Neutral Citation Number: [2022] EWCA Civ 1406

Case No: CA-2022-000611

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
Mr Justice Jacobs
[2022] EWHC 467 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/10/2022

Before:

LORD JUSTICE NEWEY
LORD JUSTICE MALES
and
LORD JUSTICE ARNOLD

- -

Between:

MUR SHIPPING BV	**Claimant/ Respondent**
- and -	
RTI LTD	**Defendant/ Appellant**

- -
- -

Vasanti Selvaratnam KC & James Shirley (instructed by **Clyde & Co LLP**) for the **Appellant**
Nigel Eaton KC & Adam Woolnough (instructed by **Rosling King LLP**) for the **Respondent**

Hearing dates: 26 & 27 September 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on Thursday 27th October 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Males:

1. The issue in this appeal is whether the shipowner under a contract of affreightment was entitled to rely on a force majeure clause as suspending its obligation to load seven cargoes of bauxite in April 2018. LMAA arbitrators held that it was not and that the charterer was therefore entitled to recover the cost of chartering in replacement vessels, but that decision was reversed by Mr Justice Jacobs on an appeal to the court under section 69 of the Arbitration Act 1996.

2. This aspect of the parties' dispute (there were many other issues with which the arbitrators had to deal, with which we are not concerned) arose out of the imposition of sanctions by the United States on a company associated with the charterer. That led to prospective difficulties and delays for the charterer in paying freight in United States dollars, as it was required to do. It proposed as an alternative that it should make payment in euros which could be converted into dollars as soon as they were received by the owner's bank, and agreed to bear any additional costs or exchange rate losses in converting the euros into dollars. However, the owner rejected this proposal, insisting on its right to receive payment in dollars.

3. As I shall explain, the critical issue for decision is whether acceptance of the charterer's proposal would have overcome the state of affairs caused by the difficulty of making timely payments of United States dollars resulting from the sanctions imposed on the charterer's associated company.

The contract of affreightment

4. The contract of affreightment was between MUR Shipping BV, a Dutch company, as the owner and RTI Ltd, a Jersey company, as the charterer. RTI was the claimant in the arbitration and the respondent in the court below. It is now the appellant in this court. I shall refer to the parties as MUR and RTI.

5. The contract of affreightment was dated 9th June 2016 and provided for the carriage of about 280,000 metric tons per month, 15% more or less in charterer's option, of bauxite in bulk in lots of 30,000 metric tons up to 40,000 metric tons, 10% more or less in owner's option, from Conakry, Guinea to Dneprobugsky, Ukraine between July 2016 and June 2018. The quantities involved meant that in practice there would be a continuous flow of vessels loading at the load port and a corresponding flow of payments of freight due to the owner, 95% of freight being payable on each cargo within five banking days after signing or releasing of bills of lading.

6. The contract contained a force majeure clause in the following terms:

> "36.1. Subject to the terms of this Clause 36, neither Owners nor Charterers shall be liable to the other for loss, damage, delay or failure in performance caused by a Force Majeure Event as hereinafter defined. While such Force Majeure Event is in operation the obligation of each Party to perform this Charter Party (other than an accrued obligation to pay monies in respect of a previous voyage) shall be suspended.

36.2. Following the end of the Force Majeure Event, the Parties shall consult in good faith to make such adjustments as may be appropriate to the shipment schedule under this Charter Party.

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.

36.4. A Party wishing to claim force majeure in respect of a Force Majeure Event must give the other Party a Force Majeure Notice within 48 hours (Saturdays, Sundays and holidays excepted) of becoming aware of the Force Majeure Event. Such Force Majeure Notice shall be a notice in writing which:

a) sets out or attaches details of the Force Majeure Event, and

b) states that the Party giving the Force Majeure Notice wishes to claim force majeure in respect of such Force Majeure Event.

c) give reasonable estimated duration of the Force Majeure Event to the extend [*sic*] it is reasonably possible to do so at the time of giving the Force Majeure Notice.

36.5. A Party which fails to give a Force Majeure Notice upon the occurrence of a Force Majeure Event in accordance with Clause 36.4 shall not be permitted to claim force majeure in respect of such Force Majeure Event.

36.6. Without prejudice to the generality of this Force Majeure Clause, time lost while waiting for berth at or off the loading port or discharge port and/or time lost while at berth at the loading port or discharge port by reason of a Force Majeure

> Event or one or more of the port authority imposing restrictions in relation to safe navigation in the port, the restraint of Princes, strikes, riots, lockouts of men, accidents, vessel being inoperative or rendered inoperative due to the terms and conditions of employments of the Officers and Crew, shall not count as laytime or time on demurrage."

The facts

7. On 6th April 2018 the US Department of the Treasury's Office of Foreign Assets Control ("OFAC") imposed sanctions on Mr Oleg Deripaska and various companies which he controlled, either directly or indirectly. One such company was United Company Rusal Plc ("Rusal"), which was added to OFAC's Specially Designated Nationals and Blocked Persons List ("the SDN List"). Rusal, a Jersey company, was the majority owner of RTI. However, RTI was not itself added to the SDN List.

