggatt J described fiduciary loyalty as "'… being guided solely by the interests of the principal and not by any consideration of the fiduciary's own interests".[139] It is curious and striking that Courts stress that duties under relational contracts are not fiduciary, in one case Beatson LJ contrasting contracts "between those whose relationship is … fiduciary … and

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[131] *Ibid* at [29] citing an edition of Anson of which Lord Burrows had been an editor, although it is worth noting that William Day considers that *Times Travel* itself may be destabilising – William Day, "Duress and Uncertainty" *supra* note 100 at 198.

[132] *Interfoto Picture Library Ltd v Stiletto Visual Programmes* [1988] 2 WLR 615 at 439. See also C Haward Soper, "Occam's Razor or Leggatt's Multiblade – Good Faith or a Clean Shave?" (2021) JBL 580 [Soper, "Occam or Leggatt"] observing at 594 that, for example, *Mackay v Dick* does not deal with unfairness but provides a method of making contracts work.

[133] *Chitty on Contracts*, *supra* note 2 at 8–046.

[134] *Pakistan International*, *supra* note 100 at [128].

[135] Soper, "Occam or Leggatt", *supra* note 132.

[136] P D Finn, *Fiduciary Obligations* (Sydney: Law Book Co, 1977) at 18.

[137] Paul B Miller & Andrew S Gold, "Fiduciary governance" (2015) 57 Wm & Mary L R 512 at 537. See also Paul B Miller, "The Idea of Status in Fiduciary Law" (Ch 1) in Paul B Miller & Andrew S Gold, eds, *Contract*, *Status, and Fiduciary Law* (Oxford: Oxford University Press, 2016).

[138] Martin Day, "Fiduciary duties" (2009) 15 T & T 446 [Martin Day, "Fiduciary duties"] at 456 also indicating that the floor for fiduciary obligations are "no conflict" and "no profit" rules. See Dunn LJ's reference to deterrence in *O'Sullivan and Another v. Management Agency and Music Ltd* [1985] QB 428 [*O'Sullivan*] at 441.

[139] *Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Ioannis Kent (AKA John Kent)* [2018] EWHC 333 (Comm) [*Sheikh Tahnoon*] at [159].

those involving a longer-term relationship …"[140] despite consistent use of language redolent of fiduciary duty, including:

(a) repose
(b) trust and confidence
(c) loyalty
(d) integrity
(e) fair dealing.

The very use of this epi-fiduciary language is a category error. Fiduciary status arises from an imbalance of risk and power[141] and inferred assumption of responsibility and does not arise from agreement. It is, essentially, status based and not contract based.[142] Using epi-fiduciary language is likely to mislead and has misled. A second problem is that once deployed, the robust and weighty language of fiduciary obligation is necessarily diluted in action.

Restraint of power, part of the power norm, is a core relational theory norm, derived from Ian Macneil's assertion that "American legal rules … tend towards limiting unilateral power in contractual relations …", adding that the norm is common to all contracts.[143] In two of the High Court's cases judges used implied terms of good faith to restrain power, in *Al Nehayan* obliging one party to advise the other of his intentions prior to selling a share in the business[144] and in *Post Office* placing limits on unilateral suspension and termination provisions (amongst other things).[145]

Modern English contract law already benefits from a range of methods for the control of unilateral power in contracts. These include restraints on decision making, the duties of certifiers, and limitations on penalty provisions. Fraser J may have recognised the potential for error saying that "complaints of imbalance of power are [not] relevant …", (although in this case fiduciary duties were owed by SubPostMasters to the Post Office).[146]

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[140] Beatson LJ in *Globe Motors*, *supra* note 99 at [67]. See also Fraser J in *Post Office*, supra note 1 – "… trust and confidence … but of a different kind to that involved in fiduciary relationships" – at [725.6] and Leggatt J at [165] in *Sheikh Tahnoon*, *ibid*.

[141] See RC Nolan, "Controlling Fiduciary Power" (2009) 68 Cambridge LR 293. In *Tate v Williamson* (1866) LR 2 Ch App 55 [*Tate v Williamson*] Lord Chelmsford refers to influence growing out of a relationship in which "confidence is necessarily reposed by one" at 61.

