KEY POINTS

- A Further Assurance clause (FAC) is about carrying the contract which has been made into effect, and so in determining the scope of the clause the focus is on the obligations and commercial purpose of the contract.
- An FAC cannot be used to introduce new obligations which were not bargained for.
- There appears to be no objection to seeking specific performance of an FAC clause.

Feature

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Further Assurance clauses: scope, operation and how they can be enforced

In this article Jonathan Nash QC considers the proper scope and operation of "Further Assurance" clauses and how they can be enforced.

"Further Assurance" clauses (FACs) are boiler-plate provisions in many different types of commercial contract, and are included in many institutional standard forms, but surprisingly little attention has been paid to how they operate and, crucially, how they can be enforced. Indeed, a search of the English case law over the past thirty years yields only a handful of decisions where there has been any attempt to rely on an FAC to supplement the express obligations of a contract, and such attempts have often failed because the courts have rejected arguments which appear to overreach and seek something which was not bargained for. Two decisions of Snowden J in *Beveridge v Derek Quinlan and Others* [2019] EWHC 424 (Ch) and [2019] EWHC 1411 (Ch), provide a welcome opportunity to consider in more detail the proper scope and operation of FACs, and how they can be enforced.

The FAC in *Quinlan* was part of a security package whereby the defendants assigned to a bank their rights in certain loans which they had made to a Dutch company. The relevant clause appeared in a document entitled "The Subordinated Creditors' Security Agreement" (SCSA) and was in the following form:

> "Each Chargor must, at its own expense, take whatever action the Facility Agent or a Receiver may require for:
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> (a) creating, perfecting or protecting any security intended to be created by this Deed; or
> (b) facilitating the realisation of any Security Asset, or the exercise of any right, power or discretion exercisable by the Facility Agent or any Receiver or any of its delegates or subdelegates in respect of any Security Asset.
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> This includes:
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> (i) the execution of any transfer, conveyance, assignment or assurance of any property, whether to the Facility Agent or to its nominee; or
> (ii) the giving of any notice, order or direction or the making of any registration which, in any such case, the Facility Agent may think expedient."

In due course the bank appointed a receiver over the loans. The Dutch company entered into an insolvency process in Spain, and the receiver was concerned to ensure that any distribution made by the insolvency administrator in respect of the loans should be paid directly to him rather than to the defendants. He therefore obtained an order from Snowden J in the first of the judgments declaring that by virtue of his appointment the receiver was entitled to be paid the proceeds of any distribution in respect of the loans, and requiring that a notice in a prescribed form (including notarisation before a Spanish notary) be sent to the insolvency administrator.

Matters might have rested there, except that having given the notice, the defendants then wrote to the insolvency administrator in terms which cast doubt (at least in the insolvency administrator's mind) as to the validity of the notices. The receiver therefore made a further application to the court seeking a mandatory injunction, ancillary to the first judgment, to carry into effect the first order. Snowden J held that further orders should be made to carry his first order into effect, and required the defendants to make a further clear and unqualified statement to the insolvency administrator that they had no objection to his complying with the first order of the English court and paying the proceeds of any distribution to the receiver.

Two points should be emphasised at the outset. First, an FAC does not constitute a condition precedent to the existence of the contract. It is about carrying the contract which has been made into effect, and so in determining the scope of the clause the focus is necessarily on the obligations and commercial purpose of that contract. Second, an FAC commonly does not prescribe what each party to the contract must do: it is an open-ended obligation designed to sweep up formal matters which may not be fully understood at the time the contract is made, or which may arise unexpectedly at a later date during the life of the contract. If a contracting party knows that there are specific things which must be done to achieve the contractual purpose – the obtaining of a planning permission, for example, or the registration of security in an appropriate register – he will be well advised to contract for this expressly rather than rely on such matters to be swept up by the FAC.

Notwithstanding the open-ended nature of the FAC, such clauses usually contain some controlling mechanism of reasonableness or necessity to define the outer limits of what one party can ask of another, and there is no doubt that in an appropriate case an FAC can and will be enforced. The English court is increasingly impatient of arguments that a contractual provision lacks sufficient certainty. Even an obligation to use "reasonable endeavours" to do something is now regarded as capable of assessment and enforcement by the court. In the case of an FAC, whether or

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not the clause requires a party to take any particular act depends upon measuring the required action against the terms of the clause and the commercial purpose of the contract.

