MUR Shipping BV v RTI Ltd: Force majeure and reasonable endeavours

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Introduction

1. The Court of Appeal last week handed down judgment in the case of *MUR Shipping BV v RTI Ltd* [2022] EWCA Civ 1406, an important decision relating to the application and interpretation of force majeure clauses. The issue before the Court was whether, as a matter of construction, a party seeking to invoke force majeure could resist an offer of alternative performance that departed from the contractually-specified method. On the facts, that raised the question whether charterers could offer to pay (and to require the owners to accept) freight in Euros, despite a contractual term requiring payment in US dollars.

2. Males LJ, with whom Newey LJ agreed, allowed the appeal, finding that non-contractual performance by payment in Euros, on the facts of this case, could overcome a force majeure event thereby depriving the affected party of the right to rely on a force majeure clause.

Brief summary of the facts

3. The relevant facts concerned payment obligations under a shipping contract, and the effect of sanctions imposed by the United States government, on the charterer's ability to pay freight in compliance with those obligations.

4. In June 2016, MUR Shipping BV ("MUR") entered into a Contract of Affreightment ("COA") with RTI Ltd ("RTI"). Under the COA, RTI contracted to ship and MUR contracted to carry consignments of sedimentary rock (bauxite), in consignments of 30,000 – 40,000 metric tons from Conarky in Guinea to Dneprobugsky in Ukraine. The COA required the freight payments to be made in US dollars.

5. On 6 April 2018, sanctions were applied to RTI's parent company by the US Department of the Treasury's Office of Foreign Assets Control. The effect of these sanctions was that

payments by RTI that passed through an intermediary bank in the US would likely result in a delay to payment whilst the bank investigated whether the transaction complied with US sanction requirements.

6. On 10 April 2018, MUR (the owners) invoked a force majeure clause in the COA by sending a force majeure notice ("the FM Notice") to RTI. MUR contended that the imposition of sanctions would prevent RTI paying freight in dollars in accordance with the contract, upon which MUR in turn relied to suspend its obligations to load cargo. The COA defined a force majeure event as follows:

> *"36.3. 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 acts of God, extreme weather conditions, war, lockout, strikes or other labour disturbances, explosions, fire, invasion, insurrection, blockade, embargo, riot, flood, earthquake, including all accidents to piers, shiploaders, and/or mills, factories, barges, or machinery, railway and canal stoppage by ice or frost, any rules or regulations of governments or any interference or acts or directions of governments, the restraint of princes, restrictions on monetary transfers and exchanges;*
>
> *d) It cannot be overcome by reasonable endeavors from the Party affected."*

7. The FM Notice stated that it would be a breach of sanctions for RTI to continue performance of the COA, relying on the requirement to make US dollar payments under the COA. RTI's response was to offer payment in Euros instead of US dollars as RTI, unlike its parent company, was a Dutch company that was not caught by the sanctions. RTI further offered to bear any additional costs or exchange rate losses in converting Euros to US dollars. MUR refused that alternative, and brought a claim for the additional costs incurred in obtaining alternative tonnage.

8. In accordance with the COA, the matter was referred to arbitration. The tribunal concluded that, all other contractual elements of "Force Majeure" being satisfied, the issue was whether the effect of the event or state of affairs constituting force majeure could "be overcome by reasonable endeavours from the Party affected". The tribunal found that the exercise of reasonable endeavours required MUR to accept the proposal made by RTI of

payment in Euros, which was described by the tribunal as a "completely realistic alternative" to the payment obligations in the COA. Since, by that means, the effect of the force majeure event could be overcome, MUR's reliance on the force majeure clause failed.

9. MUR appealed under s.69 of the Arbitration Act 1996 on a question of law arising out of the Award. MUR's contention was that the exercise of "reasonable endeavours" did not require the affected party to agree to vary the terms of the contract or agree to non-contractual performance. RTI, on the other hand, contended that there was no reason in principle why the exercise of reasonable endeavours should not involve a variation of contractual terms and that, in this case, acceptance of payment in Euros was plainly sensible.

Decision of the Commercial Court

10. Jacobs J in his judgment placed heavy reliance on the cases of *Bulman v Fenwick* [1894] 1 QB 179 and R*eardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food ("the Vancouver Strikes" case)* [1963] AC 691 (HL).

11. Bulman was a case where the charterers of a vessel sought to rely upon a strike clause in response to the owner's claim for demurrage. Jacobs J considered the case of Bulman to be significant for a number of reasons:

    (a) Firstly, Bulman was authority for the general proposition that an event will not come within a force majeure or similar clause if it could have been overcome or avoided by the taking of reasonable steps.