[142] Henry Sumner Sir Maine, *Ancient Law: its connection with the early history of society and its relation to modern ideas* (UK: Murray, 1906) – Ch V – describing exceptions to the movement from status to contract ; "the classes of persons just mentioned are subject to extrinsic control on the single ground that they do not possess the faculty of forming a judgment on their own interests; in other words, that they are wanting in the first essential of an engagement by Contract".

[143] Ian R Macneil, "Power, Contract and the Economic Model" (1980) 14 Journal of Economic Issues 909 at 915 and 913.

[144] *Al Nehayan v Kent*, *supra* note 6.

[145] See Paul Davies referring to the *Al Nehayan* term as "generous" – Paul S Davies, "The Basis oof Contractual Duties of Good Faith" (2019) 1 Journal of Commonwealth Law at 20.

[146] *Post Office*, *supra* note 1 at [724]: SPMs owe the PO fiduciary duties in cash handling at [785] and SPMs are agents of the PO at [794].

A. *Repose*

"Repose", an odd word to use in modern contracting, the Oxford English Dictionary describing the use of it as deposition or placement as "rare", (although it may be that the learned editors spent insufficient time in the Law Reports), is à la mode for the relationally minded. Fraser J, for example – "essential that SPMs can repose trust in the Post Office".[147] To determine whether its use has been confined historically to fiduciary cases I entered "repose" into the Westlaw Edge database and filtered results to "contract" and "trust and personal property" which turned up 128 results (3 were criminal cases), a manageable number. A similar (but less scientific) scan was carried out in Lexis. Between *Wade's Case* in 1601[148] and 2013 there was no case in which repose was used in a technical sense outwith cases relating to undue influence (some husband and wife), agency, trustees, executors, bailees, fraud, barratry, fiduciary duties, and partnerships. A search in Chitty uncovered a use in suretyship.[149] Another use, from 1681, was in "the trust of the care and maintenance of the ideot, which the law reposes in the King".[150] The word is also used conventionally in discussion of mineral repose in strata, angles of soil repose, confidence in witness evidence and even in the US sense of limitation.[151] Its recent use in commercial contract cases is puzzling.

B. *Mutual Trust and Confidence*

Neither trust nor confidence is a necessary or sufficient condition to create a fiduciary relationship.[152] However, whereas a fiduciary must always act as if the relationship was based on actual trust and confidence[153] that element is wholly missing in contract in which obligations are, in broad terms, circumscribed by the four corners of the agreement.

Judges, however, emphasise that the trust and confidence in relational contracts is of a "different kind from that involved in fiduciary relationships"[154] and the term turns out to enjoy a fundamentally different meaning, that "the other party will act

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147 *Post Office*, *ibid* at [725] and [728]. See also Leggatt J in *Al Nehayan v Kent*, *supra* note 6 at [164], and Pepperall J in *Essex v UBB*, *supra* note 49 at [112.3].

148 See *Wade's Case* (1601) 5 Co Rep 114A, *Re Henry de Vere, late Earl of Oxford* (1625) Jones, W 96, 82 ER 50 and an early pledge case *Nehuff's Case* (1705) 1 Salkeld 151, 91 ER 139.

149 *Chitty on Contracts*, *supra* note 2 at 47-034.

150 *Prodgers v Phrazier* (1681) 1 Vernon's Cases in Chancery 9, 23 ER 268.

151 There are early English uses in this sense – see *eg In the Earl of Darby's Case* (1682) Jones, T 237, 84 E. 1234.

152 Matthew Harding, "Trust and Fiduciary Law" (2013) 33 OJLS 81.

153 See Millett LJ in *Bristol and West Building Society v Mothew; (t/a Stapley & Co)* [1996] 4 All ER 698 (Court of Appeal) [*Bristol v Mothew*] at 711: "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence."

