BCLP. Client Intelligent

Insights

DWYER WE NOT ABLE TO TERMINATE OUR CONTRACT FOR COVID-19?

Sep 09, 2021

Since the COVID-19 pandemic began, a key question for practitioners has been whether *COVID-19 constitutes a force majeure event* and so entitles parties to relief under contracts that include *force majeure provisions*. Much has been written on how little case law there is on this topic and how English law does not recognise force majeure as a standalone concept.

What is not asked so often, but most certainly should be, is what factors the party deciding whether an event constitutes force majeure should have regard to when making that decision. As the recent case of *Dwyer (UK Franchising) Ltd v Fredbar Ltd* illustrates, here there is no lack of case law. When *exercising discretion* under a contract, English law has clear principles in place. Failure to exercise these can lead to *repudiatory breach*.

This blog takes a closer look at this case focusing on the force majeure elements.

What happened?

Dwyer operated as the franchisor of a plumbing and drain repair services franchise, and entered into a franchise agreement with Fredbar (as franchisee) in October 2018.

Clause 30.1 of the agreement provided:

> *"This Agreement will be suspended during any period that either of the parties is prevented or hindered from complying with their respective obligations under any part of this Agreement by any cause which* ***the Franchisor designates*** *as force majeure including strikes, disruption to the supply chain, political unrest, financial distress, terrorism, fuel shortages, war, civil disorder and natural disasters…"*

On 24 March 2020, during the COVID-19 pandemic, Fredbar's owner, who was in effect Fredbar as there were no other employees, was advised by the NHS that his young son was vulnerable and would need to stay at home for the next 12 weeks to avoid the virus. Fredbar had also seen a drop in demand for its services resulting from the pandemic. Fredbar requested a suspension under clause 30, but Dwyer refused to designate a force majeure event in the circumstances with relevant

correspondence focusing on the effect of COVID-19 on the business (as opposed to the defendant's family position).

While maintaining its stance that there was no force majeure, on 2 April 2020 Dwyer made an offer to waive payment if Fredbar's owner suspended operations in order to self-isolate. Fredbar's owner accepted the offer on 24 April 2020.

However, on 16 July 2020, Fredbar then purported to terminate the franchise agreement on various grounds, including that Dwyer had failed to comply with its obligations under clause 30 in refusing to designate the circumstances as force majeure.

In response, Dwyer alleged that Fredbar committed a repudiatory breach in seeking to terminate the franchise agreement. It terminated the franchise agreement on 19 August 2020 and brought a claim for damages and repayment of certain franchise fees, as well as an injunction to prevent Fredbar from entering into a new business in competition with it.

The decision

The court focused on whether Dwyer had correctly exercised its discretion under clause 30 when assessing whether a force majeure event had ocurred.

Applying the principles identified in *Braganza v BP Shipping Ltd*, it held that when exercising such discretion, there was an implied term that Dwyer would exercise its discretion honestly, in good faith and genuinely. This involved Dwyer taking into account all matters that were relevant.

The court held that Dwyer was in breach of this duty because it had ignored critical relevant matters, namely the owner's need to self-isolate because of his son. This meant that the discretion was not exercised in accordance with the implied term and so amounted to a repudiatory breach of contract.

However, Fredbar was not entitled to terminate the franchise agreement in July 2020 because after breaching clause 30, Dwyer had made an alternative offer that Fredbar had accepted and in so doing had affirmed the franchise agreement.

The court therefore held that the franchise agreement was effective at the point at which Fredbar purported to terminate in July 2020 and, in doing so, the court held that Fredbar committed a repudiatory breach that then allowed Dwyer to validly terminate the agreement.

Thoughts

Dwyer v Fredbar provides a welcome reminder that when exercising discretion under a contract as to whether *COVID-19 constitutes force majeure*, the party making the decision should ensure it complies with the *Braganza* duty. From a practical perspective, parties should take care to:

- Be familiar with the contractual provision under which the claim is made.
- Evaluate and respond to each claim within the timescales and in line with the provisions set out in the contract.
- Keep a record of contemporaneous events and meticulous files of all correspondence in connection with the claims.
- When making the decision take care to:
  - consider all relevant material; and
  - exercise discretion honestly, in good faith and genuinely.

The case also serves as an interesting example of a party inadvertently accepting a repudiatory breach by trying to agree a solution to the issues that COVID-19 presented. Parties should be mindful of this and shouldn't expect to be able to terminate a contract for force majeure (or, more specifically, a failure to designate an event as force majeure) at a later date if they have already agreed a compromise solution in respect of COVID-19.

This article first appeared on the Practical Law Construction blog dated 8 September 2021.

MEET THE TEAM

Helena Savva

London

helena.savva@bclplaw.com
+44 (0) 20 3400 4548

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be "Attorney Advertising" under the ethics and

professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP's principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.

© 2025 Bryan Cave Leighton Paisner LLP.