

Press Distribution Charter

Step 2 - Independent Arbitration Decision

PDC Reference Number:

PDC/255484/130723

Date First Issued:

13/07/2023

Name of Arbitrator:

Neil Robinson B.A. (Law), M.C.I.Arb.

Date complaint sent to Arbitrator:

30/08/2023

In the matter of the Arbitration Act 1996 and in the matter of a dispute between Mr. J. and Smiths News (SN), Unit 3A, Celtic Way, Newport, NP10 8BE. This complaint concerns alleged failure by Smiths News to deliver all titles and their appropriate sections no later than the Retailer Delivery Time (RDT) or Scheduled Delivery Time (SDT) for the day of sale contrary to Press Distribution Charter (PDC) 3rd Edition Standard 2.1.

By On-line PDC Step 1 Complaint form dated 13/07/2023 Mr. J. claimed that since October 2022 his delivery of newspapers and magazines had been late. He blamed the service failures on a new driver to the round and advised that his store opened at 07.00 and that prior to October 2022 delivery was at approximately 06.00. Since October 2022 delivery was often at 08.00 and later at weekends. Mr. J. did not provide a detailed schedule of arrival times.

By letter dated 08/08/2023 SN responded to the complaint by admitting to frequent delivery issues and citing traffic delays/road works in the centre of Cardiff as being responsible for the delays. SN could not move Mr. J. to alternative round as a driver was not available and it was working closely with the driver in order to improve leaving times from the depot. SN understood that this had a positive effect on Mr. J.'s delivery times. SN did provide a schedule of arrival times between 01/08/2023 and 13/08/2023 which showed that it had been late on four occasions. It further admitted that in the three months prior to the complaint there had been 22 instances of lateness where it thought restitution was appropriate thereby ignoring cases where road works and traffic congestion were responsible for delayed delivery. It calculated restitution at £88.20, such sum to appear on Mr. J.'s invoice week ending 26/08/2023. SN advised Mr. J.'s RDT is 06.45 Monday - Friday and 06.35 Saturday and Sunday.

By undated PDC Step 2 - Arbitration Retail Statement of Case Mr. J. claimed that "comparing sales and units to the same 5 weeks from last year we are 1033 units down and £775 down over the 5 weeks."

By email dated 03/06/2023 SN informed Mr. J. that "Unfortunately compressed inbounds do not mean we are running late it just means last packs are delayed and some of the less experienced packers are slower departing."

Having carefully considered the evidence submitted to me I adjudicate as follows:

1. SN has admitted to late delivery on a number of occasions. Some of these service failures it blames on road works, traffic congestion and 'bunching' of incoming publisher deliveries.
2. I dismiss 'bunching' of publisher incoming deliveries as, provided they are not late, it is the responsibility of the wholesaler to manage its operation in such a way that it enables retail delivery in a timely manner.
3. Citing road works and traffic congestion as excuses for late retail delivery opens up consideration of contract frustration and/or force majeure.
4. A contract is frustrated when it becomes impossible to perform due to a 'supervening event' - one that it isn't the fault of either of the parties, and that they couldn't reasonably have predicted. If this happens, the contract is declared invalid, and the parties to it no longer have to perform their contractual obligations. This means the contract ends immediately.
5. I do not think road works and traffic congestion constitute a 'significant event' sufficient to constitute frustration of contract and neither do I think that the parties would want to bring the contract to an end.
6. Standard 11 of the PDC, Force Majeure, provides that:

"No party to this Charter shall be liable for delay or failure to perform its obligations under the Charter so far as this is attributable to any act beyond the reasonable control of any party, including but not limited to Act of God, act or regulation or any governmental or supranational authority, war or national emergency, accident, fire, riot, epidemic, strikes or industrial disputes provided that such party has taken all reasonable steps to minimise any such delay or failure."

7. In English law there is no defined meaning or legal doctrine of force majeure. The underlying principle of force majeure is that the occurrence of certain events is outside a party's control and therefore that party's either excused from performing all or part of its obligations. The burden of proof is on the party seeking to rely on the force majeure clause. Therefore it is for that party to demonstrate that an event of force majeure has occurred, which had the effect of preventing it from performing its obligations under the contract.
8. The meaning of the word "prevent" has been considered by the Courts and it was concluded that if a force majeure clause provides that the relevant triggering event must "prevent" performance, the relevant party must demonstrate that performance was physically impossible, not just difficult or unprofitable.
9. Both parties are under an obligation to use 'reasonable endeavours to ensure that force majeure does not prevent them from performing their obligations under the contract or, if it does, to ensure that the effect of the force majeure is mitigated. The defaulting party cannot rely on its own commercial interests to excuse a failure to use reasonable endeavours.
10. The burden of proof in relation to force majeure is on SN and it has failed to demonstrate that the force majeure events were sufficient cause of the failure to perform its contractual obligations. Furthermore, SN has not demonstrated that it used reasonable endeavours to ensure that the effect of the force majeure was mitigated.
11. For the reasons stated I find in favour of Mr. Jones.
12. Mr. J. must now prepare a schedule of his losses caused by the SN service failures between 13/04/2023 and 13/07/2023. Once completed, he must submit the same to SN for settlement. SN must settle the same (less £88.20) unless there is a dispute, in which case the issue should be referred back to me for further adjudication.

Neil Robinson

Signature of Arbitrator: _____

Date: 6th September 2023

Seat of Arbitration: London, England.

Date form returned to PDC Administrator:

06/09/2023

Date Independent Arbitration Decision
sent to Wholesaler & Retailer:

07/09/2023