154 *Al Nehayan v Kent*, *supra* note 6 at [176], *Post Office*, *supra* note 1 at [726].

with integrity and in a spirit of cooperation".[155] Hugh Collins conflates it with fair dealing, which, it might be suggested, is not helpful.[156]

C. *Loyalty*

Loyalty is mentioned in several judgments.[157] Loyalty is a term used in employment law, in agency law and in describing the duty of a fiduciary. Martin Day describes it as the "touchstone" in relation to core fiduciary duties.[158] In these areas, loyalty connotes something more than taking the interests of the other party into account. In employment law the "employer is entitled to the single minded loyalty of his employee",[159] meaning, Harvey says (also saying it 'derived from the feudal concept of fealty')", rendering "good and faithful service" to the employer.[160] An agent's fiduciary duty of loyalty means, similarly, "single-minded loyalty", including that the agent "must not make a profit out of his trust; [or] place himself in a position where his duty and his interest may conflict".[161]

As we have seen above, the High Court relational contract meaning of loyalty is to "the agreement itself".[162] Hugh Collins agrees that loyalty is owed to the relational contract, giving examples of a franchise operation, in which the duty of loyalty might comprise a duty not to undermine the business reputation of the franchise business or, as in *Shell UK Ltd v Lostock Garage Ltd*, a duty not to favour in-house retail outlets and large franchisees against smaller outlets.[163] Again, we see this curiosity that a word or phrase with a clear meaning in a different context is used but then explained away.

D. *Fair Dealing*

Fair dealing is another term used in the fiduciary matrix, Chelmsford LC referring to the necessity of "openness and fair dealing … when he was negotiating with an extravagant and necessitous young man".[164] In one case the idea meant that Defendant managers were forced to disgorge excess profits they had made through taking advantage of a naïve and unadvised singer – "a young and inexperienced man who was content to put himself entirely in their hands and relied entirely on them to

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155 *Al Nehayan v Kent*, *ibid* at [167], cited in *Post Office*, *ibid* at [705].

156 Collins, *supra* note 69 at 450.

157 *Yam Seng*, *supra* note 6 at [142], *Post Office*, *supra* note 1 at [725], *Globe Motors*, *supra* note 99 at [67] and *Al Nehayan v Kent*, *supra* note 6 at [176].

158 Martin Day, "Fiduciary Duties", *supra* note 138 at 447.

159 Linda Clarke, "Recent Cases – Commentary – Mutual Trust and Confidence, Fiduciary Relationships and the Duty of Disclosure" (1999) 28 Ind Law J 349 at 358.

160 Harvey & Perrins, *supra* note 91 at [158].

161 *Chitty on Contracts*, *supra* note 2 at 21–131 citing Lord Millett in *Bristol v Mothew*, *supra* note 153 at [18].

162 Leggatt, Commercial Bar lecture, *supra* note 13 at [41].

163 Collins, *supra* note 69 at 68 and 76, *Shell UK Ltd v Lostock Garage Ltd* [1977] 1 All ER 481, [1976] 1 WLR 1187 – Bridge LJ was, however, in the minority.

164 *Tate v Williamson*, *supra* note 141 at 66.

give him a fair deal".[165] This is very different from the relational contract concept, vague as it is, that parties "refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people".[166]

E. *Comment*

From the notes above one can see that the use of language familiar in a fiduciary context is widespread in High Court relational contract judgments but has to be subsequently explained or discounted. It is worth wondering why the discounted version is not used in place of the epi-fiduciary language. It is unlikely to be carelessness. It seems likely that the judges are trying to promote a new form of contract, somewhere between the quotidian commercial contract and the fiduciary relationship.

XIII. Reflections

Broadly, from this haruspicatory exercise there are two discrete types of incident. One type is relatively susceptible to objective definition, but not novel, and "piecemeal" solutions are both robust and available.[167] The other descends from a confusing and misleading use of epi-fiduciary language and is novel but inappropriate, even destabilising. Marcus Smith J was surely right to question whether "importation of such fiduciary questions actually helps in the context of what is really very commercial litigation".[168]

Second, it is impossible to predict whether a Court will determine that a contract is relational. Most scholars and judges would agree that a degree of certainty is desirable[169] but, as we have seen, contracts of identical classes, dealing in the same industries, are sometimes characterised as relational and sometimes not. This lack of coherence permeates every incident. Relational scholars are similarly unhelpful. Macneil, as we have seen, believing most contracts to be relational and Eisenberg saying that a contract is relational if it "involves not merely an exchange, but also a relationship", under this definition including regular shopping at Macy's or bookstores.[170] Quite how that affects the contract provisions under which I agree to buy the latest James Lee Burke, or some new underwear is not fully explained.

