Press Summary

15 May 2024

RTI Ltd (Respondent) v MUR Shipping BV (Appellant)

[2024] UKSC 18
On appeal from [2022] EWCA Civ 1406

Justices: Lord Hodge (Deputy President), Lord Lloyd-Jones, Lord Hamblen, Lord Burrows, Lord Richards

Background to the Appeal

This appeal concerns the interpretation of a force majeure clause in a shipping contract between MUR Shipping BV ("**MUR**") and RTI Ltd ("**RTI**"). A force majeure clause relieves a party from its obligation to perform under a contract on the occurrence of specified events that are beyond the reasonable control of the parties (eg acts of God). Force majeure clauses commonly include a "reasonable endeavours" proviso, providing that a party cannot rely on what would otherwise be a force majeure event if that party could avoid its effects by the exercise of reasonable endeavours.

The central issue in this appeal is whether the exercise of reasonable endeavours may require the party affected, if it is to be entitled to rely on the force majeure clause, to accept an offer of non-contractual performance from the other contracting party in order to overcome the effects of the specified event. Although this question arises in relation to a specific force majeure clause, it has significant implications for the interpretation of reasonable endeavours provisos and force majeure clauses more generally.

On 9 June 2016, MUR and RTI entered a contract of affreightment based on an amended Gencon standard form voyage charterparty. MUR (the shipowner) agreed to make monthly shipments of bauxite from Conakry in Guinea to Dneprobugsky in Ukraine, between 1 July 2016 and 30 June 2018. RTI agreed to make monthly payments to MUR, in US dollars. Clause 36 of the contract was a force majeure clause. Clause 36.3(d) of the contract was a reasonable endeavours proviso. It stipulated that the specified event would only be a force majeure event if "it cannot be overcome by reasonable endeavors from the Party affected."

On 6 April 2018, RTI's parent company was sanctioned by the US government. The parties now agree that this was highly likely to create difficulties in RTI making

timely contractual payments in US dollars. MUR claimed that this constituted a force majeure event and suspended the shipments of bauxite, relying on the force majeure clause. RTI disputed this and offered: (i) to make payments to MUR in Euros, which could then be converted into US dollars by MUR's bank on receipt; and (ii) to indemnify MUR for any loss it suffered as a result. MUR rejected RTI's offer.

RTI commenced arbitration against MUR for breach of contract. MUR argued that it was permitted to suspend performance under the force majeure clause. RTI argued that MUR could not rely on the clause, because, in rejecting RTI's offer, it had not satisfied the reasonable endeavours proviso. The arbitrators agreed with RTI, and awarded it damages for MUR's breach of contract.

MUR appealed to the High Court. Jacobs J allowed MUR's appeal, on the basis that the reasonable endeavours proviso did not require MUR to accept an offer of non-contractual performance before it could rely on the force majeure clause.

RTI appealed to the Court of Appeal, which allowed its appeal by a majority (with Arnold LJ dissenting). The majority held that the event could have been "overcome" by accepting RTI's offer as this would have achieved the same result and would have involved no detriment to MUR. It therefore would have constituted reasonable endeavours in this case.

MUR now appeals to the Supreme Court.

Judgment

The Supreme Court unanimously allows the appeal. MUR's rejection of RTI's offer of non-contractual performance did not constitute a failure to exercise reasonable endeavours and therefore the reasonable endeavours proviso did not prevent MUR from relying on the force majeure clause.

Lord Hamblen and Lord Burrows give the judgment, with which Lord Hodge, Lord Lloyd-Jones and Lord Richards agree.

Reasons for the Judgment

The majority in the Court of Appeal treated this as a case turning on the wording of the specific force majeure clause and, in particular, the use of the word "overcome" in the reasonable endeavours proviso. However, reasonable endeavours provisos are commonly found in force majeure clauses, either expressly or impliedly, and in materially similar terms to the clause in this case. It followed that the issue raised is one of general application which should be addressed as a matter of principle **[25] – [30]**.

MUR was correct that, absent express wording, a reasonable endeavours proviso does not require acceptance of an offer of non-contractual performance. This conclusion is supported by principle and the authorities.

There are several reasons of principle which support MUR's case.

First, force majeure clauses, and reasonable endeavours provisos, concern the causal effects of impediments to contractual performance. The party affected must be able to show that the force majeure event caused the failure to perform. That means establishing that the failure to perform could not have been avoided by the exercise of

reasonable endeavours. Contractual performance means performance of the contract according to its terms. Failure to perform means a failing to perform in accordance with those terms. The causal question is to be addressed by reference to the parameters of the contract. The object of a reasonable endeavours proviso is to maintain, not alter that contractual performance **[36] – [40]**.

Second, the principle of freedom of contract includes the freedom not to contract. This extends to the freedom not to accept non-contractual performance **[41] – [42]**.

Third, clear words are needed to forego valuable contractual rights. Under the contract, MUR had an undoubted right to insist on payment in US dollars and to refuse payment in any other currency. RTI's interpretation is inconsistent with the general principle that contractual parties do not forego their valuable rights without it being made clear that that was their intention **[43]** – **[46]**.

Fourth, certainty and predictability are of particular importance in the context of English commercial law. MUR's case is straightforward: absent clear wording, a reasonable endeavours proviso does not require acceptance of an offer of non-contractual performance. The focus of the reasonable endeavours inquiry is clear: what steps can reasonably be taken to ensure contractual performance. The limits to that inquiry are also clear; they are provided by the contract.

By contrast, RTI's case is not anchored to the contract. It begs a number of questions and gives rise to considerable legal and factual uncertainty. In particular, it requires inquiries into whether the acceptance of non-contractual performance would: (i) involve no detriment or other prejudice to the party seeking to invoke force majeure, and (ii) achieve the same result as performance of the contractual obligation in question. There is no justification for creating needless additional uncertainty by departing from the standard of performance provided by the terms of the contract **[48] – [49]**, **[57]**.

Additionally, the authorities relied on by MUR provide strong support for its case. First, there is *Bulman & Dickson v Fenwick and Company* [1894] 1 Q.B. 179 which concerned a reasonable endeavours proviso in an exceptions clause. Although the case did not deal with an offer of non-contractual performance by the other party, it supports the view that a reasonable endeavours qualification in respect of an exceptions clause does not require the affected party to give up its contractual right (including by exercising an option in the contract) even if it would be reasonable to do so. Secondly, there is the *Vancouver Strikes* case [1963] AC 691. In that case charterers were able to rely on an exceptions clause to excuse a delay in their performance due to a strike, even though they had not exercised a contractual option which would have enabled them to avoid the delay. The charterers were not obliged to exercise the option, even if it would have been reasonable to do so **[60]**, **[64]**, **[74]**. The facts of this case are stronger than in the *Vancouver Strikes* case. There was no option for MUR to accept payment in Euros. Had there been, the *Vancouver Strikes* case indicates that MUR would still have been entitled not to exercise that option and to insist on payment in dollars **[75]**.

The various cases relied upon by RTI are distinguishable and do not provide support for its case. **[76] – [101]**.

For these reasons, the Supreme Court allows MUR's appeal **[103]**.

References in square brackets are to paragraphs in the judgment.