

The implied duty of good faith in commercial contracts

The recent High Court case of [Carewatch Care Services v Focus Caring Services Ltd](#) clarifies that English Courts will only imply a duty of good faith into commercial contracts in circumstances where there is a clear gap in the contract that needs to be filled in order to make the agreement commercially viable in practice. It once again illustrates the importance of clear and comprehensive drafting in commercial contracts as well as (more specifically) the risks inherent for franchisees entering into franchise agreements.

The facts

Carewatch was a provider of care home services. They owned a number of directly owned care home businesses as well as running a number of outlets as franchises. Focus Caring Services Ltd was a franchisee who had an agreement to operate two of those care homes. After some time Carewatch decided to focus more on their directly owned branches and the number of franchises began to decline.

Focus Caring Services Ltd was suspicious that Carewatch was deliberately trying to run down the franchise side of its business in favour of its branches, which were free to compete with franchisees in the same areas. Focus Caring Services Ltd tried to terminate the agreement with Carewatch. Focus Caring Services Ltd claimed that because Carewatch had ceased to support and develop its franchise network and had set up its own branches in direct competition, Focus Caring Services Ltd had breach the implied duty of good faith contained in their franchise agreement and as a result, caused the agreement to come to an end.

Focus Caring Services Ltd set up its own care home business outside of the franchise agreement. Carewatch claimed that this was a breach of their agreement and gave notice of its intention to enforce its contractual right to 'step in' and operate the business in Focus Caring Services Ltd's place.

The consequences

The court said there would be no presumed intention that there is a general obligation of 'good faith' in a commercial contract. Before a court could imply such a term into a contract it must decide if it was necessary in order to fill a clear gap in the agreement and to make the contract work in practice. The franchise agreement contained very detailed express terms, dealing with all aspects of the franchise business from its inception to its termination. An implied duty of good faith was not necessary to make this agreement work commercially, and in fact many of the proposed implied terms were inconsistent with express provisions of the agreement relating to guarantees, warranties and representations.

The court was satisfied that the franchise agreements did not contain an implied duty of good faith and as a result Carewatch was entitled to enforce its contractual right to 'step in' and operate Focus Caring Services Ltd's care home businesses.

The lesson

The exact status of a potential general duty of good faith in English commercial law has been the subject of significant debate in recent years, prompted to an extent by recent decisions in the English courts but also the attempts by the EU to introduce this general concept across all member states via the proposed Common European Sales Law.

The historic approach of English law has been to develop piecemeal solutions to specific good faith issues in commercial contracts - for example, the law on misrepresentation. However, general duties of good faith have been reserved for specific types of arrangements such as employment contracts or partnership agreements.

It may be that to an extent the difference between a general duty of good faith and the current position under English law is more form than substance. Often English courts are willing to assist parties if they feel they have been taken advantage of. However, this case illustrates that they will be very reluctant to step in and go behind the express terms of a commercial contract, even if one party might be acting in a way which could be seen as unreasonable. It once again highlights the importance of ensuring contractual arrangements are clearly drafted.

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