

OVERCOMING FORCE MAJEURE BY REASONABLE ENDEAVOURS

MUR Shipping BV v RTI Ltd

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It is not uncommon for a force majeure clause to contain wording the effect of which is that it cannot be relied upon to excuse a failure to perform if the event or state of affairs, or its effect on performance, could have been overcome by the exercise of ‘reasonable endeavours’. As has been pointed out,¹ such a provision may just make express what is implicit in other parts of the force majeure clause, eg whether the event is ‘beyond the control’ of the party affected (it is not beyond their control if it could have been avoided by taking reasonable steps), or whether the necessary causal link is met (performance is not ‘prevented’ by the event in question if it was still possible by the taking of reasonable steps).² Where it is made express that the party affected must make ‘reasonable endeavours’, the same problem emerges in this context, as in others, as to what is meant by ‘reasonable’.³ In the context of a force majeure clause, it is now accepted that such an obligation requires the party in question to compromise their own commercial interest to some extent,⁴ but just how far they are required to go will depend very much on the particular circumstances of each case. In *MUR Shipping BV v RTI Ltd*⁵ the Court of Appeal dealt with a more fundamental point of principle, namely whether the requirement of overcoming by reasonable endeavours extends to the party affected having to accept some form of non-contractual performance by the other party. At first instance,⁶ Jacobs J held that it does not, but a majority of the Court of Appeal held that no such restriction was necessary, as had been the conclusion of a Tribunal which first considered the matter in arbitration. A divided Court of Appeal which reverses the decision of the High Court, which had itself departed from the conclusions of a Tribunal, on a point of some commercial significance, and at a time when contested claims of force majeure can be expected to be a little more frequent than normal, perhaps hints at an appeal to the Supreme Court.

The parties, MUR Shipping BV (MUR) (as shipowner) and RTI Ltd (RTI) (as charterer), entered into a contract of affreightment for the carriage of cargoes of bauxite from Conakry in Guinea to Dneprobugsky in Ukraine between July 2016 and June 2018. An important feature of the contract is that the payment of freight by RTI was required in US dollars.⁷ On 6 April 2018 the US imposed sanctions on the majority owner of RTI, but not on RTI. On 10 April 2018, MUR sent a force majeure notice claiming that it was entitled to suspend performance, but on 25 April it resumed

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E Peel, *Frustration and Force Majeure*, 4th edn (Sweet & Maxwell, 2022), [12-045].

2 This is essentially the point made in *MUR Shipping* by Arnold LJ: [2022] EWCA Civ 1406 at [72].

3 See eg *Gaia Ventures Ltd v Abbeygate Helical (Leisure Plaza) Ltd* [2019] EWCA Civ 823; *Jet2.com Ltd v Blackpool Airport Ltd* [2012] EWCA Civ 417; 142 Con LR 1; *Yewbelle Ltd v London Green Developments Ltd* [2007] EWCA Civ 475; [2007] 23 EG 164

4 See *Seadrill Ghana Operations Ltd v Tulla Ghana Ltd* [2018] EWHC 1640 (Comm); [2018] 2 Lloyd’s Rep 628, [93] (‘The reason why in the present context, a force majeure clause, the mere fact that a step is contrary to a party’s commercial interests is insufficient to show that it has exercised its reasonable endeavours is that in such context the party cannot ignore the commercial interests of the other party in the force majeure being avoided or circumvented’, Teare J).

5 [2022] EWCA Civ 1406.

6 [2022] EWHC 467 (Comm); 201 Con LR 18.

nominations of vessels, after a further General License had been issued by the US Treasury Department.⁸ RTI claimed that MUR was not entitled to rely on the force majeure clause and that it was entitled to recover the cost of chartering in replacement vessels during the period of MUR's suspension (the 'suspension period').⁹

The material parts of the force majeure clause which MUR relied upon concerned the definition of a 'Force Majeure Event'. They were set out in Clause 36.3 and were as follows:

A Force Majeure Event is an event or state of affairs which meets all of the following 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 ... restrictions on monetary transfers and exchanges;
- d) It cannot be overcome by reasonable endeavors (sic) from the Party affected.

