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Dispatch

Force Majeure

Litasco SA v Der Mond Oil and Gas Africa SA & Anor
[2023] EWHC 2866 (Comm)

Litasco was seeking summary judgment of sums said to be due under an agreement reached by the parties on 4/5 November 2022. Litasco is an oil marketing and trading company incorporated in Switzerland, but wholly owned by Lukoil PJSC, a Russian oil company. One of the defences raised related to clause 14, which dealt with force majeure:

> "*14 FORCE MAJEURE*
>
> ***14.1*** *If by reason of 'force majeure', which for the purpose of this Agreement shall mean any cause beyond the reasonable control of the affected Party including, but not limited to, any act of God, war, terrorism, riots, acts of a public enemy, fires, strikes, labour disputes, accidents, or any act in consequence of compliance with any order of any government or governmental or executive authority, either Party is delayed or hindered or prevented from complying with its obligations under this Agreement, the affected Party will immediately give notice to the other Party stating:*
>
> > ***14.1.1*** *the nature of the force majeure event;*
> >
> > ***14.1.2*** *its effect on the obligations under this Agreement of the Party giving the notice;*
> >
> > *and*
> >
> > ***14.1.3*** *the estimated date the contingency is expected to be removed.*
>
> ***14.2*** *To the extent that the affected Party is or has been delayed or hindered or prevented by a 'force majeure' event from complying with its obligations under this Agreement, the affected Party may suspend the performance of its obligations until the contingency is removed*".

The defendants argued that the force majeure clause was engaged because payment had to be made through the international banking system and, on the evidence, no European clearing bank would make payments to Litasco. This refusal of the banks approached to make the payments was an event "*beyond the reasonable control*" of the defendants which "*delayed, hindered or prevented*" them from complying with their obligations to pay Litasco, with the result that the payment obligation had been suspended.

Foxton J noted that it was well established that clauses triggered when a force majeure event "*hinders*" performance of an obligation have a wider field of operation than those limited to events which "*prevent*" performance.

Foxton J stressed that it was performance of the obligation which must be rendered "*more or less difficult*", not a particular method of performance where the contract does not require performance by that method. Further, here, the defendants relied on clause 14 to suspend their obligation to discharge an accrued payment obligation. Whereas the suspension of an obligation to deliver goods will ordinarily have the effect of relieving the other party of its concurrent obligation of payment, a seller who has an accrued right to payment has, by definition, already done what it is necessary to do on its part to be paid, such that suspension of the payment obligation will inevitably operate asymmetrically.

Accordingly, an argument that a party owing an accrued debt obligation is relieved of performance because paying the debt has been made more difficult is one which must be approached with particular care. Even in the context of force majeure clauses under which hindering performance is sufficient, before difficulty in making payment would suspend performance of an accrued obligation, a significant degree of difficulty would be required, perhaps one approaching, albeit falling short of, impossibility.

Here, in the view of the judge, the evidence fell "*far short*" of establishing a realistic prospect that payment of the accrued debt was hindered for the purposes of clause 14: For example:

> (i) The defendants had adduced evidence of five African banks with whom they had established banking relations who were unwilling to make payments to Litasco because of sanctions concern when contacted between February and May 2022 and, in one case, when contacted again in November 2023.
>
> (ii) However, Litasco had adduced evidence showing payments it had made through to, and received from, a variety of international banks throughout 2022 and 2023.
>
> (iii) Further, the whole premise of the joint venture arrangement was that West African customers would be able to open letters of credit directly in favour of Litasco, which would provide at least one of the means by which the defendants could meet their payment obligations. Those plans did not materialise, but that was because of issues relating to the sale of oil of Russian origin rather than because of issues about paying Litasco.
>
> (iv) The defendants were able to make payments to Litasco in both November and December 2022. It was no answer for the defendants to say they were able to make the first of those payments because they had sufficient Euros deposited with the bank to do so, but the payment exhausted its balance. Lack of foreign currency was not a force majeure event, and no explanation was offered as to why funds could not have been transferred by the defendants from elsewhere. While the Russian-Ukraine war and the sanctions imposed in response to it may have caused a downturn in the defendants' trade, and reduced its inflows of foreign currency, those events could not be said to have hindered or prevented performance of accrued payment obligations. The causal effect of such events on the defendants' ability to pay was too remote.

The reality was that the defendants simply did not have the foreign currency to make the payments, not that they had been hindered by difficulties in the international banking system in

making payments they were otherwise able to make. This was clear from the correspondence.

Writing in 1918, Sir Thomas Scrutton ("*The War and the Law*" (1918) 34 LQR 116, 132) had summarised the resultant disputes in the following terms:

> "*Did the inability to pay arise from the war; or was it, like Mr Micawber's, a chronic inability, equally present in war or peace? Numbers of debtors, however, urged with great vehemence to an unsympathetic Court that only this unforeseen war had prevented them finding El Dorado*".

