ESRC SEMINAR SERIES: TRUST IN THE PUBLIC SECTOR

at the

TRUST MANAGEMENT CONFERENCE, HERAKLION CRETE

THURSDAY MAY 29 2003, 5PM – 7PM

PART ONE: LEGAL AND SOCIAL PRINCIPLES

TRUST ‘IN’THE CONTRACT: GOOD FAITH AS AN EMERGING COMMERCIAL LAW PRINCIPLE APPLICABLE TO THE GOVERNANCE OF PUBLIC-PRIVATE PARTNERSHIPS.

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Abstract

The rise of public-private partnerships in the public sector to, for example, build infrastructure such as hospital buildings and roads and run the railways, has given rise to a plethora of contractual agreements between governments and private organizations. In many cases, these contracts are for work carried out over long periods for many millions of pounds and are in the public interest; a considerable amount of trust is placed in the private companies carrying out the work. Often, contractual enforcement has been through the use of confidence measures, such as expected completion dates, to obviate the trust question. However, the failure of many to meet such dates raises coupled with the continuation of the projects concerned, such as the Scottish Parliament buildings in Edinburgh, raises the question of whether there is any other form of contractual restitution available to governments acting on the public’s behalf. This paper seeks to demonstrate how the legal principle of ‘good faith’ may be seen as a legal embodiment of trust and is increasingly being used as such.

As a general rule, the law prefers to enforce commercial contracts rather than allow parties to escape performance of their obligations. Clearly, however, conduct which can be objectively regarded as morally reprehensible will be recognised as justifying the ‘innocent’ party either to escape from the performance obligation or to receive compensation. The most obvious example of this is the case of fraudulent misrepresentation: where X induces Y to contract with him by deliberately providing Y with false information. Although UK judicial vocabulary is unlikely to refer to the construct in this situation, one might say that X has acted in bad faith and not in good faith here. Y will be entitled to avoid the contract and, additionally, will have a claim for damages against X. But how far is the law prepared to push the notion of good faith. Would it, for example, apply it to pre-contractual negotiations which are broken off by one of the parties? If one follows the UK case law the answer would appear to be an emphatic ‘NO!’ [Walford v Miles [1992] 2 AC 128 – Slide 1] Would the construct be recognised as being applicable in a situation where, despite compliance with the letter of the terms of a contract, it might be thought morally justifiable to disregard these in the interest of the cognate concept of fair dealing?

Specific good faith rules abound in UK Commercial Law [Slide 2]. So good faith is accepted as an interstitial construct or gap-filler. But the debate currently being waged concerns the need for a general principle such as that articulated by international commercial legislation or in codified systems of national commercial law such as the US Uniform Commercial Code. In the supra-national private law of contract which will probably be implemented in the European Union good faith and fair dealing will also be articulated as an over-arching, general, principle [Slide 3]. The arguments in favour of a general principle can be adumbrated as follows: (1) it will allow the law to adapt and develop to meet new problems [eg in Smith v Bank of Scotland plc 1997 SC (HL) 111 –Slide 4]; (2) it can avoid unfairness
which specific articulations of good faith may not be able to prevent; and (3) it is consistent with the intellectual tradition of legal systems (such those of Scotland and the rest of Western Europe – though not England) which are deductive rather than inductive; developing principles first and then either applying or refusing to apply them in specific instances. We have also to recognise the raft of soft law provisions in the UK, codes of practice such as those promulgated by the banks and the insurance industry, many of which reflect the notion of good faith and, more specifically, perhaps, that of fair dealing. Is it not perhaps the case that commerce is already well on the way to accepting the relevance of the construct and that it is the courts which are in danger of lagging behind business practice here?

A substantial number of legal scholars and judges remain unconvinced of the desirability of a general principle. Some are positively hostile to its introduction. A selection of the heads of opposition to the construct may be summarised as follows: (1) it undermines the party autonomy theory of commercial contracts; (2) the construct has no role in the market place; and (3) good faith is an inherently destabilising concept and offends against the requirement of certainty in the law. Counter-arguments to these points will be developed in the presentation.

Good faith, from a legal perspective, is not to be feared. At a purely pragmatic level it will have to be accepted and, indeed, the signs are there that this is happening, albeit slowly in the UK courts. But how, and in what situations, will it be applied? The future remains unclear. But it is essential, if the principle is to find root in the UK and flourish there, that its application by the courts is consistent with business acceptance of the role of good faith, fair dealing and trust.

TRUST AS A SOCIAL JUDGEMENT

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Abstract

This paper considers trust within the framework of psychological research on judgement and decision-making. Most real-life decisions are made under conditions of greater or less uncertainty. Part of such uncertainty arises from the actions of other people or organisations with whom we interact, who provide us with ‘expert’ advice, or on whom we depend to manage risks on our behalf (e.g. doctors, air traffic controllers, taxi drivers, politicians, financial advisors). Hence, decision-making under uncertainty typically implies judgements about other people. Difference parameters of such judgements can be distinguished:

a) Discrimination ability (Competence). Does the person/organisation have the knowledge or skill to evaluate information accurately and/or take the appropriate action? (e.g. Are rail maintenance engineers properly trained?) Do the ‘experts’ know what they’re talking about?

b) Decision bias (Impartiality). Is the person/organisation predisposed to make excessively risky or cautious decisions, e.g. through a consideration of costs and benefits? (e.g. Has rail safety been compromised to cut costs?) Is the ‘expert’ independent?

c) Communication bias (Transparency). Is the advice we’re given ‘dressed up’ to disguise or exaggerate any risk? (e.g. Can we trust what politicians tell us about risks to national security?)