8. On 10th April 2018 MUR sent a force majeure notice to RTI which read in part as follows:

> "MUR were sorry to note that guarantors UC Rusal have been placed on the OFAC SDN list, and that as Charterers RTI are a subsidiary of UC Rusal, Charterers are similarly to be treated as if they are named on the list. …
>
> Having reviewed the effect of these sanctions and General License 12 we note that, subject to the terms of that license, it would be a breach of sanctions for Owners to continue with the performance of the COA. For contracts entered into prior to 6 April 2018, General License No. 12 provides that performance until 5 June 2018 is permitted but only to the extent that it is 'ordinarily incident to and necessary to the maintenance or wind down of operations, contracts ...' etc, to do so. It is not 'necessary' for MUR to load any further cargoes under the COA and it would therefore be a breach of sanctions if MUR were to do so. MUR's present intention is to however continue with the transportation of Charterers' cargoes that have already been loaded as detailed above, provided that this can be done without breaching sanctions.
>
> We further note that the sanctions will prevent dollar payments, which are required under the COA.
>
> Therefore, as a result of the sanctions placed on Charterers and guarantors, we are left with no option but to claim force majeure in accordance with clause 36 of the charterparty and this notice will have to remain effective for as long as the sanctions remain in place, or unless it is possible to obtain relief from sanctions which we will investigate."

9. On 14th April 2018 RTI sent an email to MUR rejecting the force majeure notice. It said that the sanctions would not interfere with cargo operations, that payment could

be made in euros, and that MUR, as a Dutch company, was not a "US person" caught by the sanctions. RTI also put MUR to proof of the time at which it learned of the events set out in the force majeure notice and reserved its position as to whether the notice had been sent within 48 hours of MUR becoming aware of the force majeure event. It called upon MUR to withdraw the notice.

10. On 17th April 2018 MUR emailed its disagreement with RTI's message, saying (among other things):

> "... Freight is specified in US dollars in the recap, and 'restrictions on monetary transfers' is listed as a force majeure event which might prevent loading and discharging for the very good reason that if monetary transfers from Charterers to Owners are restricted Owners cannot be expected to load and discharge the cargo without receiving payment in accordance with the COA. For Charterers' guidance we can confirm that the notice was sent within the COA time limits, and Owners' notice remains in effect for the reasons set out above and in that notice."

11. RTI continued to protest that the sanctions against Rusal did not preclude performance of the contract of affreightment. There were also exchanges about whether payments could be made in a currency other than US dollars and whether payment in euros would constitute a breach of the contract. RTI made clear that it would bear any additional costs or exchange rate losses in converting euros to US dollars. However, MUR was not prepared to accept payment in euros and maintained its refusal to nominate vessels under the contract.

12. On 23rd April 2018 OFAC issued General License 14 which extended the permission given by General License 12 to maintain or wind down activities until 23 October 2018.

13. On 25th April 2018 MUR resumed nominations of vessels under the COA and henceforth did accept payments of euros which were converted into dollars by its bank on receipt.

14. It appears that during the period in which MUR refused to make nominations, the question whether timely dollar payments of freight could have been made was never put to the test. Because MUR refused to nominate vessels to load, no obligation on RTI to pay freight arose. However, so far as the findings in the award are concerned, it is fair to say that the tenor of the correspondence was that RTI recognised that there would or at least might be difficulties in making dollar payments. Hence the proposal to pay in euros and bear the cost of converting the euros into dollars.

The award

15. The question whether MUR was entitled to rely on the force majeure clause involved a number of different issues and was itself only one of the many disputes which the arbitrators had to determine. Perhaps for that reason, their reasoning on the issue of law with which we are concerned was somewhat compressed.

16. After stating the facts, the arbitrators dealt first with whether the force majeure notice had been given on time, i.e. within 48 hours of MUR becoming aware of the "Force Majeure Event". They held that it had, their reasoning being that the 48 hours ran from MUR first learning of the imposition of sanctions on Rusal.

17. The arbitrators next considered the impact of these sanctions as a matter of United States law. The context here was the question whether, as asserted by MUR in its force majeure notice, "it would be a breach of sanctions" for MUR to load further cargoes under the contract of affreightment. After considering expert evidence on US law, the arbitrators found that this would not have been contrary to US law.

18. However, the arbitrators continued by saying that this had not been clear at the time, and that it was reasonable for MUR to take some time to review the position. They said that:

> "43. … The effect of primary and even secondary sanctions is drastic. Normal commercial counterparties will be frightened of trading with the party that has been sanctioned, bank finance is likely to be frozen and underwriters will be reluctant to ensure normal trading activities. Consequently, MUR were *prima facie* perfectly entitled, *subject to consideration of whether the force majeure event could be overcome by reasonable endeavours*, to take time to review the position and opt for caution by only reinstating the COA once General License 14, which allow the activities to continue beyond the end of the COA period, had been issued."

