TABLE OF CONTENTS

THIS MONTH'S CONTRIBUTOR

Daniel Tivadar

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THE CITY LAWYER - April 2013

The business law update from 3 Hare Court

3 Hare Court continues to lead the field in providing practical advisory and advocacy services to business clients. In these monthly updates we outline recent developments in litigation ranging from general contract law, to injunctions, to specialist areas such as banking and finance. In addition, we will provide either a commentary piece or a feature on a recent 3 Hare Court case.

We hope you enjoy this April edition.

Case: Mid Essex Hospital Services NHS Trust v Compass Group UK & Ireland Ltd (t/a Medirest) [2013] EWCA Civ 200

In 2008 Medirest entered into a contract with the NHS Trust for the provision of catering and cleaning services in two hospitals in Essex. Under the contract Medirest incurred 'service failure points' where its performance did not reach the level required; the contract set out the precise rules for determining how failure points would be calculated and how these points could result in payment deductions.

Medirest was to monitor its own performance and set out its service failure calculations. The Trust could challenge Medirest's calculations and the contract provided for a resolution process to settle the issue of how many failure points had been incurred. Once the figures for service failure points and corresponding deductions had been established, the Trust had a discretion whether to make payment deductions or not.

Seminars & workshops

3 Hare Court members regularly provide seminars and workshops to individual firms or groups of practitioners. If you have a request for a seminar or lecture, or would like further information then please do not hesitate to get in touch with our marketing manager, Mika Thom.

Conferences

We are often invited to speak at conferences in the UK and abroad. If you have a query concerning a conference then please get in touch with our marketing manager, Mika Thom.

Clerks

We have an experienced and approachable clerking team who will be happy to assist with recommendations, fees, our service protocol or general enquiries. Please contact the clerks on 0207 415 7800. Alternatively you can contact our Senior Clerk, James Donovan.

Feedback

As always at 3 Hare Court we welcome your feedback. In particular, any feedback or suggestions on this and forthcoming

The question for the Court of Appeal was whether a term was to be implied into the contract obliging the Trust not to exercise its discretion in an arbitrary, capricious and irrational manner. The Judge at first instance held that such a term was to be implied. The Court of Appeal disagreed.

Jackson LJ set out a number of authorities establishing that a party may not use a contractual discretion unreasonably: see e.g. *The Product Star* [1993] 1 Lloyd's Rep 397. His Lordship, however, observed that an important feature in this line of authorities was that the discretion involved making an assessment or choosing from a range of options, taking into account the interests of both parties. In *The Product Star* case for example, the discretion involved considering which ports were 'dangerous'. In such cases the party exercising the discretion cannot do so in an arbitrary, capricious or irrational manner.

In the present case, however, the Trust's discretion involved a simple decision whether or not to exercise an absolute contractual right. The Court held that Trust is a public authority delivering a vital service to vulnerable members of the public. It rightly demands high standards from Medirest. The Trust could not be criticised if it makes a full deduction which it was entitled to make. There was simply no justification for implying into the contract a term that the Trust will not act in an arbitrary, irrational or capricious manner.

The Court of Appeal therefore drew a distinction between cases where 'simple' discretion was exercised and cases where the discretion is complex. The practical difficulty with this approach is that there will cases where it cannot be easily determined which type of discretion one is dealing with. The number of options available to the party exercising the discretion provides no logical basis for the distinction – presumably it would not influence the outcome if the Trust could make a full deduction, no deduction or any percentage deduction in between. A further difficulty created by the decision is that it did not discuss whether the requirement that the discretion should be exercised in good faith applies to the 'simple discretion' type of cases.

Case: MRI Trading AG v Erdenet Mining Corporation LLC [2013] EWCA Civ 156

In 2005 MRI, a Swiss trading company, entered into a contract for the purchase of copper concentrates from EMC, a Mongolian mining company. A dispute arose and the parties commenced arbitration proceedings. In 2009 the

monthly updates will be gratefully received.

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parties entered into a settlement agreement in which they settled their dispute. As part of the settlement agreement the parties further entered into three new contracts to govern their relationship going forward. Two of these contracts were fully performed.

EMC was of the view, however, that the third contract was unenforceable. This was because the contract provided for three matters – a shipping schedule, treatment charges and refining charges – to be agreed at a later stage. Arbitration proceedings were commenced to determine the issue of enforceability.

The arbitral tribunal held that the contract should be construed without reference to the settlement agreement and concluded that the contract was no more than an 'agreement to agree' and was, therefore, unenforceable.

The Court of Appeal disagreed. Tomlinson LJ held that the overall transaction comprised the settlement of the original dispute; MRI's claim was compromised in terms that three new contracts were entered into. It was therefore wrong for the tribunal to have no regard to the wider arrangement of the settlement agreement when construing the contract. Further, EMC derived the full benefit of MRI abandoning its claim and the parties worked together on the first and second contracts for over a year without any suggestion that the third contract was unenforceable.

From an objective standpoint, it was clear that the whole of the settlement agreement was intended to be legally binding and the contract had to be construed in a way to give effect to that intention. The fact that certain terms were 'to be agreed' was hardly surprising given that the terms were drafted over a year before performance was to take place. A term was therefore to be implied into the contract that the shipping schedule and the treatment and refining charges would be reasonable and, in the event of any dispute, would be determined by arbitration.

This is a useful decision on the importance of the wider contractual and commercial context when considering the enforceability of contracts or when construing contractual provisions. It is a clear demonstration that the courts will be very reluctant to allow a party to derive a benefit from a contract but avoid its obligations by relying on a technical legal argument. The courts will much rather imply terms necessary to make the contract workable than to declare it unenforceable.

Feature: 3 Hare Court in practice - United Policyholders Group v Prime Minister of Trinidad and Tobago

Peter Knox QC and **Robert Strang** of 3 Hare Court represented the United Policyholders Group in their application for judicial review of the Trinidadian Government's plan to compensate policyholders in the failed insurance giant, CLICO. The High Court in Port-of-Spain, Trinidad granted leave in April 2012 and the full hearing took place in November 2012.

The High Court has now given judgment for the several hundred policyholders in excess of £30 million. The court held that the government's plan, which would have required policyholders to accept a lesser sum than was owed to them by CLICO, was unlawful, because the government was acting in breach of binding promises to them to protect their investments in full.

Madam Justice Joan Charles ordered the government to pay the applicants their full entitlements. She found that representations had been made to the policyholders by the government to the effect that the government would ensure that the funds in CLICO would be safe and that it would guarantee repayment of all monies owed to policyholders. These representations gave rise to a legitimate expectation. The onus was on the government to establish that a breach of its promises was in the public interest, but it had failed to put forward evidence to justify its case.

The Judge further held that the government had failed properly to take into account its previous promises and had acted wholly unfairly and disproportionately in denying the Claimants information as to the value of rights they were being asked to surrender.

The case made front-page news in Trinidad.

The next edition is due out in May 2013, until then!

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