

Contract termination in Covid-19 times

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The 'new normal' has brought with it a variety of different challenges and it has had an impact on nearly all facets of our lives.

Many public (and indeed private sector) bodies have had to consider how the contracts they have entered into prior to the pandemic respond when performance of those contracts is delayed and frustrated as a result of Covid-19. Although each contract will need to be considered on its own merits, how a contract responds to Covid-19 will often hinge upon whether the definition of force majeure (if there is one) is wide enough to capture the present circumstances.

The courts have offered some guidance in the recent case of *Dwyer (UK Franchising) Ltd v Fredbar Ltd* which applies previous guidance about the implied duty of rationality in *Braganza v BP Shipping Ltd [2015] UKSC 17*.

Facts of the case

Dwyer (UK Franchising) Ltd ('Dwyer') and Fredbar Limited ('Fredbar') entered into a franchising agreement ('Agreement') in October 2018. Dwyer is a Franchisor of Drain Doctor, which is a substantial plumbing and drain repair services franchise. Fredbar was a Drain Doctor franchisee in accordance with the terms of the Agreement, which gave Fredbar the exclusive right to trade within nine postcode areas in Cardiff for a period of 10 years.

The agreement included the following force majeure clause: *"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..."*

Fredbar's owner was advised by the NHS on 24 March 2020 that his son was vulnerable and he was advised to isolate at home for 12 weeks. Fredbar had also experienced a drop of service demand and due to these circumstances, requested a suspension of the contract under the force majeure clause. He cited both reasons for wanting to suspend the Agreement under the force majeure clause.

This was rejected by Dwyer, who focussed on the effect of the Covid-19 pandemic on Fredbar's business rather than personal position. Dwyer also noted that Drain Doctor was a key worker service.

Dwyer offered to waive payment during the isolation period which was accepted by Fredbar. Fredbar then sought to terminate the franchise agreement on 16 July 2020 on various grounds, including Dwyer's refusal to suspend the Agreement under the force majeure clause. Fredbar's owner stated that even if Fredbar was not entitled to terminate the Agreement, Fredbar no longer was bound by its terms. Dwyer asserted that Fredbar's actions amounted to repudiatory breach. Dwyer terminated the agreement on 19 August 2020 and brought a claim for damages.

The court considered whether Dwyer executed their discretion under the force majeure clause correctly. They applied the principles set out in *Braganza v BP Shipping Ltd*. The court found that there was an implied term for Dwyer to take into account all matters that are relevant, exercise their discretion honestly, in good faith and genuinely and that Dwyer was in breach of this duty. Following this, the court

asserted that Dwyer should have taken into account that Fredbar was a small business, thus their services were significantly disrupted by the owner's need to self-isolate. Dwyer failed to recognise this and because of that failure, Dwyer had acted irrationally and had not considered the relevant issues. Fredbar would have been entitled to terminate the Agreement. However, because Fredbar accepted Dwyer's offer to waive payment, Fredbar had affirmed the Agreement.

The court therefore ruled that by seeking to terminate the contract, Fredbar had committed a repudiatory breach as Fredbar had no right to terminate the Agreement after accepting the offer. Following which Dwyer could then validly terminate the agreement.

Considerations going forward

If a party needs to exercise discretion in deciding if Covid-19 is a force majeure event, the party should ensure its consideration complies with Braganza. This means that parties should ensure that:

- They are familiar with the relevant contractual provisions.
- They assess and respond to each claim within the timescales and in line with the provisions set out in the contract.
- They keep records of contemporaneous events and of all correspondence in connection with the claims.
- When making the decision take care to:
 - consider all relevant material including business and if relevant, personal circumstances for smaller contractors; and
 - exercise discretion honestly, in good faith and genuinely.

Parties alleging a force majeure event should be careful when accepting a solution to the Covid-19 problems. They may be inadvertently accepting a repudiatory breach, which may prevent them from later terminating the contract for force majeure.

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