The construction of force majeure clauses (Totsa v New Stream)

This analysis was first published on Lexis®PSL on 10 November 2020 and can be found here (subscription required)

Dispute Resolution analysis: The claimant applied for summary judgment on its claim for the repayment of money advanced to the defendant under a contract for the supply of goods. The defendant was unable to deliver the goods in question, asserting that this was as a result of a force majeure event, and that the repayment clause in question did not accordingly apply. For the purposes of the summary judgment application, it was assumed that a force majeure event had occurred, and valid notice given pursuant to the terms of the contract. The court held that, on a proper construction of the terms of the contract, the obligation was for the seller to repay the advance payment if the product was not delivered when due (subject to any extension) for any reason whatsoever. In particular, as a result of the broad and all inclusive language of the repayment clause, the obligation to repay was not affected by any force majeure event, despite there being some cross-referencing between the force majeure clause and the repayment clause. In fact, the court held that the cross-referencing, if not completely surplusage, was demonstrating that it would be open to the parties to agree a different course if they so chose in light of a force majeure event occurring (understandable in light of such a stark and wide-ranging phrase as 'if for any reason whatsoever…the product has not been delivered…') but that they had not done so. Written by Georgia Whiting, barrister, 4 King's Bench Walk.

Totsa Total Oil Trading SA v New Stream Trading AG [2020] EWHC 855 (Comm) (27 March 2020)

What are the practical implications of this case?

In the light of the current pandemic, force majeure provisions in contracts are likely to be at the forefront of parties' minds. This case makes clear that, even where it could be said that force majeure provisions are engaged, clear wording in respect of an ancillary clause that a party will make payment (repayment here) in the event of delay for 'whatever reason' will take effect unless the wording of the force majeure clause alters the position.

In the instant case there was a cross-reference between the two material clauses, which seemingly led to the dispute as to construction. Contract drafters should accordingly seek to make any cross reference explicitly clear in terms of what it is intended to achieve. If such a cross reference does not in fact clarify or reflect the parties' intention in respect of the terms of the contract, it should not be included.

Parties should be mindful when drafting such clauses as to the scope of factors which are intended to amount to force majeure events, and as to the effect of the same in respect of all other contractual obligations, including the obligation to repay advanced funds. If the parties intend a force majeure clause to apply such that the obligation to repay any deposit/advanced payment is no longer to apply in light of a force majeure event, then they must say so. Broad, inclusive wording that such a repayment is to be made 'for whatever reason' is likely to mean just that.

What was the background?

This case related to a sale contract for the supply of chemicals entered into between the claimant ('Totsa') and the defendant ('New Stream'). Totsa had made an advance payment reflecting 90% of the purchase price in anticipation of delivery. New Stream were obliged to deliver the goods by a specified date and a failure to do so would require the repayment of the advanced sum paid by Totsa. This 'repayment clause' (clause 10.18) read as follows:

'Save for clause 16.6 [force majeure] of the Contract…, if for any reason whatsoever, the agreed contractual Quantity of the Product has not been delivered to Buyer in accordance with this Contract

and any agreed extension, the Seller shall…reimburse to the Buyer…the outstanding amount of the advance payment…'.

Two days into the delivery date range period (on 22 April 2019) New Stream gave notice of a force majeure event pursuant to clause 16 of the contract, which provided that neither party would be in breach of contract as a result of a delay or failure to perform as a result of a force majeure event. If any delivery was delayed or prevented for a period in excess of 30 days, either party could terminate the contract by giving written notice. Clause 16.6 read as follows:

'Subject to any agreement between the parties in relation to deliveries after termination of Force Majeure Event or any variation of the Contract with regard to the delivery affected by Force Majeure Event, in case of termination of the Contract, nothing herein shall impair the obligations by the Seller to repay to the Buyer the amount of the advance payment…in the event that the delivery of the Product is not made…due to Force Majeure Event'.

Totsa subsequently sought to terminate the contract pursuant to clause 16.3 of the contract (relating to force majeure) in the alternative to an alleged repudiatory breach of contract by New Stream. Totsa claimed repayment of the advanced sum (plus 'late interest' under clause 10.18(2)).

While Totsa denied that a force majeure event had occurred and that the relevant notice provisions had been complied with, for the purposes of its summary judgment application, it was content to assume that New Stream's arguments in this respect would be accepted. No delivery of the goods had taken place and Totsa accordingly argued that New Stream was required to return the advance payment made, even if a force majeure event had prevented the delivery.

New Stream's primary line of defence was that, in force majeure circumstances, even after a clause 16.3 termination, Totsa's rights, whatever they may be, in respect of the sum originally funded by way of advance payment, were not caught by or governed by clause 10.18 but arose, if at all, elsewhere. As such, they asserted that the summary judgment application could not succeed.

What did the court decide?

The judge held that the effect of clause 10.18 was plain when read with the contractual force majeure regime as follows:

- clause 10.18 provided that where the product was not delivered for any reason whatsoever, 'in accordance with this Contract and any agreed extension', then the seller was, upon written demand, to repay the advance payment together with interest
- by clause 16.3, where force majeure has arisen and been properly notified, the time for the seller to make delivery is extended, but with the right of each party to terminate if that situation persisted for more than 30 calendar days
- thus the effect of clause 16.3 was to pre-agree an extension to the delivery period under the contract if the circumstances within clause 16 arose. If it was necessary to rely upon the wording of clause 16.3, a period by which the contractual requirement for delivery had been extended pursuant to clause 16.3 was a period of an agreed extension within the language of clause 10.18
- in circumstances where, on the present assumption of a validly invoked force majeure event that extended delivery until 30 October 2019, it could not be said that the goods had not been delivered 'in accordance with the contract and any agreed extension' until the contract had actually been terminated. The judge held that the email which Totsa relied upon as terminating the contract in accordance with the terms of the contract was clear and effective to do so
- as such, where there had been no product delivered in accordance with the contract, even as extended pursuant to clause 16.3, then under clause 10.18 the advance payment was repayable on demand. The failure of the seller to deliver, even if as a result of a force majeure event, did not provide any defence to the obligation to repay. This was because clause 10.18 had the 'for any reason whatsoever' language, and clause 16 in appropriate provisions made it clear that it did not excuse or discharge any obligations to make payment pursuant to the contract

Summary judgment was accordingly granted in respect of the obligation of New Stream to repay the advance payment. The residual matters (and those which were not subject of the application) would be dealt with at trial.

Case details:

- Court: Commercial Court, Queen's Bench Division, Business and Property Courts of England and Wales, High Court of Justice
- Judge: Mr Justice Andrew Baker
- Date of judgment: 27 March 2020

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Georgia Whiting is a Barrister at 4 King's Bench Walk, and a member of LexisPSL's Case Analysis Expert Panels. If you have any questions about membership of these panels, please contact caseanalysis@lexisnexis.co.uk.