Case in Brief: Supreme Court of New South Wales finds force majeure clause offered no protection for loss and damage to goods in transit

By Kate Holland

In Woolworths Group Ltd v Twentieth Super Pace Nominees Pty Ltd [2021] NSWSC 344, the Supreme Court of New South Wales applied a narrow interpretation to the meaning and effect of a force majeure clause, finding that it did not override other clauses in the contract, or alter the overall allocation of risk intended by the parties.

The facts

The case concerned a contract for the transportation of goods (the **Contract**) between Woolworths Group Ltd (**Woolworths**) and Twentieth Super Pace Nominees Pty Ltd (the **Carrier**).

In April 2014, the Carrier transported 258 pallets of Woolworths' goods to Western Australia by train. During transit, the train was derailed by flash floods, resulting in damage to the goods in the amount of $893,399.25. Woolworths sought to recover these losses from the Carrier. The Carrier made an unsuccessful attempt to deny liability for the damage by invoking the Contract's force majeure clause.

Alternative interpretations of the force majeure clause

The parties disagreed about the correct interpretation of the Contract's force majeure clause and how it interacted with the rest of the Contract – whether it overrode the clauses concerning allocation of risk and the Carrier's obligation to indemnify Woolworths for loss or damage during transit.

The clauses at play included:

- **risk allocation clause** stating that that the Carrier was liable for goods in its possession from collection until delivery;
- **indemnity clause** requiring the Carrier to indemnify Woolworths against all losses arising from or in connection with any loss, theft,

destruction or damage to the goods;
- **insurance clause** requiring the Carrier to effect and maintain insurance for the full replacement value of the goods against damage, theft, destruction or loss in transit; and
- **force majeure clause** providing that neither party was liable to the other for any delay or failure to fulfil its obligations under the Contract owing to a force majeure event.

The Carrier claimed that the force majeure clause operated to exempt the Carrier from indemnifying Woolworths where the loss or damage of the goods was owing to a force majeure event. This, it claimed, was the purpose of the clause, and of force majeure clauses in general.

Woolworths put forward a different interpretation – it was entitled to be indemnified by the Carrier for any loss and damage to the goods, irrespective of the force majeure clause or whether the loss or damage was caused by a force majeure event.

The decision

The Court preferred Woolworths' interpretation. It agreed that the force majeure clause was intentionally worded to have a narrow application – it protected the Carrier only from liability for performance-related issues, such as failure to deliver the goods on time or not at all, where that delay or failure was due to force majeure events beyond the Carrier's control.

The force majeure carve-out did not protect the Carrier from liability for loss or damage to the goods. The contractual bargain struck between the parties, evidenced by the clear wording of the risk allocation, indemnity and insurance clauses, was that the Carrier was 'on risk' and required to indemnify Woolworths for loss or damage for any damage to the goods during transit – regardless of whether the loss or damage was owing to a force majeure event.

Conclusion

In the current climate of the Covid-19 pandemic, outbreak of war in Ukraine and increasing extreme weather events all over the world, this decision serves as a salutary reminder of the courts' restrictive approach when it comes to force majeure clauses, and the importance of clear and unambiguous drafting.

ABOUT THE AUTHOR

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