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Genuine Discretion vs Absolute Contractual rights

Business contracts have become the language and form of commercial transactions. Their ubiquity is only surpassed by their functionality. They are useful for establishing one parties rights and obligations towards others as well as available remedies and dispute resolution mechanisms. Contracts can also confer powers upon a party to decide on issues that affect another party.

As useful as contracts are it is not always the case that all their terms are in writing. Terms are often implied by statute, common law or other mechanism and this can impact the way the contract is performed. Therefore, it can be the case that the interpretation and performance of a contract is not governed by the wording alone.

This is the case when exercising a "genuine discretion" as there is an implied contractual term for the party to use their decision-making power in good faith and "*not in a way which is capricious, arbitrary or irrational*". This would imply that there is a limit to how the party can act and their discretion on how to perform the contract is curtailed somewhat. This differs from the application of an absolute contractual right which is not limited by such an implied term. So where do we draw the line between the two?

Whilst the courts have not produce an ultimate distinction between these two concepts, the Court of Appeal in *Mid Essex Hospital Services NHS Trust v Compass Group UK & Ireland Ltd (trading as Medirest)* [2013] EWCA Civ 200 at para 83 drew the line by stating "The

discretion involved making an assessment or choosing from a range of options, taking into account the interests of both parties.”

Following on from this the Supreme Court in *Braganza v BP Shipping Limited* [2015] UKSC 17, subsequently went to great lengths to describe how such an implied term should operate. Lady Hale found that the decision of the employer, BP shipping in this case, was unreasonable in the sense of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*. [1948] 1 KB 223. This implies that the two stage *Wednesbury* unreasonable test is applicable when assessing the exercise of contractual discretion.

Thus, while this principle is in no way new, the above cases show how it has recently become more prevalent and is applicable to a wider variety of circumstances. This trend does not appear to be slowing with cases as recent of September 2017 (see *BHL v Leumi ABL Limited* [2017] EWHC 1871 (QB)) discussing contractual discretion in relation to collection fees.

Thus, although it seems the courts have not clearly delineated the boundaries between a genuine discretion and an absolute contractual right what is clear is that the law relating to business contracts is changing and taking more consideration of the parties' behaviour in performing the contract throughout its term. It appears that the distinction is likely to come down to the wording of the clause in the context of the surrounding factual circumstances.

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