Reports from the courts

Our regular round up of the court decisions of most interest to construction from **Andrew Croft** and **Ben Spannuth** of **Beale & Company Solicitors LLP** examines a case that will interest anyone hoping to invoke force majeure clauses against the background of sanctions against Russia; and another that serves as a reminder that terminating parties must take care to follow contractual termination procedures in their entirety

MUR Shipping BV v RTI Ltd

[2022] EWHC 467 (Comm); Jacobs J

In June 2016, Mur Shipping BV (MUR), a cargo logistics and freight services provider, concluded a Contract of Affreightment (COA) with RTI Ltd (RTI) to carry monthly shipments of bauxite from Guinea to Ukraine.

The COA contained a force majeure clause which provided that neither party would be liable to the other for loss, damage, delay, or failure in performance caused by a 'Force Majeure Event', which was defined as an event or state of affairs which met the below criteria:

a) It is outside the immediate control of the Party giving the Force Majeure Notice
b) It prevents or delays the loading of the cargo at the loading port and/or the discharge of the cargo at the discharging port;
c) It is caused by one or more of […] any rules or regulations of governments or any interference or acts or directions of governments, the restraint of princes, restrictions on monetary transfers and exchanges;
d) It cannot be overcome by reasonable endeavors [sic] from the Party affected.

On 6 April 2018, the US applied sanctions to RTI's parent company, following which MUR invoked a force majeure clause in the COA. On 10 April 2018, MUR sent a force majeure notice stating that it would be a breach of sanctions for it to continue with the performance of the COA and that "sanctions will prevent dollar payments, which are required under the COA".

RTI argued that sanctions would not interfere with cargo operations, that payment could be made in Euros, and that MUR, being a Dutch company, was not a "US person" caught by sanctions. MUR declined however to nominate ships under the COA, relying upon force majeure which resulted in RTI obtaining alternative tonnage and bringing a claim in arbitration for the additional costs incurred.

The arbitration tribunal decided in favour of RTI (the Award). Whilst MUR's case on force majeure succeeded in all other aspects of the arbitration, it ultimately failed because it could have been "overcome by reasonable endeavors [sic] from the Party affected". Whilst the tribunal accepted that the sanctions had drastic effects on commercial transactions, the exercise of reasonable endeavours required MUR to accept RTI's proposal to make payment in Euros – this was a "completely realistic alternative" to the payment obligation in the COA.

In May 2021, MUR appealed under section 69 of the *Arbitration Act 1996* on a question of law arising out of the Award, namely whether reasonable endeavours extended to accepting payment in non-contractual Euros instead of contractual US dollars. MUR argued that the exercise of reasonable endeavours did not require the affected party to agree to vary the terms of the contract or agree to a non-contractual performance. RTI contended that there was no reason in principle why the exercise of reasonable endeavours should not involve a variation of contractual terms and that payment in Euros was "plainly sensible".

Decision

Jacobs J did not uphold the Award.

Jacobs J found that the exercise of reasonable endeavours did not require MUR to sacrifice its contractual right to payment in US dollars. Jacobs J held that the contractual right to payment in US dollars, and a contractual obligation to pay in that currency, was a right and obligation which formed part of the parties' bargain.

Jacobs J accepted MUR's submission that if the loss of a contractual right turns purely on what is reasonable in a case, then "the contractual right becomes tenuous, and the contract is then

necessarily beset by uncertainty which is generally to be avoided in commercial transactions".

Comment

This case is particularly relevant to construction companies given the recent further sanctions on Russian entities because of the war in Ukraine as an example of the courts construing what is meant by a reasonable endeavours obligation. Parties looking to invoke force majeure clauses should note that that an obligation to exercise reasonable endeavours to overcome a force majeure event does not mean that the party claiming force majeure must accept a non-contractual performance.

Struthers v Davies (trading as 'Alastair Davies Building') and another

[2022] EWHC 333; Singler QC

Mr and Mrs Struthers (Struthers) engaged Alastair Davies Building (Davies) to undertake building works at their home in Surrey in March 2015 pursuant to a RIBA Building Contract (the Contract). The Contract provided for a completion date of 10 August 2015.

Clause 12.3 of the Contract stated: "If the Contractor: abandons the Works; fails to proceed regularly and diligently; consistently fails to comply with instructions; is in material breach of the Contract; then the Architect/Contract Administrator may issue the Contractor with a Notice of Intention to Terminate".

Clause 12.4 of the Contract entitled Struthers to terminate Davies' appointment by issuing a Notice of Termination "[i]f the Contractor has not remedied the default within 14 days of receiving the Notice".

Davies failed to progress the works regularly and diligently. It was accepted that Davies failed to carry out any appreciative work on site and carried out no further work after 10 December 2015. Davies also failed to provide any completion programme for the works.

On 23 December 2015, Struthers purported to send a Notice of Intention to Terminate to Davies. On 11 January 2016, Struthers sent a Notice of Termination to Davies.

Davies disputed the validity of the termination on the basis that the Contract required the Contract Administrator to issue the Notice of Intention and that, absent a valid Notice of Intention, no further Notice of Termination could be sent. Alternatively, Davies contended that there was no evidence that the Notice of Intention had been delivered or received by a particular date and therefore no evidence that the required 14-day period between notices had passed. Struthers relied on ***Akenhead J's judgment in Obrascon Huarte Lain SA v The Attorney General for Gibraltar [2015] EWHC 1028 (TCC)*** where, despite a notice being sent to the incorrect address, the validity of the notice was upheld.

Decision

Singer QC found that, whilst the Notice of Termination was invalid, Davies was in repudiatory breach of the Contract which Struthers accepted in January 2016. Singer QC therefore awarded Struthers damages for breach of contract in respect of defective and incomplete works and consequential losses in the sum of £349,913.67.

Whilst Singer QC agreed that clause 12.3 of the Contract was not mandatory in the sense that only a Contract Administrator could issue the Notice of Intention, he agreed with Davies that it is established law that termination clauses must be construed strictly – "it does not seem to me as a matter of interpretation that the Claimants' argument is correct as a matter of law and it seems to me that there are sound reasons for requiring the initial Notice to come from the Contract Administrator rather than the client". Singer QC was also not satisfied that Davies received the Notice of Intention a clear 14 days before the Notice of Termination.

Nevertheless, Singer QC was satisfied that Davies' "litany of failures to carry out work in time and to give any indication of a final date for already delayed works" and his lack of actions "clearly showing an intention to abandon and altogether refuse to perform the work" amounted to a repudiatory breach. The Notice of Termination therefore operated as an acceptance despite it not being contractually valid.

Comment

This case is a reminder that terminating parties must take care to follow contractual termination procedures in their entirety. Whilst Struthers was ultimately successful, parties that deviate from the contractually agreed procedure risk rendering the termination invalid. A failure to correctly terminate an appointment may itself constitute a repudiatory breach and expose the terminating party to damages. **CL**