

## When Santa gets it wrong: a force majeure saga

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**PRACTICES** Energy Litigation, Offshore Oil and Gas, Offshore Oil and Gas Dispute Resolution, Litigation

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Parents among the readership may recognise the following. The beloved little one wishes for a very specific toy. It must be ‘Laser Man’ – the one with the jet pack. That model is of course in extremely high demand and proves to have sold out. The parent may also have left it too late to put the order in to Father Christmas (Amazon). On Christmas day, the opening of the present reveals ‘Laser Man’ – but in his scuba gear. The parent’s case is that there has been a *force majeure* event and equivalent performance has been rendered. No claim for damages can lie, and please can festive celebrations resume without tantrums. The child rejects this prayer for relief and insists on the strict terms of the wishlist.

Happily the Supreme Court has now resolved this argument by clarifying the law on *force majeure* provisions. In English law, every *force majeure* clause will include an obligation on the parties to use their reasonable endeavours to overcome the state of affairs or event that has made performance impossible. That obligation will either be express (it is often found in well-drafted contracts) or, if it has been forgotten by the parties, implied by operation of law. In *RTI Ltd v MUR Shipping BV* [2024] UKSC 18, the Supreme Court had to decide whether this ‘reasonable endeavours’ obligation can ever require a party to accept performance which is not prevented by the force majeure event in operation, but which is different (by whatever degree, however minute) from the strict terms of the contract.

In other words, can a party insist on getting precisely what the letter of the contract provided for, or is it good enough for the other party to offer substantially the same performance?

### The facts

A company called RTI was in the business of supplying bauxite. RTI contracted with shipowners MUR to carry substantial quantities of bauxite for RTI from Guinea to Ukraine. MUR was to make available all the required vessels. The contractually-agreed minimum quantities meant there was a regular flow of MUR’s vessels loading RTI’s cargo at the specified port of Conakry in Guinea, with corresponding regular freight payments becoming due from RTI to MUR. The contract required RTI to pay MUR in US\$. The agreement was to run from July 2016 to June 2018.

RTI was owned by Rusal. On 6 April 2018, the United States Treasury Department imposed sanctions against Rusal. As a wholly owned subsidiary of Rusal, RTI became subject to the same sanctions although RTI was not itself a sanctioned entity. The US sanctions made timely payment by RTI in US\$ impossible because, as was later common ground, any such payments by RTI would have to pass through at least one US intermediary bank, and they would initially have been stopped pending an investigation by the bank of whether the underlying transaction complied with the US sanctions.

On 10 April 2018, four days after the sanctions took effect, MUR took the initiative and served a *force majeure* notice on RTI. MUR suspended performance and ceased to make any vessels available for loading RTI’s bauxite in Guinea. RTI rejected the *force majeure* notice and called for

more ships as it had deliveries to make. RTI also offered to pay all sums contractually due to MUR in €Euros, which would automatically be converted into the correct US\$ amount on receipt into MUR's bank accounts, with RTI bearing all additional banking charges. MUR declined to accept that solution and continued the suspension of its performance. MUR insisted that it be paid in US\$ on time, and relied on *force majeure* because prompt payment in the contractual currency had become impossible because of the sanctions.

On 23 April 2018, the United States Treasury Department published a relaxation of the sanctions. This permitted affected parties to wind down operations under existing contracts for a period of six months. The contract between MUR and RTI only had two months' left to run. On 25 April 2018, MUR resumed performance and continued nominating vessels for RTI's cargo, as well as agreeing to be paid in €Euros by RTI, which were duly converted into the contractual currency upon receipt by MUR. The parties continued to perform until the contract came to an end in June 2018. However, during MUR's suspension of about two weeks, RTI had been forced to charter seven vessels from someone other than MUR to continue making the bauxite shipments that RTI was committed to.

It seems that, prior to the relaxation of the sanctions, MUR had been unwilling to accept any payments at all from RTI, and had seized on the *force majeure* clause to put the contract on ice, probably because of a concern about having any dealings with a sanctioned entity. Yet RTI had offered MUR exactly what MUR had bargained for, an offer that MUR eventually accepted only a few weeks later. The question was whether MUR could nonetheless insist on the strict letter of the contract and stop performing until MUR was happy to continue providing services and taking RTI's money.