19. The words in italics were added by the arbitrators in response to a request for clarification of the award under section 57 of the Arbitration Act 1996.

20. The arbitrators then turned to the effect of the sanctions on the making of dollar payments under the contract. They held, again contrary to MUR's assertion in its force majeure notice, that such payments were permitted.

21. As a matter of US law, therefore, the arbitrators found that there was no reason why performance of the contract could not have continued. It was not unlawful for MUR to load cargoes, or for RTI to pay freight in US dollars. However, the arbitrators continued:

> "45. In any event, crucially the experts were agreed:
>
> > 'In the event RTI was required, between April 6 and April 23, 2018, to make any U.S. Dollar payments to MUR that passed through an intermediary bank in the U.S. (which is highly likely), it is highly probable that the U.S. intermediary bank would have initially stopped the transfer on the basis of RTI's status as a blocked party until the bank could investigate whether the transaction complied with U.S. sanctions requirements'.

> 46. The evidence was that in practice virtually all US dollar transactions are routed through US banks and common sense indicates that any US bank would exercise extreme caution before making a payment that could conceivably fall foul of sanctions legislation."

22. The experts referred to RTI's "status as a blocked party" even though it is common ground that RTI was not placed on the SDN List. However, we were told that a majority-owned subsidiary of an entity named on the list is subject to the same restrictions as its parent. In any event, the finding that it was highly probable that there would have been difficulties in making timely payments of US dollars is clear.

23. Mr Nigel Eaton KC for MUR pointed out that the word "crucially" in paragraph 45 demonstrated the importance which the arbitrators attached to this finding.

24. The impact of these findings, therefore, was that although it would not have been unlawful for RTI to make payments of freight in US dollars, it was highly probable that any such payments would have been delayed: banks would initially stop the transfer in order to investigate whether the payment was permitted; implicitly (because the arbitrators had found that such payments were permitted) the payments would eventually have been made, but there would have been a delay; and it would not have been practicable to avoid these difficulties in making timely dollar payments by using a bank located outside the United States.

25. The arbitrators then turned to clause 36.3(d) of the contract of affreightment, which included in the definition of a *force majeure* event that "It cannot be overcome by reasonable endeavours from the Party affected".

26. As to this, one argument advanced by RTI was that MUR should have obtained guidance from OFAC whether payments in dollars were permitted. The arbitrators rejected that argument, doubting whether OFAC would have been prepared to give guidance on which MUR could rely within what they described as "a meaningfully short timescale".

27. The arbitrators continued:

> "50. However, accepting payments in euros was a much more realistic possibility. It would have presented no disadvantages to MUR because their bank in the Netherlands could have credited them with US dollars as soon as the euros were received. RTI could of course not insist as of right on making payments in euros because their payment obligations in the COA were to pay US dollars. However, we are satisfied that it was a completely realistic alternative that MUR could have adopted with no detriment to them because (i) RTI made clear in correspondence that it would bear any additional costs or exchange rate losses in converting euros to US dollars and (ii) a number of payments were in fact made by RTI in euros and converted on receipt by MUR's bank; there is no evidence that MUR rejected those payments.

> 51. Consequently although MUR's case on force majeure succeeded in all other respects, it failed because it could have been 'overcome by reasonable endeavours from the Party affected'."

28. Finally, the arbitrators commented that the force majeure notice given by MUR identified sufficiently the "details of the Force Measure Event", as required by clause 36.4(a):

> "52. Although the issue was academic, for the sake of completeness, we should comment that we considered that the force majeure notice given by MUR would have been effective. Clause 36 merely required the notice to set out details of the force majeure event. The details that mattered were the imposition of sanctions against Rusal. Contrary to the argument advanced on behalf of RTI, we did not consider that the force majeure notice was defective because it did not spell out in detail what specific parts of the COA operation could not be carried out because of sanctions."

29. There was some debate before us as to precisely what was the relevant force majeure event in this case, but it is implicit from the reasoning in the award that the arbitrators regarded the relevant event as the imposition of sanctions on Rusal causing probable delay in payment of US dollars.

30. The result, therefore, was that MUR was not entitled to rely on the force majeure clause as suspending its obligation to load, solely because the force majeure event could have been overcome by the exercise of reasonable endeavours. Accordingly RTI was entitled to damages for MUR's refusal to nominate vessels to load the relevant cargoes.

The appeal to the Commercial Court

31. MUR sought and obtained permission to appeal to the Commercial Court under section 69 of the Arbitration Act 1996, the specified question of law for decision being "whether 'reasonable endeavours' from the Party affected within Clause 36.3(d) of the Contract of Affreightment can include accepting payment in € instead of the US$ for which the contract provides".