Trust is undermined by perceived shortcomings in any of these three criteria. However, communicators who are liked for extraneous reasons, and/or provide news or advice consistent with their audience’s prior attitudes, tend also to be trusted (an example of what psychologists term ‘peripheral’ as opposed to ‘central’ information processing.)

This framework will be discussed in the context of a number of public sector domains.
PART TWO: APPLICATIONS

TRUST AND PROFESSIONAL HIERARCHIES: A CONCEPTUALISATION FOR USE IN STUDIES BETWEEN MANAGERS AND CLINICIANS IN HEALTH CARE SCENARIOS

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Abstract

Trust has been the subject of considerable research over many years encompassing the early thoughts of Hobbes (1640) to more modern considerations espoused in the key texts of Fox (1974), Luhmann (1979), Barber (1983), Gambetta (1988), Fukuyama (1995), Kramer and Tyler (1996) and Govier (1997). Much of the work has been devoted to the social aspects of trust and trust within organisations.

Recent events within the British National Health Service exemplified by the Bristol Enquiry (Date) and the Shipman Report (Date) have identified grave concerns about levels of trust within this service and there have been a number of papers recently examining trust relationships within the NHS. This is set against a background of ever increasing monitoring from central government which is not calculated to enhance levels of trust.

This paper builds on work conducted on examining trust within and between professional hierarchies within the NHS and specifically between clinicians and management during a period of Trust merger. The work consists of an examination of the relevant literature and highlights the emergent themes which are part of an ongoing study to test the validity of a number of models, which examine trust during a hospital merger. It is anticipated that this work will provide valuable information which will assist the effective functioning of the new organisation and inform the thoughts of all who work within the organisation of the importance of trust and its implications in their everyday work.

‘APPLYING TRUST ORIENTED MARKETING TO HEALTH CARE MANAGEMENT’

Azienda sanitaria e paziente: un rapporto in evoluzione

Il Trust Oriented Marketing applicato alla sanità:
dalla promozione della salute allo sviluppo della fiducia

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Abstract

Healthcare Marketing is aimed to establish, to maintain, and to strengthen trust between health organization and patient. The healthcare marketing model proposed in this article is just based on the trust concept. To the aim to explain the essential contents of such model, the article first analyse the meaning of trust, such as last evolution of marketing discipline. Subsequently it develops a model of Trust Oriented Marketing for the Health System. This model decomposes the process of marketing in four logical stages: (1) an analytical phase, (2) a decisional stage, in order to segment the demand and to define the positioning; (3) an operative phase, that defines the Trusting Mix; and (4) a feed-back stage, that check trust and fairness in the distribution of resources.
MARKETING AND REGULATION: ISSUES OF TRUST IN VIRTUALLY MEDIATED ENVIRONMENTS

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Abstract

The increasing use by business of new media such as the internet and mobile communication technologies targeting prospective customer groups, raises a number of issues concerning the capability of existing regulatory structures to oversee such activity. Advances in technology giving rise to new ways of communicating with target audiences are being rapidly exploited by businesses. These communication strategies rely on IT, potential consumer’s access to that environment, and on organisational resources to formulate and implement effective communication strategies.

These strategies take advantage of the media’s unique capacity for achieving a virtual interaction between the organisation and the individual consumer. As a result, a number of implications arise that are of significance for the regulation of these virtually mediated marketing strategies. In this paper the authors explore these issues through the study of virtually mediated marketing strategies used by drinks companies to target young consumers. The marketing of a number of drinks products, and the impact the information technology has on the quality of interactions are analysed.

The authors find that as a result of the available technology, the interaction can be manipulated by the organisation in such a way as to create a relationship with the consumer that goes beyond mere exchange-based trust to a more significant trust based on the development of what appears to the individual consumer to be genuinely shared values attitudes and beliefs. In addition, the geographical location of the interaction in the consumer’s private space increases their willingness to engage with the message being delivered, as a result of lowered perceived risk, increased personal benefit and crucially no cost at the point of interaction. Such virtually mediated interaction between the organisation and the consumer focuses on the development of trusting and trustworthy behaviour, a subjective understanding that is personal to the individual at the point of interaction.

The authors conclude by arguing that since regulation relies on the establishment of external objective and measurable parameters as means for monitoring and control, the increasing use of new media to target consumers, coupled with the speed of change in its use renders regulatory organisations and frameworks incapable of effective monitoring and control. As a result of an explicit focus on trust, the authors suggest a number of guiding principles upon which the regulation of marketing in the new media may be usefully based.