## **The *force majeure* clause in the contract**

Clause 36 of the contract between RTI and MUR set out the *force majeure* provisions. Clause 36.1 stated that:

*“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.”*

The clause provided that a *force majeure* event had to be something that (i) was “*outside of the immediate control*” of the party giving notice; (ii) prevented or delayed “*performance*”, which was expressly described by reference to the loading or discharging of the cargo at the relevant port(s); (iii) was caused by a list of things including extreme weather conditions, war, fire, floods, earthquakes, government regulations or acts, and restrictions of money transfers or exchanges; and – importantly – (iv) “*cannot be overcome by reasonable endeavors from the Party affected*”.

## **Arbitrators held that the problem could have been “*overcome*”**

When the case reached the Supreme Court, the score was RTI – 2, MUR – 1. RTI had kicked off by commencing an arbitration under the contract to claim from MUR the extra costs of the replacement vessels. The arbitrators found for RTI. They concluded, in two out of 156 paragraphs in their award that, while the sanctions against RTI's parent company and the inevitably ensuing payment delays could have constituted *force majeure*, MUR was prevented from relying on Clause 36 because MUR could have “*overcome*” the problem by accepting RTI's offer to pay in €Euros with immediate

and automatic conversion into US\$, with RTI bearing all additional bank or currency exchange charges. It seems that the arbitral tribunal was untroubled by the *force majeure* argument. They certainly did not think that the suggestion that MUR could decline to perform based on a technical point of this nature merited a great deal of discussion.

### **The Commercial Court finds there was *force majeure***

The arbitration clause in the contract did not exclude an appeal to the High Court on a point of law under section 69 of the Arbitration Act 1996, unlike arbitration clauses which incorporate the rules of major arbitral institutions such as the ICC or the LCIA. MUR appealed the award, and was successful before Jacobs J in the Commercial Court. The Judge decided that the obligation on MUR to use reasonable endeavours did not require MUR to accept non-contractual performance – namely, payment being tendered in a different currency than the contract required. Jacobs J considered that the reasonable endeavours had to go towards performance as required by the contract, and not towards performing in a different but allegedly equivalent manner.

The question was, therefore, whether RTI could pay on time in US\$ by applying its reasonable endeavours? The agreed position was that RTI could not do that, and so MUR was entitled to rely on *force majeure* to excuse its suspension or non-performance. The Judge rejected RTI's argument that one had to look at reasonable endeavours in the round, and that whether a party might be required to accept non-contractual performance depended on the circumstances (for instance, where it would not suffer any real detriment, it might have to do so). RTI said this was, in essence, a question of fact (not one of law) which the arbitrators had already decided in RTI's favour. Jacobs J disagreed. He noted that there was earlier authority (discussed below) supporting the proposition that, as matter of legal principle, a party did not have to accept something different to what it had bargained for on the terms of the contract. It followed that MUR was entitled to rely on the *force majeure* clause.

### **A divided Court of Appeal then prefers a pragmatic, common sense solution**

It was RTI's turn to appeal. A divided Court of Appeal upheld RTI's appeal. Males LJ (for the majority) took the view that the case turned on the interpretation of the specific wording in Clause 36. The real question was not precisely what kind of steps the obligation to use reasonable endeavours required, but whether MUR's acceptance of RTI's proposal to pay in €Euro would have "overcome" the *force majeure* event. The focus was on the end result. Males LJ explained his reasoning as follows:

*"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."*

It will be recalled that *force majeure* in English law is a creature of contract. There is no general principle or doctrine in English contract law that will excuse a party from having to perform where it is prevented from doing so by supervening events, unless the effects of those events are so serious as to amount to frustration of the contract. The decision of the House of Lords in *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 is a famous example of how narrow the concept of frustration is under English law. Construction work on a housing development took 22

months as opposed to the planned seven months. The main reason for this delay was the shortage of skilled construction workers in England at the time, following World War II. Nonetheless, even though the contractor had to spend more than three times longer building the houses through no fault of its own, the contract was not frustrated. Lord Radcliffe said that:

*“... frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract”.*

In considering whether frustration applied, Lord Reid asked *“whether the contract ... is, on its true construction, wide enough to apply to the new situation”* and did this *“... transmute the job the contractor had undertaken into a job of a different kind, which the contract did not contemplate and to which it could not apply”*. The answer was ‘no’. Lord Reid explained why:

*“... the cause of the delay was not any new state of things which the parties could not reasonably be thought to have foreseen. On the contrary, the possibility of enough labour and materials not being available was before their eyes and could have been the subject of special contractual stipulation.”*

Inserting a *force majeure* clause dealing with such foreseeable problems is precisely the kind of *“special contractual stipulation”* that English law expects the parties to agree. If they forget, then on their heads be it. Almost 250 years ago, in *Clarke v Watson* (1865) 18 CB (NS) 27 Erle CJ warned that *“every man is the master of the contract he chooses to make”* or, as the phrase came to be used later on, the parties are *“... the masters of their contractual fate”*: see *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd’s Rep 610. English commercial law upholds the principle of freedom of contract as fundamental, and that includes also the freedom of the parties to make *“unreasonable agreements”*: see *Transocean Drilling v Providence Resources* [2016] EWCA Civ 372.

MUR and RTI included a *force majeure* clause in their contract. The question was whether they had made an agreement that some might see as unreasonable but which should nevertheless be upheld, to the effect that MUR could suspend performance even though RTI is actually able to send the exact amount due under the contract on time? Or had they instead made an agreement that was more practical in nature, to the effect that, if the parties together could ‘overcome’ or resolve the *force majeure* event without any real detriment, then that is what they had to do?

In the Court of Appeal, Males LJ read the contract in this wider, more practical sense. He felt that the use of the word *“overcome”* did not inevitably mean that the contract had to be performed to the letter, in strict terms. Newey LJ agreed with this, finding that it was sufficient that the *force majeure* event could be *“overcome”* in a *“practical sense, such that all its adverse consequences would be avoided.”*

Arnold LJ dissented. He found that there was an underlying legal principle which precluded a party from having to accept non-contractual performance, and if the parties wanted to vary that underlying position, then they would have had to use very clear words. Clause 36 was not sufficiently clear to him. He gave an example illustrating how the notion that the parties simply had to find a way to *“overcome”* a *force majeure* even in practical terms could lead to the contract effectively being varied: suppose the goods could not be unloaded at the specified destination port because of a strike (*force majeure*), but they could be unloaded at another port that might be equidistant to the buyer’s ultimate destination for the goods. Could it be said that the seller could simply nominate a different destination on the basis that the buyer would be in the same position,

and the buyer would have to make new arrangements whether it wanted to or not? Arnold LJ thought not.

## The Supreme Court's decision: a point of principle

MUR was given permission to take the case to the Supreme Court. Counsel for MUR submitted that the majority of the Court of Appeal had fallen into error by mischaracterising an important point of general legal principle – namely, whether a party can ever be required to accept non-contractual performance – as a question of fact or a point of interpretation limited to the specific clause. The Supreme Court agreed with MUR that this was not a narrow issue of interpretation. Under English law, *force majeure* clauses will always be interpreted to apply only where the party seeking to rely on the clause can show that the event or state of affairs in question was (i) beyond its reasonable control; and (ii) could not be avoided by taking reasonable steps. If the force majeure does not say this, then a term to that effect will be implied. The leading contract law textbooks all interpret the authorities in this way. Judicial support can be found in cases such as the decision of the Court of Appeal in *B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419:

*“[I]t is clear that where an exception of strikes is invoked, then like all other exceptions it is subject to the principle that the party seeking to rely on it must show that the strike and its consequences could not have been avoided by taking steps which were reasonable in the particular circumstances: ... All these matters are really implicit in the words ‘force majeure,’ the heading of this clause. The situation and its consequences must be beyond the reasonable control of the party seeking to rely on the exceptions clause. In the present case the situation is still simpler, because what I have been referring to as being implied by law generally, is expressed in the opening words of the clause: ‘Every effort will be made to carry out any contract.’”*

Since the obligation to use reasonable endeavours or efforts is implied by law, the question of whether this obligation required a party to accept non-contractual performance was a point of principle, and not a narrow issue of interpretation.