32. Mr Justice Jacobs allowed the appeal and granted permission to appeal on this question to this court. His essential reason, expressed at [98], was that the contract required payment in US dollars and that "a party is not required, by the exercise of reasonable endeavours, to accept non-contractual performance in order to circumvent the effect of a force majeure or similar clause", as shown by the decision of this court in *Bulman v Fenwick & Co* [1894] 1 QB 179. In so holding, the judge rejected what he described as the "the broad argument" and "the narrower argument" advanced on behalf of RTI.

33. The broad argument was that in considering whether MUR as "the Party affected" had exercised reasonable endeavours, the only question was whether it had acted reasonably, the arbitrators having found as a fact that it had not. The parties'

contractual obligations were one factor in determining the answer to that question, but were no more than that. There was no rule that a party could never be required to accept non-contractual performance by its counterparty.

34. The narrower argument was that even if reasonable endeavours did not require the owner to accept non-contractual performance of obligations relating directly to loading or discharge, these being matters expressly mentioned in clause 36, different considerations applied to the obligation to make payment in US dollars, so that the owner could be required in the exercise of reasonable endeavours to accept payment in another currency.

35. As well as resisting the appeal, RTI sought also to uphold the award on a number of grounds determined against it by the arbitrators. These were, in summary, that (1) the contract did not require payment of freight in US dollars, but permitted payment in euros; (2) clause 36 was not engaged in any event, because any practical difficulty for the charterer in making US dollar payments did not amount to a force majeure event; (3) the necessary element of causation was not established because any difficulty in making US dollar payments did not prevent the loading of the cargo; and (4) the requirements for an effective force majeure notice were not complied with. Mr Justice Jacobs rejected all these arguments and RTI did not seek or obtain leave to appeal to this court against his decision on them.

The scope of the appeal to this court

36. It is important to explain the limited scope of an appeal to the Court of Appeal on an appeal under section 69 of the Arbitration Act 1996. As section 69 makes clear, and as is well known, an appeal to the High Court from an arbitration award can only be on a question of law arising out of an award. There can be no challenge to the arbitrators' findings of fact and the appeal is limited to the question of law for which permission has been granted (or as to which there is agreement between the parties), although a respondent may seek to uphold the award on legal grounds with which the arbitrators have not (or have not fully) dealt or which they have rejected. However, leaving aside a residual discretion which exists more in theory than in practice (*CGU International Insurance Plc v Astra Zeneca Insurance Co Ltd* [2006] EWCA Civ 1340, [2007] 1 All ER (Comm) 501), a further appeal to this court is only possible with the permission of the court below and even then requires that "the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal" (section 69(8)).

37. This means that the jurisdiction of this court is constrained by the scope of the permission to appeal granted by the court below, in this case (as in most arbitration appeals) the Commercial Court. The decision of the arbitrators must be accepted, not only on questions of fact, but also on questions of law which are not the subject of any appeal or respondent's notice; the decision of the court below must be accepted on questions of law for which the judge in the court below does not give permission to appeal to this court.

38. In the present case, therefore, as Mr Eaton submitted, the arbitrators' conclusion in paragraph 51 of the award that "MUR's case on force majeure succeeded in all other respects" apart from whether the force majeure event could have been "overcome by reasonable endeavours from the Party affected" has a number of consequences. It

means that we must proceed on the basis that the requirements of paragraphs (a) to (c) of clause 36.3 were satisfied. Thus the arbitrators must be taken to have found, and there is no appeal from their decision, that the imposition of sanctions on Rusal was an event or state of affairs which was outside the immediate control of MUR as the party giving the force majeure notice (para (a)); it prevented or delayed the loading of cargo at the load port (para (b)); and it was caused by one or more of the matters specified in paragraph (c).

39. While there is no difficulty in accepting that the imposition of sanctions on Rusal was outside the immediate control of MUR, the arbitrators' reasoning as to paragraphs (b) and (c) is more problematic. They appear to have found that the imposition of sanctions prevented or delayed the loading of cargo because it was reasonable for MUR to refuse to nominate vessels in view of the anticipated problems with timely payment of freight in dollars, although this reasoning is not spelled out. It is not clear which of the matters specified in paragraph (c) the arbitrators found to have been the cause of the imposition of sanctions. The main candidate suggested was "restrictions on monetary transfers and exchanges", but paragraph (c) is concerned with the cause of the force majeure event, not with its consequences. On the arbitrators' findings, there was no relevant legal restriction on monetary transfers, and the delay liable to be caused by the cautious attitude of US banks was a consequence of the imposition of sanctions, not its cause. These issues, however, are not the subject of the appeal. We heard no argument upon them and must proceed on the basis that the requirements of paragraphs (a) to (c) were satisfied.

40. The only issue before us concerns paragraph (d), whether the force majeure event or state of affairs could have been overcome by reasonable endeavours from MUR as the party affected. It arises on the basis that RTI's contractual obligation was to pay freight in US dollars.