One effect of this mixter-maxter of unclear boundaries[171] has been an increase in the number of cases in which parties investigate the possibility of having their commercial contract classified as relational, a Lexis search showing three results in

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[165] *O'Sullivan*, *supra* note 138 at 448.

[166] *Post Office*, *supra* note 1 at [706] and [711], *Al Nehayan v Kent*, *supra* note 6 at [175].

[167] See generally Soper, "Occam or Leggatt", *supra* note 132.

[168] *Watson's Diaries Ltd v AG Lambert and Partners* [2020] EWHC 2825 (Ch) at [36].

[169] See, for example, Sir George Leggatt, "Making Sense of Contracts: the Rational Choice Theory" (2015) 131 LQR 454 at 474–475.

[170] Eisenberg, *supra* note 46 at 295, 297.

[171] Davies & Raczynska, *supra* note 3 at 98. See also Andrew Bowen QC, "Relational contracts, an implied duty of good faith and commercially unacceptable conduct" (2020) Bus LB 1 referring to the "very broad nature of the characteristics".

2017, six in 2018, twelve in 2019 eleven in 2020 and five to June 2021, indeed in a recent Court of Appeal case the bench referred to an "avalanche" of cases, noting a low success rate, (Catherine Mitchell referring to the cases as an "enclave"),[172] but the Court of Appeal then failed to go any further than this, merely rejecting the submission in this case that an "ordinary solicitors' retainer which happened to be on a CFA basis" was a relational contract.[173] In another example, a submission that an "arms length" share purchase agreement was relational was dismissed as "hopeless" by Stephen Davies J who used the commercially unacceptable conduct test in a more recent case.[174] A similar result was reached by Gavin Mansfield QC in relation to a distribution agreement.[175]

Even sympathetic scholars are reluctant to claim that relational theory is fully coherent Catherine Mitchell, for example, observing that "There are only a set of diverse and often incompatible considerations".[176] In more recent work she encapsulates the issue well, saying that

> Judges have attempted to rein in the concept of relational contracts, and make the application of the label more predictable, by identifying the precise circumstances when a contract will be determined to be relational … The problem is that the relational contract concept resists being structured in such a way, since, as Macneil tells us, ultimately all contracts are relational.[177]

Others are less forgiving, Jonathan Morgan referring to an "inevitable lack of certainty with such vague doctrines"[178] and in Michael Trebilcock's prescient summary, accounts of relational contracting do not "yield determinate legal principles" but lead to "highly amorphous sociological enquiry", well beyond the competence of courts.[179]

I suggest that the High Court's difficulties in defining relational contracts were entirely predictable. They reflect fifty years of academic work which has had the same result and when the theorists have found it hard to create a concrete concept or matrix, it is not surprising that heavyweight judicial intellects founder on the same rocks. The late US Supreme Court Justice, Potter Stewart, is said to have regretted

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[172] Mitchell, *Vanishing Contract Law*, *supra* note 17 in ch 1.

[173] *Candey Ltd v Bosheh*, *supra* note 12 at [31], [42].

[174] *Keystone Healthcare Ltd and another v Parr and others* [2018] EWHC 1509 (Ch) and *Phoenicks Ltd (formerly Nickleby & Co Ltd) v Bellrock Property and Facilities Management Ltd (formerly SGP Property & Facilities Management Ltd)* [2021] EWHC 2639 (Comm). See *Acer Investment Management Ltd and another v Mansion Group Ltd* and *Microsoft Mobile Oy (Ltd) v Sony Europe Ltd and other companies* [2017] EWHC 374 (Ch)

[175] *Demand Media Ltd v Koch Media Ltd* [2020] EWHC 32 (QB). See also *Taqa Bratani v RockRose*, *supra* note 79.

