

## REASONABLE ENDEAVOURS IN INTERPRETING FORCE MAJEURE CLAUSES

*RTI Ltd v MUR Shipping BV*

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If a contracting party cannot pay in US dollars, can they pay the equivalent in Euros? Set against the backdrop of *force majeure*, the conclusion reached by the UK Supreme Court in *RTI Ltd v MUR Shipping BV* was, perhaps surprisingly, no. The court held that reasonable endeavours provisos in *force majeure* clauses can never require a party to accept non-contractual performance (*ie*, performance on different terms from the contract). This comment has two aims. First, it explains why the holding should be reconsidered, and in so doing sets out a preferable approach to interpreting reasonable endeavours provisos in *force majeure* clauses. Second, it makes suggestions on the approach to interpreting *force majeure* clauses more generally. In this regard, references and observations will also be made on the position in Singapore.

### I. INTRODUCTION

This comment concerns the decision of the UK Supreme Court (the “Supreme Court”) in *RTI Ltd v MUR Shipping BV*<sup>1</sup> (“*RTI Ltd*”). The case concerned the interpretation of reasonable endeavours provisos in force majeure clauses. In broad terms, such provisos serve to limit the exercise of force majeure clauses, in order to safeguard the sanctity of contract. In short, the court held that such provisos could never require a party to accept any form of non-contractual performance (*ie*, performance on different terms from the contract).

Although *RTI Ltd* has already been subjected to extensive commentary,<sup>2</sup> this comment makes additional novel points and is structured as follows. Part II sets

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<sup>1</sup> *RTI Ltd v MUR Shipping BV* [2025] AC 675 [*RTI Ltd*].

<sup>2</sup> See, *eg*, William Day and David Foxtan, “Gold, Banking Cents and MUR” (2025) 141 LQR 13; Hetty de Rooij and Ewan McKendrick, “Force Majeure Clauses and the Acceptance of Non-Contractual Performance” [2025] LMCLQ 1; Miriam Goldby, “Force Majeure in the Supreme Court: *MUR Shipping BV v RTI Ltd* [2024] UKSC 18” (2024) 44(4) LS 748; Christopher Hose, “You Get What You Pay For: Reasonable Endeavours and Force Majeure” (2024) 83(3) CLJ 433; Alexandra Kosta-Foti, “Money, Currency and Contracts: An Alternative View of *RTI Ltd v MUR Shipping BV*” (2024) 35(3) KLJ 477;

out the decision. Part III has two goals. First, it suggests that the Supreme Court's decision is worth reconsidering. It will be shown that the decision was based around a flawed premise, not explicitly considered in the decision itself. Second, and for that reason, a preferable approach to the interpretation of *force majeure* will be suggested. Part IV makes certain suggestions on the interpretation of *force majeure* clauses more generally. In this regard, references and observations will also be made on the position in Singapore. In particular, it will be suggested that part of the Singapore Court of Appeal's seminal decision in *Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd*<sup>3</sup> ("*Holcim*") may deserve review. Part V concludes.

## II. THE DECISION

The relevant facts are helpfully straightforward. RTI Ltd ("*RTI*"), the charterer, and MUR Shipping BV ("*MUR*"), the shipowner, entered into a contract for the monthly carriage of bauxite from July 2016 to June 2018.<sup>4</sup> For present purposes, the contract contained two material clauses. The first was that payment was to be made in US dollars.<sup>5</sup> The second is the *force majeure* clause, which included a proviso defining a force majeure event as one which (among other things) could not be "overcome by reasonable endeavours from the Party affected".<sup>6</sup>

In April 2018 (before performance was complete), RTI's parent company was sanctioned by the US. These sanctions had the same effect on RTI.<sup>7</sup> Possibly wanting to suspend the contract for commercial reasons and sensing a good opportunity to do so, MUR sent a *force majeure* notice to RTI.<sup>8</sup> MUR claimed that due to the sanctions, RTI would be unable to make payment in US dollars.<sup>9</sup>

RTI rejected the notice.<sup>10</sup> Instead, RTI offered to pay in Euros, and bear any additional costs or exchange rate losses suffered in converting Euros to US dollars.<sup>11</sup> MUR rejected this offer, insisting that it was entitled to rely on the clause.<sup>12</sup> Later, MUR suspended performance; RTI sued. The critical issue was whether MUR's failure to accept RTI's offer was in breach of the reasonable endeavours proviso. If so, MUR could not rely on the *force majeure* clause.

