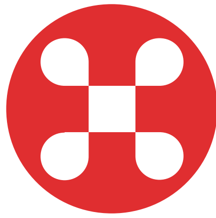

St John's Buildings

Can reasonable endeavours which avoid/overcome a force majeure event include a requirement to accept an offer of non-contractual performance?

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This case note considers the Supreme Court judgment in *RTI Ltd v MUR Shipping BV* [2024] UKSC 18.

The Parties

MUR Shipping BV ('**MUR**') is a shipping company.

RTI Limited ('**RTI**') was a charterer of MUR's vessels.

The Contract

MUR contracted with RTI for carriage of bauxite between Guinea and Ukraine. The contract gave rise to a continuous flow of payments being made from RTI to MUR. The payments were contractually required to be in USD.

The contract provided that where a force majeure event caused any loss, damage, delay or failure in performance, the parties would not be liable for same. For an event to be a force majeure event, it needed to meet four criteria. For present purposes, we are concerned with the fourth of those: "[the event] cannot be overcome by reasonable endeavours from the Party affected" ('**the Reasonable Endeavours Clause**').

The Force Majeure Event Relied On

RTI's parent company were made the subject of US sanctions in 2018, which indirectly applied to RTI. Though the sanctions did not prevent payments being made in USD, the sanctions would cause delay in payments. As a result, MUR sent a force majeure notice and said it was the "party affected".

RTI rejected the force majeure notice, offering to pay in euros and assume any costs or exchange rate losses MUR suffered.

MUR declined RTI's proposal, insisting that it was entitled to payment in USD and that the performance ought to be suspended until the end of the force majeure event. As a result, MUR refused to nominate its vessels for further chartering.

The Proceedings

Arbitration

The dispute was originally arbitrated on. The arbitrator found that though the circumstances would ordinarily amount to a force majeure event, MUR could not rely on it because it could have been overcome by MUR's reasonable endeavours, which would have been accepting RTI's alternative offer of payment in euros.

MUR appealed pursuant to section 69 of the Arbitration Act 1996.

High Court

When the matter came before the High Court, Jacobs J found that the Reasonable Endeavours Clause required endeavours towards performance of the bargain, not towards performance directed to achieving a different result that formed no part of the parties' agreement. In the premises, MUR

had a contractual entitlement to payment in USD and the Reasonable Endeavours Clause could not be said to require MUR to accept payment in another currency.

RTI appealed.

Court of Appeal

The appeal was allowed; Males LJ and Newey LJ finding in RTI's favour, with Arnold LJ dissenting.

Males LJ in effect held that the court needed to specifically consider the force majeure clause (an exercise of interpretation). The question was whether acceptance of RTI paying in euros and bearing any associated costs would "overcome" the state of affairs caused by the sanctions. Males LJ noted the state of affairs would be overcome if RTI's offer was accepted and MUR still received the right quantity of USD into its account at the right time.

Newey LJ agreed with Males LJ's judgment and noted that to meet the requirements of the Reasonable Endeavours Clause, it was enough that the event could be overcome in a practical sense, meaning all adverse consequences would be avoided.

Arnold LJ disagreed, noting that an event or state of affairs is not overcome by accepting an offer of non-contractual performance.

MUR appealed.

Supreme Court

The Supreme Court unanimously allowed the appeal. Reasonable endeavours to overcome a force majeure event did not include accepting an offer of non-contractual performance if there was no clear wording to that effect. This was a proposition accepted in the courts below by Jacobs J and then by Arnold LJ.

The Supreme Court confirmed that force majeure clauses will generally be interpreted as applying only where the party invoking it can show the event or state of affairs was beyond its reasonable control and could not be avoided by taking reasonable steps (to imply this if not expressly stated). The majority of the Court of Appeal was wrong to approach it as a matter of interpretation of the Reasonable Endeavours Clause, as their findings would apply generally to force majeure provisions; it instead required considerations of principle.

The following were considerations of principle the Supreme Court gave regard to:

1. The object of reasonable endeavours provisos. The provisos address issues of causation; where performance is inhibited by an event which reasonable steps cannot overcome. The inhibition related to payment in USD, so an offer to pay in another currency would not overcome this.
2. Freedom of contract, including freedom not to contract. It is open to parties not to accept an offer of non-contractual performance of a contract.
3. Clear words needed to forego valuable contractual rights. Payment in USD was a valuable right. In principle a party should not be required to forego a valuable right in absence of

clear words used. If there are to be circumstances when a party would be required to accept an offer of non-contractual performance, it should be provided for expressly.

4. Importance of certainty in commercial contracts. RTI's proposals would not ensure certainty and would require inquiries into whether detriment would be suffered by the invoking party and whether the same purpose would be achieved by the non-contractual performance. This would raise its own questions as to what "detriment: and "purpose" were. Certainty could be achieved through clear express wording providing for when there must be acceptance of an offer of non-contractual performance or by stating payment can be in another specified currency.

MUR referred the cases of *Bulman & Dickson v Fenwick & Co* [1894] 1 QB 179 ('**Bulman'**) and *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1963] AC 691 ('**Vancouver Strikes**').

In *Bulman*, charterers had the right to choose where the goods were unloaded. The charterers elected for a particular dock which then went on to have strikes, causing delay in unloading. The shipowners claimed demurrage and argued the charterers acted unreasonably in failing to elect another port for unloading (so as not to be caught by an exceptions clause). The court found that a reasonable endeavours clause (in respect of the exceptions clause) did not require the affected party to give up a contractual right, even if that was a reasonable thing to do. The Supreme Court applied the principles in *Bulman* to the circumstances, leading to a result that MUR did not have to give up a contractual entitlement to payment in USD even if would have been reasonable to do so.

In Vancouver Strikes, the charterers had an option of loading up to one-third of barley and the same of flour but chose the loading of a full cargo of wheat. A strike then prevented full cargo of wheat being loaded, causing delay. The shipowners claimed demurrage, which raised an issue of whether the exceptions clause would apply and protect the charterers. This required determination of whether the charterers were required to exercise their options instead of maintaining that the full cargo be of wheat. It was determined they did not have to exercise their options. The Supreme Court went on to find that if there was a true option for MUR to accept payment in euros, it would still leave MUR entitled to insist on payment in dollars, let alone the reality that RTI had a contractual obligation to pay in USD.

The Supreme Court found both authorities provided strong implicit support for MUR's case and there was no suggestion by RTI that they be overruled.

The Takeaways

The case will be of relevance to practitioners advising on disputes over whether an affected party did use reasonable endeavours in the face of a *prima facie* force majeure event and also when drafting force majeure clauses in written agreements.

The headline points of note in those exercises will be:

1. Regarding the impact of a force majeure event, what contractual obligation(s) is it said (or could it be said) to hinder performance of?

2. Does (or would) the ‘reasonable endeavour’ act relied on (or which could be relied on) amount to changing the terms of a contractual obligation?
3. If the ‘reasonable endeavour’ act suggested (or which could be suggested) involves acceptance of non-contractual performance, is it expressly provided for in the contract?

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April 2025

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