

# Certainty v Pragmatism

MUR Shipping BV v RTI Ltd  
[2022] EWCA 1406

James Leabeater KC  
23 April 2024



# MUR Shipping BV v RTI Ltd: facts

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(c) Lloyd's List



# MUR Shipping: Force Majeure Clause

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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...any rules or regulations of governments or any interference or acts or directions of governments, ....restrictions on monetary transfers and exchanges;
- (d) It cannot be overcome by reasonable endeavors from the Party affected.



# MUR Shipping: should have accepted Euros?

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- LMAA Tribunal: Jeremy Russell KC, Mark Hamsher and Sarra Kay: yes
- Commercial Court: Jacobs J: no
  - [2022] EWHC 467 (Comm); [2022] 2 Lloyd's Rep. 297
- Court of Appeal: Males and Newey LJ: yes; Arnold LJ no
  - [2022] EWCA Civ 1406; [2023] 1 Lloyd's Rep. 463
- Supreme Court: Lord Hodge, Lord Lloyd-Jones, Lord Hamblen, Lord Burrows and Lord Richards: argument 6-7 March 2024, judgment awaited



# Commentary

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- "Overcoming Force Majeure by Reasonable Endeavours": Edwin Peel, [2023] LMCLQ 178:

At no point did Males LJ's close attention to the question of interpretation really address Jacobs J's concern that, if the party affected by the force majeure event can be required not to insist on its strict contractual rights in an attempt to overcome it, some uncertainty has been introduced, which is best avoided in commercial transactions, especially where the issue is whether or not a force majeure clause can be invoked

- "When uncertainty is not enough". Jim Leighton, Lloyd's Shipping and Trade Law, December 2022:

...the decision in the present case undermines the certainty on which parties can reliably make commercial decisions about any future performance of a contract, when their counterparty becomes mired by problems related to sanctions.



# Presumptions

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“Although the court may not dictate to the parties what their bargain should be, in many areas of the law prima facie presumptions have evolved about the meaning or effect of particular provisions. The usefulness of these presumptions is the promotion of commercial certainty, and thus contracts will usually be interpreted in the light of these presumptions. However, a prima facie presumption may be rebutted on a consideration of the contract as a whole and the circumstances in which it was made.”

Lewison, Interpretation of Contracts, 8<sup>th</sup> edition, ch.2, section 9



# Overarching theory

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(1) The contract must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean.

(2) The court must consider the contract as a whole and, depending on the nature, formality and quality of its drafting, give more or less weight to elements of the wider context in reaching its view as to its objective meaning.

(3) Interpretation is a unitary exercise which involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its implications and consequences are investigated.

Sara & Hossein Asset Holdings v Blacks Outdoor Retail Ltd [2023] UKSC 2; [2023] 1 W.L.R. 575 per Lord Hamblen at [29]



# Presumptions/canons of construction

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- Standard contract wordings

"Where a contract has been professionally drawn... the draftsman is certain to have in mind decisions of the Courts on earlier editions of the clause. Such decisions are part of the context or background circumstances against which the particular contract falls to be construed...."

"The Kleovoulos of Rhodes" [2003] 1 Lloyd's Rep 138, 145 per Clarke LJ.

- Common sense

- Eg: constructing the document as a whole, preferring specifically negotiated or specific terms to standard or general terms



# Presumptions/canons of construction

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- Good writing

“many of them are general rules of composition which any writer seeking clarity of expression is likely to follow, such as *expressio unius exclusio alterius*, *eiusdem generis* and *noscitur a sociis* though, unlike lawyers, he does not express them in the arcane obscurity of the Latin tongue.”

Prestcold (Central) Ltd v Minister of Labour [1969] 1 W.L.R. 89, 97 per Lord Diplock



# Presumptions from knowledge of law

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- “the preponderance of authority is to the effect that the parties must be taken to know established principles of English law.” Lewison on the Interpretation of Contracts, [4.44]
- The presumption that a Court should give a legal term of act its technical legal meaning may be displaced in a contract intended to have extra-territorial effect: Lewison [5.75].

“...where a word or phrase which is a ‘term of art’ is used by an author who is not a lawyer, particularly in a document which he does not anticipate may have to be construed by a lawyer, he may have meant by it something different from its meaning when used by a lawyer as a term of art.”

Sydall v Castings Ltd [1967] 1 QB 302, 314 per Diplock LJ



# Certainty v ossification

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- Wuhan Guoyu Logistics v Emporiki [2014] 1 Lloyd's Rep. 266, Longmore LJ:
  - The only assistance which the courts can give in practice is to say that, while everything must in the end depend on the words actually used by the parties, there is nevertheless a presumption that, if certain elements are present in the document, the document will be construed in one way or the other.
- Shanghai Shipyard Co Ltd v Reignwood [2021] 1 W.L.R. 5408, Popplewell LJ:
  - “What this illustrates is that in the present context there ought to be no room for a priori preconceptions or assumptions about the nature of the instrument to be derived from the identity of the guarantor. What matters is the wording in which the parties have chosen to express their bargain, interpreted in accordance with the well- established rules of construction.”



# Gravelor Shipping v GTLK Asia M5 [2023] 2 Lloyd's Rep 239

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- BBC included provision:

"Where a payment under this Charterparty is incapable of being processed by the relevant banking institution and has not been received by the Owner on the due date by virtue of the Owner becoming a Sanctions Target, the Owner and the Charterer shall cooperate and promptly take all necessary steps in order for the payments to be resumed."

- Foxton J:

90. While the facts are different MUR Shipping does, however, demonstrate that clauses in contracts which are intended to address extraneous circumstances which render performance in the manner originally anticipated impossible, while keeping the relevant obligations alive as a matter of substance, or in "a ... practical sense", may well involve one party accepting performance otherwise than "in strict accordance with its terms" ...

92. Against that background, I am satisfied that the expression "all necessary steps" in clause 8.10 extends, as a matter of construction, to requiring the owners to nominate an alternative bank account into which the required payment can be made, even if the owners would be restricted in their ability to access and use those funds following such payment.



# Conclusion

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- The integration of presumptions, particularly those relying on legal knowledge, into the general theory of contractual interpretation is unclear
- *Mur Shipping v RTI*: what do you think?
- Thank you for listening

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