Dwyer v Fredbar: when to designate Covid-19 as force majeure

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Since the Covid-19 pandemic began in early 2019, many companies have been faced with disruption to their everyday commercial activities. As a result, litigation concerning the use of force majeure clauses has been on the rise. For example, in *Fibula Air Travel SRL v Just-US Air SRL* [2020] EWHC 3048, the charterer contended that a lease for the charter of an aircraft had been terminated by force majeure.

This note will focus on the recent decision in *Dwyer (UK Franchising) Limited v Fredbar Limited* [2021] EWHC 1218 (Ch), where the court held that a failure to exercise a force majeure clause could itself amount to a repudiatory breach of the contract.

Background

The claimant entered into a franchise agreement with the first defendant, Fredbar, as franchisee and the second defendant, Mr. Bartlett, as guarantor. Mr. Bartlett ran the plumbing franchise through Fredbar in Cardiff.

Clause 30 of the agreement contained provisions relating to force majeure including the following:

"*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*."

When the pandemic hit, Mr. Bartlett was notified by the health authorities that his son was vulnerable and that the best way of avoiding the Covid-19 virus was to self-isolate for the next 12 weeks. When Mr. Bartlett approached the claimant about suspending the agreement under clause 30, he noted that there had been a drop in demand for his services resulting from the pandemic, and later also that he had to self-isolate for the protection of his son.

The claimant refused Mr. Bartlett's request by a letter dated 31 March, noting that plumbing services could still be provided as this was a key worker service, and the fact of fewer jobs did not constitute a force majeure.

Fredbar purported to terminate the agreement by letter dated 16 July 2020, on the grounds that, among other things, the claimant had failed to comply with its obligations under clause 30 in refusing to designate the situation as force majeure. In turn, the claimant alleged the defendants had repudiated the contract which it accepted.

The claimant then brought a claim for damages and repayment of certain franchise fees. It also sought injunctive relief to prevent Mr. Bartlett's breach of restrictive covenants. The defendants, in turn, claimed they had been induced into entering the agreement by misrepresentation and undue influence, that the failure to designate force majeure was a repudiatory breach, that the misuse of a marketing fund the funding for which came from Fredbar was a repudiatory breach and that the restrictive covenants in the franchise agreement were unenforceable.

This article will focus on the decision regarding the application of the force majeure clause.

The defendants' argument

The defendants' argument was that, while it was for the claimant to designate the situation as force majeure, the claimant's exercise of its discretion was subject to an implied term pursuant to *Braganza v BP Shipping Ltd* [2015] UKSC 17; [2015] 1 WLR 1661. The *Braganza* implied term is that a contractual decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality.

It was argued on behalf of the defendants that clause 30.1 of the franchise agreement was a classic one for the implication of a *Braganza* term. *Braganza* terms are implied where contractual decisions "*affect the rights of both parties to the contract where the decision-maker has a clear conflict of interest*" and where there is an imbalance of power in the nature of the contractual relationship (*UBS AG v Rose Capital Ventures Ltd* [2018] EWHC 3137 (Ch) at [49]). In this case, the claimant, being the franchisor, had a clear conflict of interest as to whether to designate force majeure, as such a designation would affect its entitlement to fees from the franchisee; as a franchisor there was also an imbalance of power between itself and the defendants.

There are two limbs in determining whether the discretion had been properly exercised (*Braganza* at [24]) : first "*whether the right matters have been taken into account in reaching the decision*"; and secondly, "*whether even though the right things have been taken into account, the result is so outrageous that no reasonable decision-maker could have reached it*."

The defendants argued that neither limb had been satisfied and, therefore, the claimant had not exercised its discretion properly. As regards the first limb, the claimant did not take into account the disruption to everyday life and that its effect in hindering the defendants' business was on a par with strikes, disruption to the supply chain or war; in any event, it was unclear what, if any, factors the claimant took into account when refusing to designate a force majeure event within Clause 30.1. As to the second limb, the outcome was outrageous – the effects of the pandemic were on a par with war and large-scale disruption to supply; indeed, the claimant had furloughed most of its own staff and the defendants were unable to attend on properties because Mr. Bartlett had to self-isolate.

The defendants contended that the refusal to designate a force majeure event amounted to a repudiatory breach of the *Braganza* term.

The claimant's argument

The claimant argued that it had no reason to designate the situation as force majeure, and that it

had already gone to extraordinary lengths to accommodate the defendants. In its decision letter on 31 March, the managing director of the claimant (who was not a board member but ran the claimant subject to the board's supervision) made clear that services could still be provided as this was a key worker service; nor did decreased demand for plumbing services mean that there was "force majeure". The letter did not detail its decision not to designate force majeure by reference to Mr. Bartlett's personal circumstances or family. On cross-examination, the managing director admitted that the letter on 31 March had set out all his considerations for refusing to designate the situation as force majeure.

The Judge's Decision

ICC Judge Jones sitting as a judge of the High Court noted that of the two limbs of the *Braganza* test, the first one was that the claimant, in exercising its contractual power, must have taken account of the matters which are relevant and ought to be taken into account and not have taken into consideration those matters which are irrelevant.

He held that the claimant had erred in approach because it had not exercised its discretion in accordance with the implied term: "*a critical factor had been ignored for the purpose of the discretion*" (at [269]). The decision letter on 31 March or any other of the emails afterwards concerning clause 30 had addressed solely the effect of Covid upon turnover by reference to demand. They did not take into account the need for isolation for family safety, despite being aware that this was an important consideration for Mr. Bartlett and one of the bases upon which he sought suspension of the agreement by force majeure.

This was a breach, and furthermore a repudiatory breach of the agreement which went to the root of the commercial purpose of the Agreement. ICC Judge Jones stated (at [272]) that clause 30 was a fundamental term:

"*Its application would only arise in exceptional circumstances but that did not mean its exercise was not essential when those circumstances occurred. Plainly it was and a decision by the Claimant which ignored an important consideration, in this case the potential effect upon Mr Bartlett and his family, would commercially and objectively be considered a breach of an important term which went to the root of the commercial purpose of the Agreement. Alternatively it would be an intermediate term entitling termination depending on the seriousness of the breach.*"

However, ICC Judge Jones accepted the defendants had affirmed the franchise agreement. On 2 April 2020, the managing director of the Claimant offered Mr. Bartlett the choice between ceasing to trade completely when fees to the franchisor would be suspended, and trading when the fees must be paid. While this was not a decision under clause 30, it meant that Mr. Bartlett could self-isolate as though a force majeure decision had been made. On 24 April 2020 Mr. Bartlett indicated he was self-isolating and accepted the 2 April 2020 offer. As a result, ICC Judge Jones held that this acceptance of the 2 April 2020 offer amounted to affirmation of the agreement.

It should be noted that both parties have sought permission to appeal but not on the force majeure point.

Future decisions

The use of a *Braganza* term such that the refusal to designate force majeure was a repudiatory breach is a novel point of law. The decision is likely to be cited in *Braganza* cases generally as evidence of the reach of the clause as well as force majeure cases in particular. The franchise agreement was a standard form one and there may well be many franchisees (of various franchises) reconsidering their position and constructing arguments.

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17 June 2021