[176] Catherine Mitchell, *Contract Law and Contract Practice: Bridging the Gap Between Legal Reasoning and Commercial Expectation* (London: Hart Publishing, 2013), ch 6.

[177] Mitchell, *Vanishing Contract Law*, *supra* note 17 at ch 7.1 citing Macneil, "Values in Contract", *supra* note 36.

[178] Jonathan Morgan, *Contract Law Minimalism* (Cambridge: Cambridge University Press, 2013) at 69.

[179] Michael J Trebilcock, *The Limits of Freedom of Contract* (Cambridge, MA: Harvard University Press, 1993) 141–142.

the fame which greeted his comment that, although he could not define obscenity "I know it when I see it".[180]

It is rather eccentric, however, to develop a specie of contracts called relational with nary a nod to the norms underpinning the theoretical literature which explains the idea of relational contracting. It is even less explicable when some of the incidents can be aligned clearly with some of those norms. However, the very impenetrability of relational theory may underlie the wholesale failure of even the English High Court to set out a coherent basis for defining a particular contract as relational.

Interviewed by the UK Supreme Court blog recently, Lord Leggatt divulged that "I think the law on this question is going to continue to evolve for some time to come".[181] As evolutionists know, however, only the fittest mutations survive.[182]

XIV. A Recipe for a Relational Contract

The Editor of this Journal suggested that I might tread where many more distinguished have trod and suggest an operable definition of a relational contract. I follow the same approach as the High Court. I list essential incidents. I propose a hard-boiled contextual approach to the construction of these contracts, going further than the High Court, and suggesting minor extension of current principle. I underpin my definition with a claim that the contract creates the relationship; not vice-versa. This has implications because it infers that some post closure activities will and should inform construction.

I use the possibly counter-intuitive proposition that many, if not most, readers will have experience of relational contracts, using a domestic contract for the installation of a new kitchen as my thread. Ruth Reichl observes "Even the most avid technocrat must occasionally escape from virtual space, and what better place to do it than the kitchen?".[183] Many of us have created under a contract or contracts a home extension, a new garage, a new kitchen or a new bathroom. Surprisingly, perhaps, these mundane contracts are deeply relational. The kitchen contract illustrates clearly my claim that the contract creates the relationship. There will be little or no relationship at the inception of the contracting process but as one's home is dismantled and put back together a relationship will form.

(a) The first incident is that for the contract to be performed efficaciously one party or each party must facilitate some part of the performance of the other. Lord Blackburn's principle is generic, Sir Kim Lewison citing *Mackay v Dick* as a rule of construction; that parties are under a "general duty to co-operate in the performance of a contract".[184] In the example of a new

[180] *Jacboellis v Ohio* 378 US 184 (1964).

[181] UK Supreme Court Blog, "The UKSC Blog interviews Lord Leggatt" (25 November 2021).

[182] See generally Charles Darwin, *On the Origin of Species*, (London: John Murray, 1859).

[183] Ruth Reichl, ed, *The Best American Food Writing 2018* (Boston: Mariner Books, 2018) – Introduction.

[184] Kim Lewison, *The Interpretation of Contracts*, 6th ed (London: Sweet & Maxwell, 2004) [Lewison 6th ed] at 16.06. See also Soper, *Symbiotic Contracts*, *supra* note 51 at 2.1 and 2.8. *Chitty on Contracts*, *supra* note 2 is more qualified at 16–026.

kitchen, the owner must allow the kitchen contractor access to the home, agree times for services such as water gas and electricity to be on or off or tested. And the contractor must turn up on time and allow for a certain amount of domestic activity in amongst the installation work. Those are the "something"s to which Lord Blackburn refers.