The judge here said that it was equally important, in the context of a force majeure clause such as clause 14, to distinguish between those prevented from, or hindered in, complying with their obligations because of the effects of a force majeure event, and those, such as the defendants, who simply lack the financial resources to meet their obligations.

Interpreting construction contracts

DMH Electrical (UK) Ltd v MK City Group Ltd

[2023] EWHC 2960 (KB)

This was an appeal before Ritchie J from a county court decision which related to unpaid invoices for electrical work. DMH had been awarded £63k with interest and costs. The judge introduced the case in this way:

> "*This is a tale of two old school friends, one became a plumber and the other an electrician, who worked together in harmony on many building projects ... Whilst they were working together at the Site, the main contractor went bust, money was left unpaid for works done and the school friends fell out over where the loss should fall*".

As the judge also noted, unusually, the parties agreed that MK asked DMH to quote for items of electrical installation work within the many properties being built on the site. These quotes were used to form the bases of a series of contracts made between them. Both parties agreed, there were contracts made between them. Further, MK accepted that the quality of DMH's electrical work was good and done on time. The parties also agreed that DMH should be entitled to be paid for the work.

Some of DMH's work went unpaid after the main contractor went bust. There was no point in MK taking action against the contractor. Two of the individual contracts were relevant to the appeal. The first contract ("C1") was made around June 2017 on the basis of the figures provided by DMH in a quote dated 21 June 2017 for electrical installations at houses based on a set of specifications provided by MK. In its defence, MK asserted that the installation of MVHR units was not covered by the pleaded contract and could not be awarded. On the other hand, there was no dispute that the parties had agreed to these being supplied and installed by DMH or that they were installed and properly.

The second contract ("C2") was agreed in February 2018 and was made in a similar way. The defence here was not that the work was not contracted to be done, nor that it was not done, nor that the price was wrong, nor that the work was bad. DMH said that there was no contract arising from acceptance of the pleaded quote because it was expressly stated to include provisional figures to which MK would not hold DMH. Alternatively, the contract based on the quote was void for uncertainty.

Ritchie J noted that appeals against findings of fact have to pass a high threshold test. A trial judge has the benefit of hearing and seeing the witnesses which the appellate court does not. The appellant needs to show the judge was plainly wrong in the sense that there was no sufficient evidence upon which the decision could have been reached or that no reasonable Judge could have reached that decision.

As to the scope of C1, Ritchie J noted that this was an agreement made between two commercial tradesmen who knew each other well and who were, or were to be, working on the site together. In the event, DMH was the only electrical sub-sub-subcontractor on site doing this work. One tradesman asked for a quote for items A, B and C. The other provided a quote for items A and B but said that the price for C would come soon afterwards. Then they spoke, after the price for C was provided, and reached an agreement on the prices set out in the quotation and the additional information and agreed those would be the prices in the contract. To that extent, the quote was "*accepted*".

At first instance, the judge had ruled that, as an interpretation of the words used in the quote, taking into account the circumstances of the contract and from the evidence of the contracting parties, the contract included for DMH to install MVHRs (or item C), as requested by MK in the undisclosed request to quote, at a price which was known to both parties when the agreement was reached. Ritchie J said that this was an interpretation wholly open to the judge to make in the circumstances of the case. It flowed from the behaviour of the parties before the contract and the words used in the emails and was not undermined by their behaviour straight after the contract was made but instead supported by that. The quote did not say, "*we will not install the MVHRs*". It impliedly assumed that they would be installed by DMH, as requested by MK, subject to finding out the wholesaler's price. It was not conditional upon availability of the units because it did not say so. The parties then performed contract C1 and that performance included installing MVHRs.

As to whether C2 should have been held void for uncertainty, Ritchie J referred to the case of *Openwork v Forte* [2018] EWCA Civ 783, where Simon LJ gave the following guidance:

> "*The Court should strive to give some meaning to contractual clauses agreed by the parties if it is at all possible to do so*".

Here, there was certainty over the electrical fitting work to be done on each size of house, certainty about the products to be installed, certainty about the price for each piece of work, certainty over the Site and certainty over the process by which the specification would come about – the property buyer's choice. The only uncertainty in the provisional quote (not the contract) was whether DMH would need to up its prices when the director had the discussion with MK's director in the next few days to firm matters up. In the event, the quoted prices became firm and were incorporated into the contract and hence accepted. Performance then followed in line with the terms of C2. Neither party considered the terms too uncertain whilst they performed them.

The appeal was dismissed.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

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