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COVID, Brexit and Force Majeure

***Alex Hudson**, Director, and **David Fittis**, Trainee, discuss a recent summary judgment in favour of a port operator relating to the failure of a sea ferry operator, P&O, to achieve a minimum volume guarantee contained in the contract between the parties in PD Teesport Ltd v P&O North Sea Ferries Ltd [2023] EWHC 857 (Comm)*.

Background facts

In 2021, PD Teesport Limited, the operator of Teesport in the UK (the "**Port Operator**") entered into an agreement, by which it provided general port services, including the use of Teesport, to P&O North Sea Ferries Ltd ("**P&O**").

The Agreement provided that P&O would import or export a minimum of 120,000 units per year (the "**Minimum Volume Guarantee**"). A shortfall payment of £44.54 per unit was agreed for each unit short of this.

There were two material exceptions to this obligation:

1. Clause 11.3 "*If [*P&O*] can demonstrate to [the Port Operator's] reasonable satisfaction that it is impossible for [*P&O*] to achieve the Minimum Volume Guarantee...solely due to economic factors resulting from the UK's exit from the European Union, the parties shall attend a meeting to discuss and propose strategies for [the* P&O*] to achieve the Minimum Volume Guarantee and reasonably consider any amendment to the Minimum Volume Guarantee*"; and

2. Clause 12.3 "*If a Force Majeure event affecting [the Port Operator] prevents [*P&O*] from importing or exporting Units via a Vessel at [Teesport]...the relevant number of affected Units shall be deducted from the Minimum Volume Guarantee....*"

During 2021 P&O failed to meet the Minimum Volume Guarantee; importing and exporting only 99,550 units, a shortfall of 20,450 units.

On 12 January 2022, the Port Operator emailed P&O inviting it to agree the number of units transported during 2021 and so that a shortfall payment could be calculated and agreed. P&O responded inviting the Port Operator to "*see if any strategies can be mutually developed around the [Minimum Volume Guarantee] as well as a healthy discussion on what an acceptable [Minimum Volume Guarantee] adjustment could look like*". The parties met on 26 January but did not reach agreement about a reduction in the Minimum Volume Guarantee. The Port Operator subsequently emailed P&O on 4 February advising that "*...having considered the meeting further, as detailed in the remainder of this email, our position remains that [the defendant has] not at any time demonstrated to our reasonable satisfaction that the failure to achieve the MVG in the Period is solely due to economic factors resulting from Brexit.*"

The Port Operator subsequently claimed a shortfall payment of £910,843 plus interest. Absent payment, the Port Operator issued claims in the English High Court and applied for summary judgment.

P&O accepted that it had failed to achieve the Minimum Volume Guarantee but contended that it was not liable to make any payment to the Port Operator for two reasons:

1. The Port Operator failed to meet "*in good faith*" to reasonably consider amendments to the Minimum Volume Guarantee; and
2. A force majeure event occurred, namely Covid-19 and/or Brexit, which had hindered customer orders and the number of units transported.

Judgment

The Court restated (and the parties agreed) the general test for summary judgment applications from *Easyair Ltd. v. Opal Telecom Ltd. [2019] EWHC:*

(i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success. This means a claim that is more than merely arguable;

(ii) In reaching its conclusion the court must not conduct a "mini-trial". However, in reaching its conclusion the court must take into account not only the evidence actually placed before it but also the evidence that can reasonably be expected to be available at trial;

(iii) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. On the other hand on issues of short points of law or construction, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it.

On the application of clause 12.3, the Court accepted that Brexit and Covid-19 fell as a contractual "Force Majeure event" under the Agreement. However, importantly, clause 12.3 required that the Force Majeure event affect the Port Operator (not just P&O). The Court held that P&O had insufficiently pleaded and evidenced that either Brexit or Covid-19 had directly affected the Port Operator. It was not sufficient for P&O to argue that both were notorious events of general importance which impacted the industry. Absent a clear and significant impact on the Port Operator being pleaded and evidenced the Court held that the P&O's clause 12.3 defence had no reasonable prospect of success.

On the application of clause 11.3, the Court held that P&O's defence also did not have a real prospect of success. It was not disputed that the parties had met on 26 January. As to the allegation that the Port Operator had not considered amendments to the Minimum Volume Guarantee in good faith, the Court held that the 4 February email sent by the Port Operator evidenced that it had considered amendments with an open mind, in good faith and reasonably. P&O had failed to adequately evidence its assertions to the contrary – there was "*no substance to the factual assertions made in support of it*". P&O's clause 11.3 defence was therefore held to have no real prospect of success.

Conclusions

The Court's decision provides an overview on the tactical value of a well-timed summary judgment application.

Further, it provides a timely reminder on the importance of drafting clear and well defined limitation, exception and force majeure provisions. P&O's argument that Brexit and Covid-19 were force majeure events which had impacted the industry generally was insufficient. The contractual force majeure provisions required a clear impact on the Port Operator to be evidenced.

Finally, the Judgment sets out the difficulties a party faces when alleging a breach of good faith obligations by a contractual counterpart. Great care must be taken with any such allegation and clear evidence to substantiate it is an absolute must.

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