## Four key points

Looking at considerations of principle in more detail, the Supreme Court identified four key points.

The first point of principle was the purpose of reasonable endeavours clauses, or implied obligations to use such endeavours, in the context of force majeure. The Supreme Court stressed that these obligations went to causation. A party is excused from performance by a force majeure event if the event causes the failure or inability to perform. The party's failure or inability to perform is not, however, caused by *force majeure* where the party could have continued to perform by using its reasonable efforts. In that case, the failure or inability to perform is actually caused by the party's inadequate response to the circumstances that have arisen. It follows from this that the relevant question (as Jacobs J had thought) was whether the reasonable endeavours could have enabled the continuation of the (same) contractual performance. Whether reasonable endeavours could have made some alternative mode of performance possible was irrelevant: the Supreme Court found that the “... *object of the reasonable endeavours proviso is to maintain contractual performance, not to substitute a different performance.*” Commenting on the facts, the Supreme Court held that making arrangements to perform in a non-contractual manner (paying in €Euros) could not enable the contract to be performed and it could not “overcome” the force majeure situation. The Supreme Court had no difficulty in reaching this view, noting that “*Put another way, it would be absurd to say that MUR caused the non-performance of the contract by failing to accept an offer of non-contractual performance.*”

The second point of principle was the fundamental importance of freedom of contract in English law. The Supreme Court cited the decision of the Privy Council in *Prime Sight Ltd v Lavarello* [2013] UKPC 22: “Parties are ordinarily free to contract on whatever terms they choose and the court’s role is to enforce them.” That freedom of contract included the freedom not to accept an offer of non-contractual performance.

The third point of principle was the maxim that ‘clear words are needed to forego valuable rights’. The first step was that MUR had the right to be paid in US\$, as is common in international trade, and so could refuse payment tendered in any other currency. That was a valuable right. RTI accepted this proposition, but said this right was still subject to the reasonable endeavours clause. The Supreme Court disagreed that MUR had agreed to give up its valuable right, noting that:

“... in principle a party should not be required to do so unless the contract makes clear (whether expressly or by necessary implication) that the party has given up that right. Indeed, one may regard it as a general principle of contractual interpretation that parties do not forego valuable rights without it being made clear that that was their intention.”

The submission that a party does not easily give up valuable rights under English law is often made based on the decision of the House of Lords in *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* [1974] AC 689. In that case, the question was whether a party had given up the common law right to an ‘abatement of the price’ by the terms of a construction contract. Abatement is a general right that allows a buyer to deduct, from the price it pays to the seller, the buyer’s cost of remedying defects in the goods or the works for which the seller is responsible, and which the seller refuses to remedy at its own cost and expense. The House of Lords held that this right was not displaced absent some clear wording in the contract. In *MUR v RTI*, the Supreme Court commented that:

“We do not think it greatly matters whether the applicable principle is that set out in *Gilbert-Ash* or an analogous principle applicable to valuable contractual rights. In the present case there can be no doubt that MUR had a contractual right to be paid freight in US dollars. It therefore had a contractual right to refuse to accept payment in any other currency. In our judgment, clear words would be necessary for MUR to be required to forego that valuable right, including making clear the circumstances in which that would be so required.”