(b) The second incident is that parties, deliberately or unconsciously, have left some "matters to be worked out during performance" or for the modus operandi to evolve. Gaps may be filled either by collaboration between the parties as in *Hillas v Arcos* or the contract may specify that one party may determine how to fill the gap, perhaps by choosing amongst options or issuing a variation order or instruction.[185] For my purposes the mechanism is not relevant. What matters is that gaps exist and must be filled. In the kitchen contract, I hazard, one matter of detail to be agreed is that of time for performance, it being likely that you have agreed a price and a specification but not yet a date, in which case as in the *Victoria Vesta* case, parties must make reasonable efforts to agree a date or dates for performance.[186] Even in apparently comprehensive contracts there will be gaps. The allocation of resources will, for example, be a day-to-day activity, exigency creating change, particularly in facilities management contracts.[187] In developing, for example, Contract Management Plans and Balanced Scorecards those responsible will have an eye to the constructive engagement, give and take, problem-solving, expected as part of the management of the contract, which may include some non-contractually specified "aftercare" such as providing a full time client presence to respond to queries, and transfer knowledge to assist in settling in.[188]

(c) The third incident is the possibility of changing conditions. Lord Steyn seemed to link this factor to the length of the contract. The likelihood of force majeure, for example, increases with time. Other potential changes include scope variations instructed by the client, and delays. In the kitchen example, the likelihood exists that the resident chef will suddenly realise that he or she needs an unplanned electrical socket or a USB socket to charge a mobile or a light in a different location.

(d) The fourth incident is that those "problems which would almost certainly occur from time to time", such as hidden defects in the kitchen (*eg*, unexpected holes in walls, pipes or cables blocking planned routes or not found where expected), must be attended to. Other problems will include disputes, defects, delays, resource problems, changes or updates in rules (*eg*,

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[185] As in the Chartered Institute of Building, *CIOB's Facilities Management Contract* (New Jersey: John Wiley and Sons Limited, 2015) which allows changes to numbers of personnel (Article 6), additions to or omissions from services or changes to working hours (Article 8).

[186] *Supra* note 59.

[187] See *eg* Maxwell Stephens Recruitment, "A Day in the Life of a Facilities Manager", *Maxwell Stephens Recruitment* <https://www.maxwellstephens.com/blog/a-day-in-life-of-facilities-manager/> in which in "a day in the life" example records: "the Catering Manager … explains that some deliveries did not arrive, so one of the planned meals will be off the menu. It is the main vegetarian option, so I am slightly concerned"

[188] From Wiggins, *supra* note 47 at 194.

> in my apartment block I have changed the rules to force owners to install fire detectors in kitchens). And that the resolution of such issues is best achieved through dialogue and compromise, inferring that the parties must work together, for example by facilitating access to the defect, fixing bugs (as in *Anglo Group*) or by mutual changes in resource allocation (typical in facilities management contracts)

These four incidents are critical but not sufficient. As Ian Stewart observes of genes, so of these incidents, "they tell us what ingredients to use, … but they do not provide a complete, accurate plan of the final result".[189]

At the forefront of judicial thinking in the construction of these contracts (arguably of all contracts) should be the sage words of Sir Kim Lewison that "Both parties to a contract are taken to contract on the footing that they wish the contract to be performed".[190] The question then becomes "what does performance mean?" or what efficacious performance of the contract requires. Lord Steyn, in *Total*, concluded his remarks on relational contracts by saying that such a characterisation did not affect interpretation. *Investors* principles are clear that a contract means what it "would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract".[191] In the context of contracts which include the incidents above I suggest that background includes past history, modus operandi (in this and previous contracts), expectations of those who enter similar contracts, trade practice (perhaps reviewing expert evidence[192] and academic work). Lord Steyn's suggestion that "a flexible approach may best match the reasonable expectations of the parties",[193] might allow Courts to look in more detail at previous dealing and subsequent conduct. This might tend to demonstrate that the parties intended or expected that they would act reasonably, cooperating, working collaboratively, communicating professionally, acting in the interests of the success of their venture and taking, appropriately, the interests of the other into account; in other words, they would develop, evolve or maintain a relationship, through good formal and informal governance.

Another good guide to interpretation of such contracts is found in Jackson LJ's closing remarks in *Amey*:

> … Both parties should adopt a reasonable approach in accordance with what is obviously the long-term purpose of the contract. They should not be latching onto the infelicities and oddities, in order to disrupt the project and maximise their own gain.[194]

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[189] See Elizabeth Knowles, ed, *The Oxford Dictionary of Quotations*, 5th ed, (Oxford: Oxford University Press 1999) at 743:4 – "Genes are not like engineering blueprints, they are more like recipes".