The salient findings of fact by the Tribunal were as follows: (i) the loading of cargoes during the suspension period would not have been in breach of the sanctions, but it was reasonable for MUR to take the time covered by the suspension period to review the position; (ii) the payment of freight in US dollars was also permitted, but during the suspension period any such payment would have been held up because of RTI's status as 'a blocked party';¹⁰ and (iii) it was not practicable to avoid such delay by using a bank located outside the US.

In light of these findings, there was some debate as to precisely what was the relevant force majeure event, but Males LJ regarded it as implicit from the award that it was the imposition of sanctions on RTI's parent causing probable delay in payment in US dollars. However, on the assumption that MUR could otherwise rely on the force majeure clause,¹¹ the Tribunal found that it could not do so because of the requirement in clause 36.3(d). This was an event or state of affairs that could have been 'overcome by reasonable endeavours from the Party affected', ie MUR. MUR's failure to meet this requirement arose from its rejection of a proposal put forward by RTI, under which RTI would make payment in euros which could be converted into US dollars as soon as they were received by MUR's bank, and agreed to bear any additional costs or exchange rate losses in converting the euros

⁷ An argument by RTI that the contract allowed for payment in the alternative in € in the Netherlands, which was the place of payment, was not put to the Tribunal (it required evidence of Dutch law) and Jacob J held that it was therefore raised too late.

⁸ At which point, MUR began to accept payment in euros, as proposed by RTI to deal with the period between 10 April and 25 April.

⁹ For those interested in the broader merits, Males LJ did not disguise his view when he observed (based on the award) that 'the contract had become disadvantageous to MUR, who did not want to perform it': [2022] EWCA Civ 1406 at [60]. In his dissenting judgment, Arnold LJ was more forthright when he observed that 'MUR's position has no merit': *ibid* at [66].

¹⁰ As noted above, RTI itself was not subject to the sanctions, but Males LJ proceeded on the basis that 'the finding that it was highly probable that there would have been difficulties in making timely payments of US dollars is clear': [2022] EWCA Civ 1406 at [60].

¹¹ Before the Tribunal this turned on a number of other issues, such as whether the relevant event prevented or delayed the loading or discharge of the cargo, as required by clause 36.3(b) and whether that was 'caused' by the 'restrictions' on US dollar payments, as required by clause 36.3(c). One can perhaps detect a hint of scepticism from Jacob J, when he observed that the Tribunal's findings in favour of MUR on these issues amounted to a mixed finding of fact and law and were 'within the range of permissible conclusions': [2022] EWHC 467 (Comm); 201 Con LR 18 at [149]. No comment is made in the Court of Appeal.

into US dollars. MUR rejected the proposal on the basis that it was entitled to insist on its right to receive payment in US dollars.

On appeal from the award under s.69 of the Arbitration Act 1996, Jacobs J preferred the submission of MUR and held that the requirement of reasonable endeavours did not require the party affected ‘to sacrifice their contractual right’.¹² Without such a restriction, the operation of clause 36.3(d), including the potential loss of contractual rights, would turn purely on what is ‘reasonable’ in the case at hand. As a result: ‘the contractual right becomes tenuous, and the contract is then necessarily beset by uncertainty which is generally to be avoided in commercial transactions.’¹³

Two principal authorities were cited by Jacobs J in reaching his decision. In *Bulman v Fenwick*¹⁴ a voyage charter provided that the chartered vessel should proceed to one of a number of places on the Thames to discharge. The charterer ordered the vessel to discharge at Regent’s Canal and then relied upon the delay caused by a strike there to resist a claim for demurrage. The jury had found that, once the strike broke out, it was not ‘reasonable’ to allow the vessel to continue to Regent’s Canal and that discharge at one of the other places on the Thames would have allowed discharge within the laytime allowed. The charterer was nonetheless held entitled to rely on the exception for strikes. According to Pollock B: ‘It is not a question between the plaintiffs and the defendants as to what is reasonable or unreasonable, it is a question of contract between the parties’.¹⁵ An appeal was dismissed by the Court of Appeal. In *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries & Food* (the ‘*Vancouver Strikes*’ case),¹⁶ the parties entered into a charterparty for the carriage of a ‘cargo ... of wheat in bulk ... and/or barley in bulk, and/or flour in sacks’. The charterer nominated a cargo of wheat and ordered the vessel to Vancouver to load, where strikes delayed the loading of wheat, but might not have delayed the loading of the alternative cargoes of barley or flour. The charterer again relied on an exception for strikes to resist a claim for demurrage and the House of Lords held that it could do so. It was irrelevant whether the loading of barley or flour could have been achieved within the laytime. The contract was for a cargo of wheat, and the charterer’s option to load an alternative cargo was a ‘business’ option which it was not obliged to exercise.¹⁷ The conclusion drawn by Jacobs J from these two decisions was that ‘(i)f reasonable endeavours did not require the acceptance of different contractual performance in *Bulman* and (by implication) *Vancouver Strikes*, I do not consider that it required such acceptance in the present case.’¹⁸