After the Supreme Court’s decision in *MUR v RTI*, it would seem settled that the *Gilbert-Ash* principle does not just apply to rights that exist outside of the contract that is alleged to have removed or curtailed them, but also to ‘valuable rights’ that arise under that same contract. Where one clause gives a party an express right, and another provision appears to undermine or qualify it, the party seeking to rely on the contractual right unconditionally would be able to rely on this principle. Clear drafting and care is needed to ensure that there is no internal tension in the contract. This was a factor in MUR’s favour. By way of commentary, to reverse the position, the contract would have had to say something like ‘MUR has the right to be paid in US\$, but that right is subject to MUR having to accept payment in a different currency in the following circumstances ...’. The contract did not say that.

The fourth point of principle was the importance of certainty in commercial contracts. The Supreme Court echoed the sentiment that it had itself stated only last year, in *JTI Polska v Jakubowski* [2023] UKSC 19:

“Certainty and predictability are of particular importance in the context of English commercial law, all the more so given the frequent choice of English law as the governing law in international

*commercial transactions.”*

This principle goes back 250 years, to the decision of Lord Mansfield in *Vallejo v Wheeler* (1774) 1 Cowp 143. In that case, a vessel had been chartered to carry goods from London to Seville, due only to stop at a port in Cornwall to take on provisions. The captain deviated from the voyage. Before going to Cornwall, he went to Guernsey to load brandy and wine. This was a smuggling operation solely for his benefit, and perhaps that of some accomplices among the crew. Having taken on the smuggled cargo, the ship was on her way to Cornwall to continue as planned when she sprung a leak. She made it as far as Dartmouth for repairs, and then set sail again for Cornwall. However, the vessel suffered further damage en route and was declared completely unseaworthy upon arrival at Cornwall, with the goods meant for Seville having been “*much damaged*”. The question was whether the losses were covered by an insurance policy which provided coverage in the event of “*barratry*” by the master of the ship. Lord Mansfield noted that, at the time, the concept of “*barratry*” had not been sufficiently considered judicially, stating that:

*“In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon.”*

Lord Mansfield noted that the Italians, the first great traders of the modern world, had given the English the word – it came from “*barratere*”, meaning to cheat. His Lordship went on to find that, as used in the policy, the concept covered any intentional deviation from the agreed voyage, and it did not matter that the loss of the ship occurred *after* the clandestine stopover in Guernsey, when the ship was trying to continue the agreed voyage, it was still the result of *barratry*.

Returning to MUR and RTI after that detour, the Supreme Court noted that RTI’s case gave rise to considerable uncertainty, since it involved inquiries, first, into whether the non-contractual performance would give rise to any detriment or prejudice, and second, whether it would have the same result as the contractual performance.

Considering whether there was detriment itself gave rise to numerous questions. What would count as detriment? Only the immediate consequences of accepting the offer of non-contractual performance (such as banking charges)? Or also some other consequential loss that might only happen further down the line? If the party offering the non-contractual performance offers to bear such additional costs, how and in what form does it have to undertake to do this – though a separate contract? The Supreme Court noted that establishing consequential detriment would likely require a retrospective investigation of events, which might be time-consuming and costly. It might also lead to disagreements between the parties, leading to arbitration or litigation.

As regards the second enquiry, RTI said that the alternative performance offered would have to meet the contractual purpose. To test this, that contractual purpose would have to be identified first, and next it would have to be determined whether the proposed alternative satisfied it. Would the performance have to be completely equivalent, or could there be a reasonable margin of difference – *de minimis*, or more? This approach did not offer the required certainty, since:

*“All of these questions arise in the context of a clause which requires immediate judgments to be made. Parties need to know with reasonable confidence whether or not a force majeure clause can be relied upon at the relevant time, not after some retrospective inquiry.”*

By now, readers may think that the Supreme Court adopted a technical view, and not one that business people would favour. Counsel for RTI made that point before the Supreme Court, and in

the Court of Appeal below, Males LJ had said quite starkly that “*On the facts of this case, MUR’s position has no merit*”. The Supreme Court clearly disagreed, holding that:

“*With respect, we consider that statement, and the dichotomy in this context between reasonableness and certainty, to be misplaced. It is not in dispute that “reasonable efforts” import some degree of uncertainty. But for that concept to be allowed to ride rough-shod over the required contractual performance would be to introduce unwarranted uncertainty and would thereby, it might be said, undermine the expectations of reasonable business people. It is not unmeritorious or unjust to insist on contractual performance, all the more so if being precluded from doing so would introduce uncertainty contrary to the expectations of reasonable business people.*”

## A review of some of the authorities

The Supreme Court also reviewed the authorities relied on by the parties, which serve to illustrate the approach that English law takes to interpreting and enforcing contracts when performance has become onerous or difficult.