The submissions on appeal

41. For RTI, Ms Vasanti Selvaratnam KC repeated both the broad and the narrower argument which she had advanced to the judge, to which I have already referred. She submitted that the arbitrators had found as a fact that MUR had not used reasonable endeavours, and that this finding was conclusive; there was no principle of law that it could never be reasonable to expect a party to accept a non-contractual performance (i.e. payment in euros); while it might normally be unreasonable to expect a party to accept non-contractual performance as a condition of relying on force majeure, that was not necessarily so; whether it was unreasonable in any particular case was a question for the tribunal of fact. She submitted that there are parallels with the principle in the law of damages that reasonable mitigation may require a party to accept an offer of something less than full contractual performance (e.g. *Payzu Ltd v Saunders* [1919] 2 KB 581) and with frustration cases concerning the closure of the Suez Canal, which (she said) had held that a charterparty for a voyage via Suez was not frustrated if an alternative route via the Cape of Good Hope was available.

42. For MUR, Mr Eaton submitted that the issue raised in this appeal was whether a party can be debarred from invoking a force majeure or excepted perils clause on the grounds that it should instead have agreed to vary the terms of the contract or to accept a non-contractual performance. He submitted that this was an issue of general application to such clauses which arises, not only when a force majeure clause calls

expressly for the exercise of reasonable endeavours by the party affected, but also where this is implicit even though not stated; and that it was determined against RTI by the decisions of the Court of Appeal in *Bulman v Fenwick* and of the House of Lords in the "*Vancouver Strikes*" case (*Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries & Food* [1963] AC 691). Because the issue was of general application, the answer was not to be found in a close textual analysis of clause 36. The principle was that, absent some contrary indication in the clause, reasonable endeavours did not require a party to accept anything less than contractual performance: that principle accorded with the purpose of such clauses and promoted certainty, and was consistent with the principle that a party is not to be taken to be giving up its legal rights in the absence of clear express words to that effect (*Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689).

The principal cases

43. It is convenient at this point to consider the two cases on which Mr Eaton principally relied.

44. In *Bulman v Fenwick* a voyage charter provided that the vessel, loaded with coal, should proceed to one of certain named places on the Thames to discharge. The charterer ordered the vessel to discharge at the Regent's Canal. A strike then broke out at this discharge place, and the charterer resisted a claim for demurrage in reliance on a clause which provided an exception for delay caused by strikes. The case was tried by Baron Pollock with a jury which found as a fact that, once the strike broke out, it was not reasonable of the charterer to allow the vessel to continue its journey to the Regent's Canal, and that if the vessel had been ordered to some other place of discharge named in the charterparty, discharge could have taken place within the laytime period allowed. Given that finding, Baron Pollock identified the question of law for decision as being "whether it was within the right of the defendants [i.e. the charterer], upon the true construction of this charterparty, to order the *Ashdene* to the Regent's Canal, and to leave that order undisturbed, although before she got there the strike had commenced", a question which "turns on the real rights of the parties under the charterparty, and not on the question whether it was reasonable or unreasonable to send the vessel to the Regent's Canal". He concluded as follows:

> "Even although it turns out that, when the vessel arrived at the port to which she was ordered, there was a strike of workmen there, the plaintiffs are not entitled to say to the defendant, because there was a strike there you ought not to have allowed the vessel to go there because it was not reasonable to do so. 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. … Therefore, the conclusion I come to in this case is, that the defendants were within their rights in sending the vessel to that port, and that, notwithstanding the finding of the jury on the question left to them, there ought to be judgment for the defendants."

45. An appeal was dismissed. In a brief judgment with which Lord Justices Lopes and Kay agreed, Lord Esher MR said that it was a clear case: the charterer was entitled to

send the vessel to the Regent's Canal, with no limitation express or implied on its choice of discharge place:

> "At the time when the charterers ordered the ship to the Regent's Canal there could be no objection to such an order, and there was nothing which happened afterwards to oblige the charterers to alter their order. It is true that when the vessel arrived at the Regent's Canal there was a difficulty in taking delivery because of a strike of workmen; but a strike would in itself not be sufficient to exonerate the charterers from doing the best they could to accept delivery, and would not entitle them to fold their arms and do nothing. If, notwithstanding the strike, they could by reasonable exertion have taken delivery of the cargo within the proper time, the strike would not have afforded them any defence. But the jury found that they could not, by any reasonable effort, have taken delivery. The delay, therefore, was caused entirely by the strike, and was within the exception in the charterparty. The judgment appealed against was right, and the appeal must be dismissed."