All three members of the Court of Appeal derived limited, if any, assistance from these authorities, principally on the basis that there was no equivalent of clause 36.3(d) or the question it raised of whether the force majeure event could be ‘overcome by reasonable endeavours’. For example, in *Bulman v Fenwick* there was nothing to indicate what criteria the jury had applied in reaching the conclusion that it was not ‘reasonable’ to allow the vessel to continue to Regent’s Canal; it may have had nothing to do with what would have been a comparable question to that which arose in *MUR*

¹² [2022] EWHC 467 (Comm); 201 Con LR 18 at [131].

¹³ *Ibid.*

¹⁴ [1894] 1 QB 179.

¹⁵ *Ibid.*, 183.

¹⁶ [1963] 1 Lloyd’s Rep 12; [1963] AC 691.

¹⁷ For further discussion of the concept of a ‘business’ option and the not inconsiderable difficulties created by contracts allowing for alternatives, see E Peel, *Frustration and Force Majeure* (4th edn, Sweet & Maxwell, 2022) ch 10.

¹⁸ [2022] EWHC 467 (Comm); 201 Con LR 18 at [131].

Shipping, namely whether the strikes could have been ‘overcome’ by diverting the vessel elsewhere. Instead, they approached the issue as one of the correct interpretation of clause 36.3(d).

A point which is emphasised by Males LJ is that the parties’ arguments were principally concerned with the question of ‘reasonable endeavours’. He had no doubt that what MUR was being asked to do, in agreeing to RTI’s proposal, was reasonable (‘a very straightforward matter’¹⁹), but the real question is whether this would ‘overcome’ the force majeure event or state of affairs, which was delayed payment in US dollars caused by the imposition of sanctions. That is one way of putting it, but it could still be seen principally as a question of ‘reasonable endeavours’: is it unreasonable to reject a proposal involving non-contractual performance; is it reasonable to insist on one’s contractual rights and not some variation of them? That Males LJ did not see it in such terms turns on the fact that he was prepared to take a broader approach to the question of what is meant by contractual performance, or by MUR’s contractual rights. He held that MUR had adopted too narrow an approach in restricting the operation of clause 36.3(d) to steps that would still have allowed RTI to make timely payment *in US dollars*, thereby excluding the arrangements proposed which allowed for making timely payment *in US dollars by making payment in euros*. As he put it, the word ‘overcome’ did not mean that the ‘contract must be performed in *strict accordance* with its terms’.²⁰ Rather:²¹

Acceptance of RTI’s proposal would have achieved precisely the *same result as performance of the contractual obligation to pay in US dollars*, namely the receipt in MUR’s bank account of the right quantity of dollars at the right time. MUR’s *contractual right to payment in dollars remained*, but MUR would have suffered no damage whatever as a result of RTI’s breach consisting of payment in euros.