[190] Lewison 6th ed, *supra* note 184 at 6.14, the context is a discussion on the prevention principle.

[191] *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896; Lord Hoffmann.

[192] As in *Anglo Group*, *supra* note 53 and as Steyn J did in *Eurodynamic Systems Plc v General Automation Ltd* unreported.

[193] *Total*, *supra* note 4.

[194] *Amey*, *supra* note 34.

These infelicities might, for example, include apparently tightly drafted termination clauses which should be read, as Lord Reid has ruled, as if the intent of the parties militated against opportunistic termination.[195]

The rule against considering subsequent conduct, at first blush a very good guide to party intention, is odd.[196] Hudson suggests that the rule is "not easy to apply … particularly so when there is a series of contracts"[197] and Hugh Collins claims that it is "widely ignored in practice".[198] Lord Hoffmann has ruminated that "it is a strong thing to exclude [such] evidence".[199] Chitty allows an exception "to show that the terms of a contract have been varied or enlarged" which may provide room for manoeuvre, especially where it can be shown that, in the words of Lord Hoffmann, the parties intended that matters were "partly left to evolve by conduct as time went on",[200] similar to Lord Wright's analysis of matters left to be detailed in *Hillas v Arcos*.

If background shows a desire or a necessity to develop, maintain or evolve a relationship, and professional and constant communication cooperation and collaboration is required to so do then we might describe these as relational contracts and one might paraphrase Lord Blackburn with a new *Mackay v Dick* principle:

> As a general principle where in a written contract these incidents are express or implicit the construction of the contract is that the parties must adopt a flexible and reasonable approach, and develop maintain or evolve a working relationship by:
>
> (a) Actively working together constantly to resolve the problems and manage the changes which will almost certainly occur
> (b) Entering collaborative discussions with a view to solving problems, and managing changes, including accepting reasonable solutions
> (c) consulting in order to fill in details left for adjustment (even making concessions for this purpose) without latching onto infelicities and oddities
> (d) when making decisions which affect the interests of the other, whether under express provisions, or driven by exigency, take such decisions fairly and impartially, consulting the other where possible, exercising judgement or contractual powers in a manner that they perceive would be regarded as reasonable by the other party though there may be no express words to that effect.

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[195] Lord Reid's reluctance may represent the "high-water mark" of the court's reluctance "to classify terms as … conditions" according to Edwin Peel, "Loss Of Bargain Damages" (2020) LMCLQ 450 at 467.

[196] *Schuler*, *supra* note 27, Lewison 6th ed, *supra* note 184 at 3.19. Note Johan Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 LQR 433 at 440 suggesting that estoppel by convention may temper the rule.

[197] Alfred A Hudson, *Hudson's Building and Engineering Contracts*, 13th ed by Nicolas Dennys & Robert Clay (London: Sweet & Maxwell, 2015) at 1–031. For an example see *Gunvor SA v Sky Oil & Gas Ltd (Previously Known As Keystone Trade Oil & Gas Group (UK) Ltd)* [2018] EWHC 1189 (Comm) (16 April 2018).

[198] Hugh Collins, "Objectivity and Committed Contextualism in Interpretation" in Sarah Worthington, ed, *Commercial Law and Commercial Practice* (London: Hart Publishing, 2003) at 197.

[199] *Carmichael v National Power plc* [1999] 1 WLR 2042 [*Carmichael*] at 2050–2051.

[200] *Chitty on Contracts*, *supra* note 2 at 15-060, citing *Carmichael*, *ibid*.

It might be said that these are good faith equivalents.[201] My view is that they are merely solid constructive and efficacious contract management measures, commercial expectations writ large. Good management is essential. Good faith is supernumerary.

[201] See *eg* Leggatt, Commercial Bar lecture, *supra* note 13 at [28] – "… the parties may need to show flexibility and a willingness to adapt their behaviour…"