

Commentary on Duties and Liabilities

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Key points

1. In practice, long term commodities contracts are less likely to be exposed to arguments of fiduciary and good faith obligations because the parties are almost always commercial leviathans who approach even the most preliminary negotiation on equal footing and armed with lawyers, other advisors and pre-commitment documentary regimes.
2. Clarity takes time and brevity requires courage in drafting. The draftsperson's role is a difficult one – they do not have a crystal ball – but a failure to labour over a contract's terms can leave a party locked into a bad bargain without any legal recourse.
3. The reality, though, is that the circumstances underpinning any long term contract will always change and it will never be possible to leave a long term contract to gather dust in one's desk drawer.

My perspective comes from a background of many years' involvement in the negotiation and drafting of long term contracts as an in-house lawyer to a number of the 'commercial leviathans' in the oil and gas sector, making me a consumer rather than a creator in the area of commercial law. I certainly spend little time 'wandering in the thickets of legal theology'.

I think, if I may presume to speak on behalf of many of my in-house legal brethren, our catch cry would be: 'Never be the first'. I know for a fact that my CEO, an intensely practical man, would look askance at any advice from me that relied on a radical or novel interpretation of the law to assure the enforceability of any commercial arrangement that I had drafted.

I have been asked many times over the years about the meaning of good faith, in a contractual or commercial negotiations sense, and I have only once, having explored the factual background to the query, advised the questioner that they would be better advised to consult a priest rather than a lawyer. (As an aside, I was articled to a lawyer who was also ordained as a non-stipendiary minister in the Church of England, so perhaps he at least might have fulfilled both functions: although I did sometimes wonder how he resolved his duties to his clients, the court, and the Almighty).

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