This added a further reason for distinguishing *Bulman v Fenwick*. In that case, there was a finding that the charterer’s customer required the cargo of coal near to the Regent’s Canal, and the charterer argued, in response to the suggestion that the vessel could have been directed to one of the alternative places allowed for in the voyage charter, that the clause allowing for alternative places of discharge was for the charterer’s benefit and ‘they had a right to order her to any one of the places mentioned in the charterparty’.²² According to Males LJ, if the question of whether the strikes could have been ‘overcome’ by diverting the vessel elsewhere had arisen, which it did not (see above), the answer would have been no because this ‘would not have given the charterer the *substance* of what it was entitled to under the contract’²³. Similarly, in the *Vancouver Strikes* case the charterer was entitled to load wheat and wanted to do so: ‘Loading a different cargo could not have overcome the problem that the strike prevented the loading of wheat’.²⁴ The same conclusion would be reached in the *MUR Shipping* case, if RTI’s proposal ‘would have resulted in any detriment to MUR or in *something different from what was required by the contract*’.²⁵ This final observation from Males LJ makes clear that the basis for his departure from the judgment below of Jacobs J lies in a broader interpretation of what was ‘required by the contract’. For Jacobs J what was required was payment in time in US

19 [2022] EWCA Civ 1406 at [55]; cf at [69] (Arnold LJ)

20 [2022] EWCA Civ 1406 at [58] (emphasis added).

21 [2022] EWCA Civ 1406 at [57] (emphasis added).

22 [1894] 1 QB 179, 182 (Pollock B.)

23 [2022] EWCA Civ 1406 at [61] (emphasis added).

24 *Ibid.*

25 [2022] EWCA Civ 1406 at [59].

dollars and only in US dollars; for Males LJ what was required was the right quantity of US dollars in MUR's account at the right time.

Arnold LJ dissented on the simple basis that 'what was offered by RTI was *non-contractual performance*'²⁶ and he put forward an example of what Males LJ's reasoning might lead to:²⁷

Suppose the contract required carriage to port A which was strike-bound and the party invoking clause 36 was presented with an offer by the other party to divert the vessel to port B which would not in fact be detrimental to the party invoking the clause (say because the goods being carried were required at place C equidistant between port A and port B)? Is the party invoking the clause required to accept that offer? In my view the answer is no, because the party invoking the clause is entitled to insist on contractual performance by the other party.

What this presents is a more difficult example of whether, on the basis of Males LJ's broader approach, one would conclude that the party invoking force majeure still gets what 'was required by the contract', or still gets 'the *substance* of what it was entitled to under the contract'. What has been introduced is a degree of uncertainty which is avoided if one takes the narrower, or stricter, approach that the party in question can insist on contractual performance, or its contractual rights, as set out in the contract, rather than some functional equivalent. This is understood to be the point made by Arnold LJ when he accepts that *Bulman v Fenwick* can be distinguished, for the reasons given by Males LJ, but observes nonetheless that Pollock B's statement of principle is still applicable,²⁸ i.e. '[i]t is not a question between the plaintiffs and the defendants as to what is reasonable or unreasonable, it is a question of contract between the parties'.²⁹ At no point does Males LJ's close attention to the question of interpretation really address Jacobs J's concern that, if the party affected by the force majeure event can be required not to insist on its strict contractual rights in an attempt to overcome it, some uncertainty has been introduced which is best avoided in commercial transactions, especially where the issue is whether or not a force majeure clause can be invoked.

Finally, immediately after the example put by Arnold LJ above, he made this further observation: 'If the parties to the contract of affreightment intended clause 36.3(d) to extend to a requirement to accept non-contractual performance, clear express words were required and there are none'.³⁰ This is an acknowledgement that there is nothing to stop contracting parties agreeing that they are required to make reasonable adjustments to their strict contractual rights to 'overcome' a force majeure event, or that they are not. If there is no appeal to the Supreme Court, or regardless of its outcome if there is, Arnold LJ's observation is an open invitation to contracting parties to pre-determine this issue by appropriate drafting.

26 [2022] EWCA Civ 1406 at [74].

27 Ibid.

28 [2022] EWCA Civ 1406 at [75].

29 Above n 15.

30 Arnold LJ and Males reached different conclusions about the applicability of the *Gilbert-Ash* principle, ie that a party is not to be taken to have given up its legal rights in the absence of clear words to that effect (*Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689. According to Males LJ ([2022] EWCA Civ 1406 at [54]) this 'would beg the question' of what was MUR's 'legal right' which, on his approach, was to receive payment of freight on time in US dollars in some shape or form: 'There was no question of [MUR] being required to abandon or vary that right' (ibid). According to Arnold LJ, the *Gilbert-Ash* principle was 'an important part of the context in which clause 36.3(d) falls to be interpreted' (ibid at [71]).