It is however fundamental to the construction of an FAC, and to the question of what it may require of the contracting parties, that it is ancillary to the other obligations in the contract. An FAC cannot be used to introduce new obligations which were not bargained for, still less an obligation which is inconsistent with the express terms. Thus in *Takeda Pharmaceutical Company Limited v Fougera Sweden Holding* 2 AB [2017] EWHC 1995 (Ch), T sought to rely upon an FAC to obtain certain information from F relevant to the tax liability of a company which T had purchased from F. F had covenanted to provide an indemnity against the tax liability, but this was subject to a limitation which required a final determination of the amount of the liability by a cut-off date. T sought to rely upon an FAC to obtain certain information from F in order to conduct its challenge to a tax assessment. The claim failed because the court concluded that, having regard to the other terms of the contract, it was clear that there was no obligation upon F to provide the information and that it could not be said that provision of the information was "necessary" to carry into effect some other obligation in the contract. The governing principle, derived from the decision of the Court of Appeal in *Dear v Jackson* [2013] EWCA Civ 89, is that:

> "To give effect to an agreement requires one to know what the parties have agreed that the agreement shall do. [An FAC] does not assist in that exercise."

As noted above, an FAC is not confined to actions required at the outset of the contract to make it effective. The obligation to do all things reasonably necessary to carry the contract into effect continues for the life of the contract. This means that in principle, a failure to do an act which, on a true construction of the clause and in the circumstances then pertaining, is required by an FAC would constitute a breach of contract or a renunciation of the contract, entitling the innocent party to bring the contract to an end and to claim damages based on loss of bargain.

What, however, if a party does not wish to bring the contract to an end but wants to insist on further performance? In such circumstances she will seek specific performance of the FAC. As a preliminary matter, there appears to be no objection to seeking specific performance on the basis that damages provides an adequate remedy for a breach. Why this should be is not addressed in the case law, but an FAC is by its nature an obligation to do something necessary to carry the contract into effect, and so a failure to do the required thing would amount to a deliberate and calculated breach of contract. In such circumstances the courts have typically needed very little persuasion that damages are not an adequate remedy.

Any application for specific performance must of course comply with the usual principles governing such an application. In particular, the order sought must be sufficiently clear and certain so that the party being required to do an action knows what is required of him; and the order must be capable of being performed without the constant monitoring of the court.

Thus, in *Quinlan*, the order sought was specific in setting out the text of a letter to be sent by the defendants to the insolvency administrator, and also that it should be notarised in front of a Spanish notary. The court was also asked to direct as a fallback position, pursuant to s 39 of the Senior Courts Act 1981, that if the defendants refused to sign the letter directing the insolvency administrator to make distributions directly to the receiver, then an officer of the High Court should be allowed to sign the relevant direction. The court refused to make this order, however, noting that the practice was that such an order should not be made in anticipation of a failure to comply with the court order unless a defendant has already shown by his conduct that he has refused and will continue to refuse to execute the relevant document, which was not the case here.

When the matter came back to the court following delivery of the notice and the defendants' further communication with the insolvency administrator described above, the defendants maintained that they had complied with the court's order and that nothing which they had said to the insolvency administrator contradicted or cast doubt upon the validity of the notice. The court would have none of this, however. The defendants were bound not just to comply with the strict letter of the order made on the first occasion, but also to ensure that so far as they were able to do so it was carried into effect, and so the court ordered them to send a further notice informing the insolvency administrator that the earlier notice was valid and authentic, and that they had no objection to his complying with its terms.

Quinlan shows the lengths to which the court is prepared to go to ensure that a party is not enabled to disregard its contractual obligations, and indeed earlier orders of the court, by delaying or sitting on his hands. The FAC was the key which unlocked the wide specific enforcement powers of the court. ■

Further Reading:

- The nature of security interests over intellectual property rights under English law (2019) 10 JIBFL 674.
- TMT Finance: Part 3 (2015) 8 JIBFL 520.
- LexisPSL: Banking & finance: Clauses: Further Assurance clause.