The first, marshalled by MUR in support of its position, was *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1963] AC 691. Workers at the port of Vancouver had gone on strike, taking certain grain elevators out of operation. This caused delay under a charterparty. Charterers had ordered that the ship load a full cargo of wheat at Vancouver. That proved impossible for a considerable period of time because of the strike, and the ship ended up stuck in Vancouver. The charters claimed an ‘exception’ had arisen under the charterparty (the equivalent of *force majeure*) and said they did not have to pay the shipowners for this downtime. The shipowners disagreed and claimed demurrage by way of compensation. They pointed out that the charterers had a contractual option to load a different cargo, a third of wheat, a third of flour and a third of barley, and (as was common ground) that cargo could have been loaded notwithstanding the strikes. The shipowners thus argued that the charterers should have exercised this option to overcome the strike, and the ship could have sailed loaded with a cargo of one-third each. But since the charterers insisted on a full cargo of wheat, they ought to pay for the cost of the ship being detained in Vancouver for the duration of the strike.

The House of Lords disagreed. True, there was an option in the contract, but there was no duty to exercise it. The exceptions clause covered delay in the shipping of wheat, and the charterers did not lose that protection by having to exercise their option to take some other cargo that was not affected by the delays. The contract gave the charterers a true and unfettered option to choose their cargo. In exercising (or not) that option, the charterers were under no duty to consider the interest or convenience of the counterparty. The Supreme Court noted that this decision supported MUR, since there was no suggestion that the outcome would have been any different if it had been found that loading the alternative cargo of wheat, barley and flour was reasonable in the circumstances. The option, a specific mode of contractual performance, was for the benefit of one party only.

This case can be contrasted with the decision in *Seadrill Ghana Operations v Tullow Ghana* [2018] EWHC 1640. This concerned a contract for the hire of an expensive oil drilling rig costing of the order of US\$ 600,000 a day. The contract envisaged that the rig would be deployed in oilfields offshore Ghana. It contained a *force majeure* provision, with the relevant qualifying events including any drilling moratorium imposed by the Government of Ghana. A dispute arose between Ghana and Cote d’Ivoire, as regards the precise location of the offshore boundary between the two states. This was referred to an inter-state arbitral tribunal established pursuant to the UN Convention of the Law of the Sea. The tribunal ordered that drilling in a contested area had to cease pending the

determination of the dispute, which led to a drilling moratorium imposed by Ghana in order to abide with the tribunal's ruling. The oil company claimed *force majeure* because the moratorium prevented drilling in the field that was next-in-line. The rig owner however pointed to a clause in the contract pursuant to which the oil company, it said, had a duty to give instructions for the rig to drill in another field in the contract area. Problems with potentially drilling in that other field were because the government of Ghana had not yet approved a drilling programme for that other field, but this lack of programme approval (as opposed to a full moratorium) was not a *force majeure* event under the contract.

All this was happening against the background of a significant fall in the going market rate for drilling rigs. There was at least a suggestion that the oil company was keen to use any lack of work for the rig due to extraneous factors to set up a force majeure argument, which (if the situation persisted long enough) would allow the oil company to terminate and get out of the expensive contract. The force majeure provision in the contract required the parties to use their reasonable endeavours to circumvent any force majeure event. The judge found that the drilling moratorium was not the cause of the oil company being unable to give out any instructions for the rig to carry out any work in the contract area, but he went on to find, in the alternative, that the oil company had also failed to establish that it had used its reasonable endeavours to overcome any such event (had there been one). The obligation in the contract, a term hire agreement, was to issue a drilling programme for work in the contract area. It was certainly open to the oil company to consider its own commercial interests in this regard, but it could not entirely ignore the rig owner's interests, decline to employ the rig purely because of the oil company own's commercial preferences (or a desire for a cheaper rig), and then plead force majeure. On the facts, the evidence showed that there was some available work that could reasonably have been instructed – and if there had not been, no doubt a standby-by rate would have applied for such time as the rig was left unoccupied.

