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ADVANCE PAYMENTS, FORCE MAJEURE AND BUYER'S RIGHTS: COMMON SENSE PREVAILS

In a recent judgment[1], the Court of Appeal held that the natural reading of a particular provision in a force majeure clause was that Nord Naphtha Ltd (the "Buyer") had a right of repayment of advance payments in circumstances where the goods had not been delivered and New Stream Trading AG (the "Seller") had declared force majeure ("FM"). Where there were two possible constructions of such a clause, the Court would choose the one which did not offend business common sense.

What happened?

The parties contracted for the sale and purchase of low sulphur diesel (the "Product"), to be supplied by a refinery (the "Refinery"). Payment was to be 90% in advance. There was no express clause in the contract dealing with a right of repayment, but Clause 14.5 included the words: *"...nothing herein shall impair the obligations by the Seller to repay to the Buyer the amount of the advance payment or any Outstanding Advance Amount under this Contract in the event that the delivery...is not made...due to Force Majeure Event*".

Advance payment of around US$16m was duly made but in the event, the Refinery collapsed into liquidation, delivery did not take place, the Seller declared FM and the Buyer terminated the contract. The Buyer brought a claim for repayment of the advance payment on the grounds that the Seller was contractually obliged to repay it pursuant to Clause 14.5 or alternatively, on the grounds of unjust enrichment.

First Instance decision

Following the Buyer's application for summary judgment, the Court found in its favour. In doing so, it was required to distinguish a previous decision in *Totsa Total Oil Trading SA v New Stream Trading AG* [2020] EWHC 855 (Comm). In that case, the Court had suggested *obiter* that a repayment clause in exactly the same terms as in the present case and where the refinery had also gone into liquidation, did not create a repayment obligation. In this case, the Court held that "*the starting point is that it would be a very surprising result if a buyer has no ability to reclaim its prepayment from* [the Seller] *in any circumstances. One can only make sense of Clause 14.5 by reading into it an express obligation to repay.*"

The Seller appealed, arguing that the construction of the contract was defective and that rather than considering the commercial context, "*the starting point*" should properly have been a close textual analysis of the clause. The word "*impair*" in Clause 14.5 suggested the preservation of a right and could not be construed as creating one. Further, in *Totsa*, the repayment obligation was stated elsewhere in the contract but not so here – and that difference was as a result of negotiation between the parties.

Court of Appeal decision

The Court of Appeal held that the principles of construction required it to ascertain the objective meaning of the language chosen by the parties, aiming to understand what a reasonable person with the background knowledge available to the parties when the contract was made would have understood them to mean. It must consider the Contract as a whole and if there are two possible constructions, it can opt for the construction consistent with business common sense. The Court must also consider the quality of the drafting and the possibilities that one side may have agreed something which it later regretted and that a provision may be a negotiated compromise.

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[1]Nord Naphtha Ltd v New Stream Trading AG [2021] EWCA Civ 1829

The Court of Appeal found that the judgment in *Totsa* was irrelevant to the resolution of this case. The judge in *Totsa* "*was construing a materially different contract, in order to answer a different question, set in a different context*." The contracts in the two cases were different and the Court of Appeal could not sensibly make any inferences as to why that was so.

The words "*nothing herein shall impair*" were not the operative words of the clause; they were merely an introduction to what followed. To read those words as creating a limitation was unnatural and strained and "*the more natural reading of that clause is that it creates and confirms that the seller is obliged to repay…*"

If the Seller's interpretation was right, clause 14.5 would be largely redundant. The Court of Appeal would "*take some persuading*" to find that a whole clause should be disregarded.

In conclusion, the Court of Appeal found that "[a] *reasonable person reading clause 14.5, armed with the information available to New Stream and Nord Naphtha as they entered the Contract, would have no real doubt that that clause provided Nord Naphtha with a right of repayment of the Advance in the event of non-delivery for force majeure reasons. The right is expressed by that clause, in words which are clear enough when read objectively.*"

HFW Comment

The root cause of this dispute was a clumsily worded repayment clause. It is another reminder of the importance of making sure that contracts are drafted clearly and simply and achieve what they are supposed to do. It is also a demonstration of the English courts' common sense approach to contractual interpretation.

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