

All England Reporter/2013/March/Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust - [2013] All ER (D) 200 (Mar)

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Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust

[2013] EWCA Civ 200

Court of Appeal, Civil Division

Jackson, Lewison and Beatson LJJ

15 March 2013

Contract – Construction – Express term – Duty to co-operate in good faith – Claimant providing catering services to defendant NHS trust under long-term contract – Contract providing for monitoring of performance and allocation of service penalty points and deductions in sums payable for poor performance – Parties obliged to co-operate in good faith – Dispute over deductions to contract price for purported performance failures by claimant – Each party purporting to terminate contract and claim substantial post-termination losses – Judge finding defendant failing to co-operate in good faith and exercising power to make deductions in an arbitrary, capricious and irrational manner – Judge finding each party entitled to terminate contract and neither could succeed in substantial claims – Defendant appealing – Whether judge erring.

Abstract

Contract – Construction. The Court of Appeal, Civil Division, held that, on a proper construction of a contract between the parties for the supply of catering and cleaning services to hospitals, the judge had erred in finding that the defendant NHS trust's conduct in allocating service failure points had constituted a breach of its obligations to co-operate and act in good faith since the judge had been wrong to imply such a term into the contract.

Digest

The judgment is available at: [2013] EWCA Civ 200

The claimant company entered into a contract with the defendant NHS trust (the trust) for the provision of catering and cleaning services at two of the trust's hospitals (the contract). The contract was to be performed under a division of the claimant (Medirest). The contract contained detailed provisions in relation to the performance of services and performance measurements. In particular, cl 3.5 of the contract provided, inter alia, that the trust and Medirest would co-operate with each other in good faith and would take all reasonable

action as was necessary for the efficient transmission of information and instructions and to enable the trust or any beneficiary to derive the full benefit of the contract. Further, under the contract, the trust was entitled, by notice to Medirest, to award service failure points depending on the performance of the services as measured in accordance with service level specifications. In accordance with monthly reporting, if service failure points reached a specified level, the trust was entitled to terminate the contract. Further, under the provisions for payment mechanisms, sums payable to Medirest in performance of the contract were liable to deductions based upon a formula to reflect service performance failures. Medirest had also been obliged to carry out its own monitoring of services and to provide reports in relation to its own performance. The performance of the contract met with a number of difficulties and various disputes arose as to Medirest's performance. In July 2009, the trust unilaterally deducted a large sum from its payment to Medirest, on the basis that Medirest had incurred significant service failure points which would be reflected in monthly deductions in sums due. Medirest sent a letter to the trust purporting to terminate the contract on the grounds that the trust had committed material breaches of contract by awarding excessive service failure points and making excessive deductions. Correspondence continued between the parties, with the result of a repayment being made by the trust to Medirest, but the parties continued to disagree on issues of performance. The trust issued a notice of termination of the contract, on the ground that sufficient service failure points had been accrued. By the instant proceedings, Medirest claimed against the trust for substantial damages for breach of contract. The claim was based on the premise that Medirest had validly terminated the contract. The trust counterclaimed to the effect that it had terminated the contract and was entitled to substantial damages. The judge found, inter alia, the trust's conduct had constituted a breach of its obligations under cl 3.5 of the contract to co-operate and act in good faith, since the trust had had a power to make deductions from monthly payments and to award service failure points, but there had been an implied term that, in exercising that power, the trust would not act in an arbitrary, capricious or irrational manner and, in breach of that implied term, but the trust had exercised its power in an arbitrary, capricious and irrational manner. Further, Medirest's termination notice had been valid, as had the trust's termination notice, however the trust had been in repudiatory breach of contract but Medirest had not terminated for repudiatory breach. Accordingly, the judge concluded that, since both parties had been entitled to terminate, neither could succeed in its substantial claims for post termination losses. The trust appealed.