The Supreme Court noted that this contract did not contain a precise option as in the *Vancouver Strikes* case:

*“... where there is a business option and the method of performance chosen by the option holder becomes impossible to perform the holder of the option is not bound to perform in any other way. However, in this case the defendant had an obligation to provide drilling instructions which could be performed in a number of ways; if one way became impossible then the obligation was to give instructions which could be performed in another way. The defendant was not entitled to act purely in its own commercial interests and to ignore those of the claimant. Teare J cited and applied the words of Lord Devlin in Vancouver Strikes set out at para 72 above: “the consequence of damming one channel is simply that the flow of duty is diverted into the others and the freedom of choice is restricted.”*

The final case is that of *Payzu Ltd v Saunders* [1919] 2 KB 581. The defendants had agreed to sell silk to the claimants. The terms of the contract were that the silk would be delivered in instalments with payments at a fixed price to be made following arrival of the goods, on the 20th day of the month following delivery. The first order of silk was shipped but the money did not arrive. The buyers said they had sent a cheque, but this was apparently lost in the post, and a second cheque was delayed. The buyers then placed another order, but the sellers refused to send any more instalments without cash up front. The buyers did not want to do that, and the matter became litigious. Requiring payment up front was inconsistent with the contract. The Court of Appeal held that the sellers were in repudiatory breach by declining to perform the contract as agreed and insisting on a variation. However, the buyers were under a duty to take reasonable steps to mitigate their losses. They could have had the silk they needed at the price they agreed to pay for it from the sellers, by taking up the seller's offer to supply against hard cash. The Court of Appeal held that the

buyers had acted unreasonably by declining to deal with the contract-breaker on the new terms offered, and reduced damages to £50 – comprising a small amount for business inconvenience, and the buyer’s additional financing costs that would have been incurred if they had paid up front.

RTI relied on *Payzu v Saunders* as establishing that a failure to accept equivalent (or near-equivalent) performance can be unreasonable. The Supreme Court confirmed that *Payzu v Saunders* was limited only to the principle of mitigation of loss:

*“... we firmly reject the submission of counsel for RTI that the Payzu decision on mitigation is analogous to the situation with which we are concerned. Mitigation is concerned with the remedy of damages once breach has been established. It has little if anything to do with the prior question, with which we are dealing, of whether there has been a breach of the primary obligations under the contract. Put another way, the legal principles and policies applicable to the assessment of (unliquidated) damages are not the same as those applicable to determining what is the performance required under the contract.”*

There was, therefore, no general obligation to act reasonably or accept some other tendered performance as RTI had suggested.

### Conclusion

It is sometimes said that hard cases make bad law. The Supreme Court was faced with a situation where the contract could, it is suggested, very easily have been performed despite a *force majeure* event. What does it matter that the contractual payment exists as €Euros for a split second while the electronic transfer is completed, when it immediately converts into US\$ on receipt and without further action or cost. However, if a duty to take reasonable steps to overcome *force majeure* events had been found to require the acceptance of something other than the contractual performance as specified to the letter, that would open the flood gates. Perhaps in the next case, a seller would say that while a particular component for the goods to be supplied could no longer be obtained due to some force majeure event affecting supply, it had changed the specification and could supply a new product with a different component that was ‘just as good’ – but not the one that the buyer had agreed to purchase! The enquiries necessary to work out what would and would not be reasonable in a force majeure event are too onerous and time consuming, and, as the Supreme Court has explained, would undermine the fundamental principle of certainty in commercial contracts.

If you have not yet ordered that hard-to-get Christmas present, it is best to do it now straight after reading this article. The forgetful parent’s position has been very significantly worsened by *RTI v MUR*.