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IT'S NOT FAIR – THE FINAL CRY OF THE LITIGANT RELYING ON OFFENDED CONSCIENCE

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There can often be a disconnect between the way in which certain terms are used in everyday life, and the way in which they are used in a legal context. This means that people may believe that they are protected in certain circumstances in any event, and therefore it does not matter if they are not expressly provided for in the contract. It comes as an unpleasant shock to subsequently find out that, although it may seem unfair, there is no legal remedy available.

For example, people are often heard to claim that their human rights have been impinged upon, and so believe that they must have a claim in law (possibly by virtue of the Human Rights Act 1998). However, this is often not the case; where the Act does not prescribe a right in particular circumstances or to particular persons, then (as far as the law is concerned) the individual has no rights that can be asserted, notwithstanding that a general observer's conscience may be shaken by what has happened.

"Good faith" and "Equity" are other examples of this. Many claimants seek to claim that there are general "good faith" principles that bind a defendant, sometimes on the basis of general equitable maxims, such as "*Equity will not suffer a wrong to be without a remedy.*" This, they say, means that there is a general duty to act equitably (or in good faith) and therefore a defendant is in breach of their equitable duties.

The problem with this argument, is that equity does not work in such a general way. There are a number of rights and duties that equity confers and imposes on legal persons in particular situations. Underpinning many of these rights and duties may be a general equitable maxim. However, whilst it is possible to draw a common thread from particular duties imposed in particular circumstances, it is not possible to go the other way; as the authors of Snell's Equity 33rd Ed make clear: "*…the maxim operates at such a high level of abstraction, it is of limited practical use*."

This is borne out in the first sentence of a passage from *Medforth v Blake [2000] Ch 86* at page 101G:

> "*The equity of redemption was a Chancery invention, introduced in order to ensure that a conveyance by way of mortgage remained a security for the repayment of money whether or not the date fixed for repayment and reconveyance has passed*."

A particular equitable right conferred in a particular situation to deal with a particular problem. It is not possible to derive from this a general duty of good faith any more than it is possible to derive a general obligation to respect human rights from the Human Rights Act 1998.

There are two points that can be drawn from this. The first is that it cannot be assumed that a person has a remedy just because it feels like there ought to be. A potential litigant will be given short shrift if their claim boils down to a general statement that a particular outcome is unfair and ought not to be allowed.

The second is that it cannot be assumed that you are dealing with someone who is, or will always be, reasonable. In a previous article entitled "The Cost of Correction – Implying Terms into Leases and Other Contracts", I made the point that "*with money on the line, even the most reasonable parties may dig their heels in and deny liability*." Many a commercial (and personal)

relationship has been left in tatters because of a dispute that the parties may not have foreseen when times were good.

The solution to both of these points is that the parties have a huge amount of autonomy and control when they are entering into a commercial relationship. The parties are in control of the rights and obligations that will govern the relationship between the parties, and it is therefore open to one of the parties to endeavour to negotiate a clause into the contract that (for example) requires the other to act in good faith at all times. With an express term in the agreement, the parties know where they stand.

Even where the negotiating power is unequal, and so bargaining such a clause more difficult, it is important that parties know exactly where they stand with an agreement so that they enter into the arrangement with their eyes wide open. This ensures that the parties know what they are and are not entitled to from a contractual arrangement. In that regard, there is no substitute to taking appropriate legal advice prior to entering into the relevant contractual arrangement.

An example of a situation where parties may have benefitted from appropriate legal advice is the recent case of *Standish and Ors v Royal Bank of Scotland PLC and Anor [2018] EWHC 1829 (Ch)*, in which the Judge struck out a claim pursuant to CPR r.3.4(2)(a).

The Facts

The Claimants and the Second Defendant in this case were shareholders in a company that operated a number of bowling sites in the UK. The First Defendant provided lending facilities to the company. In 2015, all of the shareholders sold their shares in the company to a third party, achieving a net return for the shareholders if £22,629,642.

However, the Claimants were dissatisfied. The reason for this is that, in 2007, they had held 100% of the shares in the company. The Claimants claimed that, in 2011 and 2012, the Defendants took advantage of the fact that the company faced a claim for substantial rent in early 2011 to restructure the company, in deals which resulted in the Claimants' shareholding in the company being reduced to 20%.

The Second Defendant was said to have profited most from this restructuring, with the result being that it held 60% of the equity and 45% of the voting rights in the company after the restructures.

The Claimant claimed that:

1. The First Defendant acted in breach of a duty of good faith.
2. The First Defendant acted in breach of certain equitable duties.
3. The Second Defendant acted in breach of its fiduciary duties as a shadow director.

The Defendants applied to strike out the claim pursuant to CPR r.3.4(2)(a) on the basis that the particulars of claim showed no reasonable grounds for bringing the claim.

The Judgment

The Judge struck out the claim. In respect of the claims against the First Defendant, the Judge was of the view that there was "*no proper or indeed principled legal (or equitable) foundation and [was] bound to fail*." The claim against the Second Defendant failed as the company was considered to have entered into the various restructuring through the directors, and the restructures were therefore of its own free will.

It may well be that the Defendants intentionally exploited the company's potentially liability in order to make a profit; it is not possible to know what went through the minds of the main

actors some 6/7 years ago, and this was (in any event) a strike out application where no disclosure or witness statements had yet been given.

However, the fact that a situation leaves a nasty taste in the mouth is insufficient to provide a party with a claim. Whether or not the Defendant in fact acted in bad faith, and it is not possible to know the answer to that, because there was no contractual clause that required good faith, claiming an obligation of good faith was always likely to be an uphill struggle.

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