46. In the *Vancouver Strikes* case the charterparty was 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. Again, there was an exception to the running of laytime in the event that loading was delayed by a strike. Loading of wheat was delayed by a strike and the issue was whether the charterer could rely on the strike exception in defence of the shipowner's claim for demurrage when it had made no attempt to load barley or flour instead. The House of Lords held that it was irrelevant whether loading of barley or flour could have been achieved within the laytime: on its true construction the charterparty was for a cargo of wheat, and the charterer's option to load barley or flour instead was a "true" or "business" option which it was not obliged to exercise. As Viscount Radcliffe put it:

> "The primary obligation is to provide a cargo of wheat only, the exceptions clause covers delay in the shipping of wheat, and there is no obligation on the charterers to lose that protection by exercising their option to provide another kind of cargo that is not affected by a cause of delay, even assuming such a cargo to be readily available. Really, that seems to me to contain the whole point of the dispute. There is in this case no duty on the charterers to 'switch' from wheat to barley or flour, because their choice of barley or flour is unfettered and is not at any time controlled in their hands by an overriding obligation to put on board by a fixed date a full cargo which must include those commodities, if it cannot consist of wheat alone."

Discussion

47. In my judgment we are concerned in this appeal with the specific terms of clause 36. It is the terms of this clause, and in particular clause 36.3(d), which we must construe, albeit that we do so against the background of the general law. But we are not concerned with reasonable endeavours clauses in general, or even with force majeure

clauses in general. Each such clause must be considered on its own terms. In this regard I would make the following points concerning clause 36.3.

48. First, each of paragraphs (a) to (d) begins with the word "It". That is in each case a reference to the "event or state of affairs" referred to in the opening words of clause 36.3. Thus it is that event or state of affairs which must be outside the immediate control of the party giving the notice, which must prevent or delay the loading of cargo, which must be caused by one of the specified matters, and which it must be impossible to overcome by reasonable endeavours from the party affected.

49. Second, an event is not necessarily the same as a state of affairs. An event is something which happens at a particular time and place, while a state of affairs is more to do with the situation which results from the happening of one or more events. The fact that the definition of "Force Majeure Event" extends either to an event or to a state of affairs suggests an element of flexibility in the application of the clause and, in particular, that it is relevant to consider not only the event itself (i.e. the imposition of sanctions on Rusal) but also the state of affairs resulting from that event (i.e. the likelihood of delay in making dollar payments from entities associated with Rusal).

50. Third, as was common ground, the "Party affected" is the party giving the notice which seeks to rely on force majeure to suspend its obligations under the contract. In this case that is MUR. It is therefore MUR's reasonable endeavours with which the clause is concerned. I would accept Mr Eaton's submission that it is irrelevant that, had it chosen to do so, RTI might have sought to rely on force majeure and to serve a notice, in which case a question might have arisen as to what RTI could have done by exercising reasonable endeavours.

51. Fourth, clause 36.3(d) is not concerned with the exercise of reasonable endeavours in the abstract, let alone with whether the party affected has acted reasonably. The question is whether the relevant event or state of affairs can be overcome by reasonable endeavours from the party affected. However reasonable a party's endeavours may be, they are irrelevant if they do not result in the overcoming of the event or state of affairs in question.

52. Accordingly both the broad submission and the narrower submission advanced by Ms Selvaratnam (see [33] and [34] above) must be rejected. According to the broad submission, all that matters is whether reasonable endeavours have been exercised (or, as she put it, whether the party affected has acted reasonably). But that is not what clause 36.3(d) says. The submission leaves out of account whether the endeavours in question have been successful in overcoming the force majeure event or state of affairs. So too does the narrower submission, for which there is in any event no warrant in the terms of clause 36.3.

53. In my view the principles drawn from the law on mitigation of damage and frustration provide no assistance here. Those principles address very different issues. There is no need to discuss them further.

54. Similarly, there is no need to discuss the *Gilbert-Ash* principle on which Mr Eaton relied. To do so would beg the question. MUR had a contractual right to rely on the force majeure clause as suspending its obligation to nominate vessels to perform the contract, but that right was subject to clause 36.3(d). It had also a contractual right to

receive payment of freight in US dollars. There was no question of it being required to abandon or vary that right. Rather, the question was whether accepting payment in euros would overcome the state of affairs resulting from the imposition of sanctions on Rusal. If it would, MUR's contractual right to receive payment in dollars would remain unaffected, and the only consequence would be that it would not be entitled to invoke force majeure as excusing it from its obligation to nominate vessels.

55. The parties' arguments, both in this court and in the court below, were principally concerned with the question of reasonable endeavours. But in my judgment the real question in this case is whether acceptance of RTI's proposal to pay freight in euros and to bear the cost of converting those euros into dollars would overcome the state of affairs caused by the imposition of sanctions on Rusal. If it would, it would have been a very straightforward matter for MUR to accept that proposal, requiring no exertion on its part. If it would not, no amount of endeavours, reasonable or otherwise, would change that situation.