The Supreme Court held that MUR need not have accepted RTI's offer. Preliminarily, the court observed that a reasonable endeavours proviso was a "very common feature"<sup>13</sup> of a force majeure clause. Two conclusions "followed"<sup>14</sup> from

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Paul MacMahon, "The Costs of Contractual Certainty: *RTI v MUR Shipping*" (2024) 88(2) MLR 404; Adam Shaw-Mellors, "'Reasonable Endeavours' Obligations in Force Majeure Clauses" (2024) 7 JBL 570.

<sup>3</sup> *Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd and another application* [2011] 2 SLR 106 [*Holcim*].

<sup>4</sup> *RTI Ltd*, *supra* note 1 at [3].

<sup>5</sup> *Ibid* at [3].

<sup>6</sup> *Ibid* at [4].

<sup>7</sup> *Ibid* at [5].

<sup>8</sup> *Ibid* at [6].

<sup>9</sup> *Ibid*.

<sup>10</sup> *Ibid* at [7].

<sup>11</sup> *Ibid*.

<sup>12</sup> *Ibid*.

<sup>13</sup> *Ibid* at [26].

<sup>14</sup> *Ibid* at [29].

this. First, if the proviso was not express, it would have been implied into the clause.<sup>15</sup> In saying this, the court accepted MUR's argument that:<sup>16</sup>

...reasonable endeavours are implicit because they go to causation. The essence of force majeure is that parties are excused when their failure to perform is caused by extraneous impediments.

Second, the court considered that the word "overcome" in the present case had "no particular significance" and was "equivalent" to the other words like "avoid", "negate", "neutralise", "defeat", "prevent", or "remove".<sup>17</sup>

On the main issue, the court reasoned that absent clear wording, a reasonable endeavours proviso did not require the affected party to accept an offer of non-contractual performance even if it involved no detriment and achieved the same result as performance of the contractual obligation.<sup>18</sup> According to the court, this conclusion was supported by the authorities, and the following four points of principle:

- (a) The object of the *force majeure* clause was to maintain, and not substitute, contractual performance;<sup>19</sup>
- (b) The "principle of freedom to contract included freedom not to contract, which in turn included freedom not to accept an offer of non-contractual performance of a contract";<sup>20</sup>
- (c) A party "should not be required to forego valuable contractual rights" unless that intention was expressly or impliedly clear from the contract;<sup>21</sup> and
- (d) A requirement to accept non-contractual performance provided it involved no detriment and achieved the same result as performance of the contractual obligation would give rise to too much uncertainty.<sup>22</sup>

### III. INTERPRETING REASONABLE ENDEAVOURS PROVISOS IN *FORCE MAJEURE* CLAUSES

#### A. Analysis

From a practical perspective, the conclusion of the Supreme Court may be unintuitive because the court declined to provide a straightforward remedy on the facts of the case. Since RTI was prepared to make exact payment, it is difficult to understand why the contract should be affected in any way just because a different currency was to be used.

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<sup>15</sup> *Ibid* at [26], [29].

<sup>16</sup> *Ibid* at 679; accepted at [36].

<sup>17</sup> *Ibid* at [29].

<sup>18</sup> *Ibid* at [102].

<sup>19</sup> *Ibid* at [36]–[38].

<sup>20</sup> *Ibid* at [41]–[42].

<sup>21</sup> *Ibid* at [43]–[46].

<sup>22</sup> *Ibid* at [47]–[59].

As a matter of law, the reasons provided by the Supreme Court are similarly open to criticism.<sup>23</sup> The first reason was that the object of the *force majeure* clause was to maintain, and not substitute, contractual performance. However, the effect of *force majeure* clauses is usually rather severe: they usually serve to either suspend or end contractual performance altogether. To that end, it is entirely possible that some non-contractual performance would prove the lesser of two evils, which better gives effect to the sanctity of the contract in light of exceptional circumstances.