    (b) Secondly, the critical question in Bulman was not the reasonableness or otherwise of the charterers' conduct, but what the contract entitled it to do. Accordingly, a finding that the charterers had not acted reasonably did not matter; the parties' contractual obligations were paramount and determinative.

    (c) Thirdly, there was nothing which required the charterers to perform the contract in a different way.

12. *Vancouver Strikes* was another case concerning a claim for demurrage by shipowners. In this case, the charterers had the option to load different cargo. The central question was whether the charterers were required to ship an alternative cargo in order to avoid the effect of a strike (an elevator strike affecting one commodity). The House of Lords found that the contractual options were "true" and "unfettered" and there was no obligation on

the charterers to switch cargo to avoid the effects of a strike and consequently to lose the protection afforded by the strike clause.

13. Jacobs J found that the exercise of reasonable endeavours did not require MUR to sacrifice its contractual right to payment in US dollars, and with it the right to rely on the force majeure clause. The exercise of reasonable endeavours required endeavours toward performance of the bargain that was reached between the parties, and not towards performance that would achieve a different result which formed no part of the parties' agreement. In reaching this conclusion, Jacobs J placed heavy reliance on the reasoning in *Bulman* and (by implication) *Vancouver Strikes*. He also accepted MUR's submissions that if the loss of a contractual right turns purely on what is reasonable in a case, then the contractual right becomes tenuous, and the contract is then necessarily beset by uncertainty which is generally to be avoided in commercial transactions.

14. RTI was granted permission to appeal to the Court of Appeal.

Decision of the Court of Appeal

15. The appeal was heard by Males LJ, Newey LJ and Arnold LJ. Males LJ, with whom Newey LJ agreed, allowed the appeal. Arnold LJ dissented.

16. Males LJ was careful to point out that his judgment was not concerned with reasonable endeavours clauses in general, or even with force majeure clauses in general. Instead, he noted that each clause must be considered on its own terms. Males LJ rejected the two bases on which RTI had put its case: the broad argument that there was no rule that a party could never be required to accept non-contractual performance; and the narrower argument that the payment proposal of Euros instead of US dollars did not constitute non-contractual performance. Instead, he considered the issue to be whether, under this force majeure clause, the endeavours would have been successful in overcoming the force majeure event or state of affairs. Males LJ stated that there was no question of MUR being required to abandon or vary the right to accept payment in US dollars but, rather, whether accepting payment in US dollars would overcome the state of affairs. In this context, Males LJ considered that "overcome" did not mean that the contract must be performed in strict accordance with its terms. He distinguished the present case from Bulman and Vancouver Strikes on the basis that these cases did not require any consideration of whether the strikes could be "overcome".

17. Dissenting, Arnold LJ considered that MUR was entitled to insist upon its strict contractual right to receive payment in US dollars. Whilst Arnold LJ agreed with Males LJ that this

case is not about the meaning of "reasonable endeavours", he did not consider that the state of affairs could be overcome by non-contractual performance.

Implications of the judgment

18. Whilst the proper approach to interpreting a force majeure clause is by reference to the words the parties used, and not their general intention, force majeure clauses are often drafted to include a provision that a party must use "reasonable endeavours" to overcome a force majeure event. The point of general importance for which permission to appeal was granted in MUR v RTI—namely the permissible objectives to which those reasonable endeavours can be directed—is likely to have a wider commercial significance.

19. Although Males LJ was careful to state that his judgment was limited to construing the contractual clauses of the COA, there is no avoiding the outcome that the effect of the Court's interpretation was that the force majeure event could be overcome by non-contractual performance. The majority reached that outcome by construing the force majeure clause "albeit… against the background of the general law" (at [47]). Applying that approach, "Terms such as 'state of affairs' and 'overcome' are broad and non-technical terms and clause 36 should be applied in a common sense way which achieves the purpose underlying the parties' obligation" (at [54]-[56], [58]-[59], [78]).

20. Although on the facts of *MUR v RTI*, the use of non-contractual performance may seem like the sensible option and may amount to commercially equivalent performance of the contract, this was nonetheless considered by Jacobs J to be a "sacrifice" to MUR's contractual right. Where the non-contractual performance is not a commercially equivalent alternative or there is some detriment to the affected party, it remains to be decided the extent to which parties can deviate from their contractual obligations.

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