The trust submitted, inter alia, that: (i) the judge had been wrong to find that the trust had been in breach of an implied term by awarding service failure points in an arbitrary, capricious and irrational manner, since to have done so there had to have been the presence of a discretion in relation to the awarding of service failure points or the making of deductions, but the contract had contained precise rules as to how service failure points and deductions were to be calculated and there had been no room for any discretion; (ii) the judge had been wrong to find that it had been in breach of cl 3.5 of the contract; and (iii) the judge had been wrong to find that Medirest had been entitled to terminate the contract.

The appeal would be allowed.

(1) The trust was a public authority delivering a vital service to vulnerable members of the public. It had rightly demanded high standards from all those with whom it contracted. There might have been circumstances in which the trust decided to award less than the full amount of service failure points or to deduct less than it had been entitled to deduct from a monthly payment. Nevertheless, the trust could not be criticised if it had awarded the full number of service failure points or if it had made the full amount of any deduction which it had been entitled to make. The discretion conferred by the contract in that regard had simply permitted the trust to decide whether or not to exercise an absolute contractual right. There had been no justification for implying a term that the trust would not act in an arbitrary, irrational or capricious manner. If the trust had awarded more than the correct number of service failure points or had deducted more than the correct amount from any monthly payment, then it was a breach of the express provisions of the contract. There had been no need for any implied term to regulate the operation of the relevant terms (see [91]-[93] of the judgment).

Accordingly, the implied term that the judge had found had not existed, with the result that the judge's finding that the trust had been in breach of the implied term could not stand (see [95] of the judgment).

(2) It was settled law that there was no general doctrine of good faith in English contract law, although a duty of good faith was implied by law as an incident of certain categories of contract. If the parties to a contract wished to impose such a duty, they had to do so expressly. Further, the content of a duty of good faith was heavily conditioned by its context (see [105], [109] of the judgment).

In the instant case, the obligation to co-operate in good faith, as contained in cl 3.5 of the contract, was not a general one which qualified or reinforced all of the obligations on the parties in all situations where they had interacted. The obligation to co-operate in good faith had specifically focussed upon two purposes contained within cl 3.5 of the agreement, namely, the efficient transmission of information and instructions, and enabling the trust or any beneficiary to derive the full benefit of the contract. In that context, the obligation to co-operate in good faith had meant that the parties would work together honestly endeavouring to achieve those two stated purposes. Therefore, the trust had not been in breach of cl 3.5 of the contract since it had been clear that the parties had co-operated effectively on all matters concerning the delivery of services to hospital patients and, so far as information had needed to pass between the parties to facilitate delivery of services to patients, that information had been duly transmitted. Despite the breakdown of relationships at management level, there had been no breach of cl 3.5 of the contract on either side (see [106], [107], [112], [115], [119], [120] of the judgment).

Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd [2001] 1 All ER (Comm) 193 applied; *Horkulak v Cantor Fitzgerald International* [2004] All ER (D) 170 (Oct) applied; *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] All ER (D) 227 (Feb) applied.

(3) When Medirest had served its notice of termination, the only continuing breach of contract which the trust had failed to correct was the award of an excessive number of service failure points. That had not amounted to a 'material breach' for the purposes of the termination provisions. 'Material breach' under the contract had connoted a breach that was more than trivial since the effect of termination for a material breach allowed Medirest to cancel a long-term contract on one month's notice. Accordingly, Medirest had not been entitled to terminate and its purported notice of termination had been invalid (see [123], [126]-[128] of the judgment).

Accordingly, the trust had been entitled to pursue its claim for financial relief on the basis that it had terminated the contract and Medirest's purported termination had been ineffective (see [129] of the judgment).

Decision of Cranston J [2012] 2 All ER (Comm) 300 Reversed.

Robert Howe QC and James Willan (instructed by DLA Piper UK LLP) for the claimant.

James Collins QC and Siddharth Dhar (instructed by Berwin Leighton Paisner LLP) for the trust.

Peter Fuller Barrister.