The second reason, that of freedom to contract, ignores that parties *are* in a contract. They had expressly agreed to the reasonable endeavours proviso. Although what reasonable endeavours entail necessarily involves some balancing, in the present instance the balance is arguably incorrectly struck: the result reached reduces the term to a nullity.

The third reason was that the parties should not be required to forego valuable contractual rights unless that intention was explicitly or impliedly clear from the contract. However, the difficulty is that payment being made in US dollars does not appear to be a valuable contractual right.<sup>24</sup> Notably, it was a finding of fact that no detriment would be suffered by MUR by accepting payment in Euros.<sup>25</sup> In fact, MUR had previously accepted payment in Euros on multiple occasions.<sup>26</sup> Further, the decision means that RTI would have to give up its own right, specifically that of having the reasonable endeavours proviso, and indeed the other parts of the contract, adhered to.

The final reason, perhaps the most defensible, was that too much uncertainty would be caused if there were a requirement to accept non-contractual performance. As the court observed, when potential issues of *force majeure* arise, parties generally want to know their rights and obligations in such urgent and serious circumstances so as to know what to do next.<sup>27</sup> In such circumstances, a mandated acceptance of certain non-contractual performance gives rise to uncertainty (in particular what kind of non-contractual performances are reasonable).<sup>28</sup> This difficult question did not arise in this case since money is fungible, but the broader rule would cause problems in more difficult cases.

But the force of this point is considerably diminished because it was the parties who had expressly decided to incorporate the reasonable endeavours proviso. Such a proviso, which does not define what is reasonable, necessarily imports some uncertainty. There is nothing wrong with this: given the breadth of *force majeure* events,

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<sup>23</sup> Some commentators have suggested alternative justifications for the decision. One possibility was that the outcome may have been “a product of what was not argued in the arbitration and the limits to what could be pursued within the narrow procedural confines of an appeal on a point of law under s.69 of the Arbitration Act 1996, rather than any contractual epiphany” (Day and Foxton, *supra* note 2 at 16). This is a difficult conclusion to reach, since the issue went entirely without reference in the Supreme Court’s decision.

<sup>24</sup> There are forceful arguments which go further to suggest that, as a matter of law, payment did not necessarily have to be in US Dollars (Day and Foxton, *supra* note 2 at 14–16; Kosta-Foti, *supra* note 2 at 477–78, 486–88).

<sup>25</sup> MacMahon, *supra* note 2 at 408.

<sup>26</sup> *Ibid* at 407.

<sup>27</sup> *RTI Ltd*, *supra* note 1 at [55]. Parties generally define a qualifying *force majeure* event more specifically and there is no need for the effects of the supervening event to be fundamental or radical. *Cf* the doctrine of frustration.

<sup>28</sup> *Ibid* at [54].

and particularly because the specific nature and consequences of any *force majeure* event remain unforeseeable, parties cannot specifically set out what they intend to do in every single case. But the question remains: how much uncertainty is too much?

The answer, the Supreme Court tells us, is as little as possible. By casting a blanket rule that an offer of non-contractual performance does not need to be accepted, *RTI Ltd* strongly limits the uncertainty generated by a reasonable endeavours proviso in a *force majeure* clause.

### B. *The Hidden Issue*

These observations on the decision, already broadly made elsewhere,<sup>29</sup> do not necessarily justify a reconsideration of the decision. It may be said that in being forced between two competing principles, the court was forced to choose between one of two evils.

It is argued, however, that this was not such a case. Where the court may have gone wrong is in the anterior premise, deeply entrenched in English law,<sup>30</sup> that parties are required to exercise reasonable endeavours before invoking the *force majeure* clause. However, it is suggested that it is not necessary for the term to be implied.<sup>31</sup> There was certainly no such justification in *Bulman & Dickson v Fenwick and Co*<sup>32</sup> (“*Bulman*”), a 19th century case of the English Court of Appeal that appears to be the genesis of the rule. In that case, cargo on a ship could not be unloaded due to strikes by workmen. The shipowners sued for demurrage. The charterers sought to avail themselves under the exclusion clause in the charterparty.<sup>33</sup> In a decision totalling less than a page, Lord Esher MR (delivering the only substantive judgment) held that:<sup>34</sup>

...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.