56. So the question is whether, in order to overcome the state of affairs in question, it was essential for the contract to be performed in strict accordance with its terms (as Mr Eaton submitted) – in this case, therefore, whether that state of affairs could only be overcome if RTI found a way to make timely payments of freight in US dollars. In my judgment that is too narrow an approach to the construction of the clause. 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' obligations – in this case, concerned with payment obligations, that MUR should receive the right quantity of US dollars in its bank account at the right time. I see no reason why a solution which ensured the achievement of this purpose should not be regarded as overcoming the state of affairs resulting from the imposition of sanctions. It is an ordinary and acceptable use of language to say that a problem or state of affairs is overcome if its adverse consequences are completely avoided.

57. The arbitrators' finding in paragraph 50 of their award was that RTI's proposal would have presented "no disadvantages" to MUR and could have been accepted with "no detriment" to it. There was no doubt about the ability and willingness of RTI to make payment in euros, and to bear any additional costs or exchange rate losses in converting the euros to US dollars. 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.

58. Accordingly, unless the word "overcome" necessarily means that the contract must be performed in strict accordance with its terms, which in my judgment it does not, the arbitrators' conclusion in paragraph 51 of the award that the force majeure could have been "overcome by reasonable endeavours from the Party affected" is a finding of fact, or at any rate of mixed fact and law, with which the court should not interfere.

59. The position would be different if RTI's proposal would have resulted in any detriment to MUR or in something different from what was required by the contract. In such a case, it could not be said that the force majeure had been overcome, but only (at most) that it had been partially overcome. That would not satisfy clause 36.3(d).

But on the facts as found by the arbitrators, there was no difference between what MUR would obtain from acceptance of RTI's proposal and what it was entitled to under the contract.

60. As I have said, the judge's essential reason for reaching the opposite conclusion was that the contract required payment in US dollars and that a party is not required, by the exercise of reasonable endeavours, to accept non-contractual performance in order to circumvent the effect of a force majeure or similar clause. I accept that the contract required payment in US dollars, but the purpose of that payment obligation was to provide MUR as the shipowner with the right quantity of dollars in its account at the right time. RTI's proposal achieved that objective with no detriment to MUR and therefore overcame the state of affairs caused by the imposition of sanctions on Rusal. It is apparent from the award that the reason why it was not accepted was that the contract had become disadvantageous to MUR, who did not want to perform it.

61. There is in my judgment nothing in either *Bulman v Fenwick* or *Vancouver Strikes* to cast doubt on this analysis. In *Bulman v Fenwick* there was no equivalent of clause 36.3(d) and the jury's finding was simply that it was not reasonable for the charterer to allow the vessel to continue to the Regent's Canal after it knew of the strike. But there is nothing to indicate what criteria the jury applied in reaching that conclusion. It may be that they thought it would have been reasonable for the parties to share the pain caused by the strike at the Regent's Canal. If so, that has nothing to do with whether the strike or its consequences could have been overcome by diverting the vessel elsewhere. There was, moreover, an important finding that the charterer's customer "required the coal near to the Regent's Canal; therefore it was a matter of importance to them that she should go there, and when it was suggested that the vessel might have gone to the Victoria Dock, or the Derricks, or the Pool, or that she might have gone in the first instance to Beckton, the answer of the defendants was that these clauses were introduced for their benefit, and that they had a right to order her to any one of the places mentioned in the charterparty". If the question had arisen, therefore, which it did not, diverting the vessel would not have overcome the problem. It would not have given the charterer the substance of what it was entitled to under the contract.

62. Similarly in *Vancouver Strikes*, there was no equivalent of clause 36.3(d) either. In any event the question whether the delay caused by the strike could have been overcome by loading barley or flour did not arise because 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.

Disposal

63. I would hold, therefore, that acceptance of RTI's proposal would have overcome the force majeure event. In respectful disagreement with the powerfully reasoned judgment of Mr Justice Jacobs, I would therefore allow the appeal and restore the award of the arbitrators.

Postscript

64. As we have had occasion in this appeal to consider the *Vancouver Strikes* case, I cannot resist drawing attention to the concluding words of Lord Justice Donovan's

judgment in this court ([1962] 1 QB 42 at 131):

> "I should also like to record that the questions in this case, one of fact, and four of the construction of the contract, have been resolved with the aid of only 55 authorities."

65. Sixty years on I am tempted to say, "if only things were still that simple".

Lord Justice Arnold:

66. I find myself in agreement with Jacobs J and in respectful disagreement with Males LJ. On the facts of this case MUR's position has no merit, but the issue is one of general principle and in my judgment MUR was entitled to insist upon its strict contractual right to receive payment in US dollars.

67. As Males LJ has explained, it is important to appreciate the limited scope of the issue before this Court. The arbitrators expressly found in paragraph 51 of their award that MUR's case on force majeure succeeded in all respects save that the "event or state of affairs" in question could have been "overcome by reasonable endeavours from the Party affected". Thus the arbitrators found that the requirements of paragraphs (a) to (c) of clause 36.3 of the contract of affreightment were all satisfied. Jacobs J held that the arbitrators had made no error of law in making those findings, and there is no appeal against that holding.