Since the parties had agreed that a strike affecting the unloading of cargo, *ipso facto*, allowed the charterers to escape liability, it is not clear why more should be read into the term.

<sup>29</sup> See, eg, MacMahon, *supra* note 2 at 409 ff; Kosta-Foti, *supra* note 2 at 490–493.

<sup>30</sup> The Supreme Court cited a number of leading commentaries and cases to that effect: *RTI Ltd*, *supra* note 1 at [27]–[28].

<sup>31</sup> As is the usual test: *Liverpool City Council v Irwin* [1977] AC 239 at 266. The element is not essential to a *force majeure* clause: see text accompanying footnote 57 below.

<sup>32</sup> *Bulman & Dickson v Fenwick and Co* [1894] 1 QB 179 [*Bulman*].

<sup>33</sup> The clause does not feature in the report, but it appears that no reasonable endeavours proviso was included: see the Court of Appeal judgment at *MUR Shipping BV v RTI Ltd* [2023] 1 All ER (Comm) 501 at [61]. The finding of the majority of the Court of Appeal (at [61]–[62]) that the authorities relied on by MUR were not relevant is therefore to be preferred. *Cf* the Supreme Court’s approach: see *RTI Ltd*, *supra* note 1 at [60]–[75].

<sup>34</sup> *Bulman*, *supra* note 32 at 185.

Why the court may have viewed the issue this way is because of a misunderstanding of the requirement of causation. It is correct that a *force majeure* event must have a causal link to the breach of contract: if the *force majeure* clause refers generally to “wars”, for example, a war occurring on the other side of the world which has no effect on the parties surely is not caught by the clause. However, assuming this basic threshold is satisfied, a breach may then be said to have *two* main causes. The first is the *force majeure* event itself, but the second is the failure of the party in breach to prevent the effects of the *force majeure* event from affecting performance. Which should be taken as the proximate cause?

English law appears to assume that the failure of the party in breach, *prima facie*, remains the proximate cause. On this basis, just as for all other events which disrupt performance,<sup>35</sup> the party in breach cannot merely point to the occurrence of the *force majeure* event to excuse their non-performance. They have to show something more. They have to, in essence, show that they exercised reasonable endeavours: this explains why such provisos are implied, even if absent.

But that proposition incorrectly assumes that the party in breach owes a duty to step in. Such a duty cannot be found on the express words chosen by the parties, and would go against the purpose of a *force majeure* clause, to limit liability in view of circumstances outside the control of one or both parties.<sup>36</sup> If the parties wanted the breaching party to be liable, they could have done without the clause (thus leaving only the doctrine of frustration to rescue the contract breaker), or explicitly added a clause stating that the breaching party would be so liable.

*RTI Ltd* may therefore be viewed as a byproduct of the wrong turn taken in *Bulman*. Although its holding may be defensible today under the rule that a term may be implied by custom or usage,<sup>37</sup> it is suggested that the better view is that this line of authority is problematic. It is similarly problematic that the Supreme Court appears to have concluded that a party should necessarily be taken to be the proximate cause of non-performance even where a qualifying *force majeure* event exists. At the very least, the issue should have been ventilated more substantively.

The better approach is this. If the parties had included the proviso, then the court should give effect to it even as there is uncertainty, since the parties had opted for it themselves.<sup>38</sup> If the proviso is not included, then it may be said that the parties had chosen certainty. The *force majeure* clause may be invoked as long as its other conditions are satisfied.

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<sup>35</sup> A party is generally liable for breach of contract, whatever the reason: see, *eg*, Edwin Peel, *Frustration and Force Majeure*, 4d ed (United Kingdom: Sweet & Maxwell, 2022) at [1-003].

<sup>36</sup> See, albeit a case on tort, *Stovin v Wise* [1996] AC 923 at 930 (“There must be some special justification for imposing an obligation [to require a person, who is doing nothing, to take positive action to protect others from harm for which he was not responsible, and to hold him liable in damages if he fails to do so]. Compulsory altruism needs more justification than an obligation not to create dangers to others when acting for one’s own purposes.”).