68. As Males LJ says in paragraph 29 of his judgment, it is implicit in the arbitrators' reasoning that the relevant "event or state of affairs" was the imposition of US sanctions on Rusal causing probable delay of payments by RTI in US dollars.

69. I agree with all of the points Males LJ makes in paragraphs 47 to 52. I also agree with Males LJ that the real question in this case is not about the meaning of "reasonable endeavours". Given that RTI offered to pay in euros, that euros could easily and speedily be converted into dollars and that RTI also offered to indemnify MUR against any costs of conversion, all that MUR had to do to solve the problem of payments in dollars probably being delayed was to accept that offer. Plainly it would have been reasonable for MUR to have done so, but as Males LJ says in paragraph 55 that would have required no exertion on its part at all.

70. So the issue comes down to this: would the "event or state of affairs", namely the probable delay in payments by RTI in US dollars, have been "overcome" by MUR accepting RTI's offer of non-contractual performance?

71. As I have indicated, I agree with Males LJ that this is ultimately a question of the proper interpretation of clause 36.3(d) having regard to its wording, context and purpose. I disagree that the *Gilbert-Ash* principle is irrelevant to this: the presumption that parties do not give up their legal rights in the absence of clear express words to that effect is an important part of the context in which clause 36.3(d) falls to be interpreted.

72. As to the purpose of clause 36.3(d), this seems to me to be clear from its wording: the Party affected cannot rely upon clause 36.1 if the "event or state of affairs" can be overcome by the Party affected making reasonable endeavours. If the event or state of

affairs could be overcome by the Party affected making reasonable endeavours, then any loss occasioned by the failure of the Party affected to make reasonable endeavours is to be regarded as self-inflicted. This makes good sense as a contractual bargain.

73. Males LJ's reasoning is that acceptance by Mur of RTI's offer of non-contractual performance would have "overcome" the relevant "event or state of affairs" because it would have solved the problem of achieving timely payment in US dollars with no detriment to MUR.

74. I agree that RTI's offer would have solved that problem with no detriment to MUR. The fact remains, however, that what was offered by RTI was non-contractual performance. In my judgment an "event or state of affairs" is not "overcome" within the meaning of clause 36.3(d) by an offer of non-contractual performance, and in particular an offer of non-contractual performance by the counterparty to the Party affected. 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. 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.

75. I accept that *Bulman v Fenwick* can be distinguished from the present case both because the contract contained no equivalent of clause 36.3(d) and because on the facts diverting the vessel would have been detrimental to the charterer. Nevertheless it seems to me that Pollock B's statement of principle is applicable here: "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". The reasoning of Lord Esher MR is to the same effect. Similarly, the *Vancouver Strikes* case can be distinguished both because the contract contained no equivalent of clause 36.3(d) and because on the facts loading a different cargo would not have overcome the problem that the charterer wanted to load wheat. Nevertheless, and although the speeches in the House of Lords do not contain such a pithy statement as that of Pollock B in *Bulman v Fenwick*, it seems to me that the same principle underlies their Lordships' reasoning.

76. I would therefore dismiss the appeal.

Lord Justice Newey:

77. My own view is that the appeal should be allowed for the reasons given by Males LJ.

78. Mr Eaton KC eschewed "close textual analysis" of clause 36 of the contract of affreightment, but, as Males LJ points out, we are concerned in this appeal with the specific terms of that provision, not general principle. Interpretation of a contract involves, of course, assessment of "the objective meaning of the language which the parties have chosen to express their agreement" (to quote Lord Hodge in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173, at paragraph 10)

or, in the words of Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912, "ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". The present appeal raises an issue as to the meaning of the word "overcome", as used in clause 36.3(d). Must the "reasonable endeavors from the Party affected" be such as to enable the contract to be performed in strict accordance with its terms? Or can it suffice that the "Force Majeure Event" would be "overcome" in a more practical sense, such that all its adverse consequences would be avoided? In my view, the latter interpretation is to be preferred. The question is not whether MUR had a contractual right to payment in dollars (there is no doubt that it did), but whether it was entitled to suspend performance under the terms of clause 36. Those terms expressly made the right to suspend performance conditional on it being the case that the "event or state of affairs" constituting the "Force Majeure event" "cannot be overcome by reasonable endeavors from the Party affected", and said nothing about the "reasonable endeavors" having to facilitate full compliance with the letter of the contract. As Arnold LJ stresses, Pollock B referred in *Bulman v Fenwick & Co* to the question being one of "contract between the parties", but the contract before Pollock B differed importantly from that with which we are concerned since there was no equivalent to clause 36.3(d). On the facts of the present case, the relevant "event or state of affairs" was friction in the banking system, and it seems to me that the arbitrators were fully entitled to conclude that that problem could have been "overcome" within the meaning of clause 36.3(d) by MUR accepting payment in euros.