<sup>37</sup> See further EG McKendrick, “Implied Terms”, in Hugh G. Beale, gen ed, *Chitty on Contracts*, 35th ed (United Kingdom: Sweet & Maxwell, 2024), ch 17 at [17-036]–[17-038].

<sup>38</sup> *Contra RTI Ltd* with the *Haviltex* case in Dutch law (ECLI:NL:HR:1981:AG4158), as noted in de Rooij and McKendrick, *supra* note 2 at 3–4. Although a case from a civilian system, the inquiry remains very much objective and is therefore relevant to common law systems.

In principle, and on that basis, a reasonable endeavours proviso may require the acceptance of a reasonable offer for non-contractual performance. There is in fact English authority for this point, not considered by the Supreme Court. In *Bremer Handelsgesellschaft M.B.H. v Continental Grain Co*,<sup>39</sup> the parties contracted for the monthly sale of soya bean meal. Later, due to a trade embargo, the sellers informed the buyers that they could only fulfil 40% of the agreed quantity. They sought to rely on the *force majeure* clause to excuse liability. The English Court of Appeal held that this was, in principle, possible.<sup>40</sup> Although no offer appears to have been expressly made, it follows from the court's conclusion that the buyers would have had to accept non-contractual performance (in the form of the reduced quantity of goods) in light of the *force majeure* clause.

To similar effect is the local decision of *Holcim*.<sup>41</sup> There, a supplier was to supply ready-mixed concrete ("RMC") to a buyer. To manufacture RMC, the supplier required concreting sand. However, due to a sand ban imposed by the Indonesian government, the supplier did not have enough concreting sand. At one point, the buyer (who became aware of this) offered to supply *manufactured* sand to the supplier at a cost. This, in effect, would amount to non-contractual performance since it would vary the contract between the parties. The supplier rejected this offer. They later sought to rely on the *force majeure* clause when the buyer sued for damages. The clause stated, among others:<sup>42</sup>

...The Supplier shall be under no obligation to supply the concrete if the said supply has been *disrupted* by virtue of inclement weather, strikes, labour disputes, machinery breakdowns, riots, and *shortage of material* [, acts] of God or any other factors *arising through circumstances beyond the control of the Supplier*. [emphasis by the Court of Appeal in *Holcim*]

The court interpreted the "beyond the control" element to mean that the supplier was required to take at least some reasonable steps to avoid the event,<sup>43</sup> but more importantly held that:<sup>44</sup>

In our view, if manufactured sand had been a viable alternative to concreting sand available to the Appellant for use in the manufacture of RMC, and there was no good or justifiable reason why the [supplier] did not accept the [buyer's] offer to supply this viable alternative, it cannot be said that the [supplier] had taken reasonable steps to avoid the operation of cl 3.

<sup>39</sup> *Bremer Handelsgesellschaft M.B.H. v Continental Grain Co* [1983] 1 Lloyd's Rep 269 [*Continental Grain*]. I am grateful to Professor Mindy Chen-Wishart for this point.

<sup>40</sup> *Ibid* at 291–2. Although the seller's defence failed on the facts of the case. Cf *J Lauritzen AS v Wijsmuller BV, The Super Servant Two* [1990] 1 Lloyd's Rep 1.

<sup>41</sup> *Holcim*, *supra* note 3. The case was in fact cited in argument in *RTI Ltd*, *supra* note 1 at 685, but did not appear in the judgment.

<sup>42</sup> *Holcim*, *supra* note 3 at [4].

<sup>43</sup> *Ibid* at [44]. The correctness of this conclusion is doubted below at the text accompanying footnotes 58 and 59.

<sup>44</sup> *Ibid* at [91].

### C. A Suggested Test for Reasonable Endeavours Provisos

A better approach to determine if reasonable endeavours have been exercised, where such provisos are included, is one that is sensitive to the words of the parties yet respecting the demand of certainty in *force majeure* circumstances. A fact-specific inquiry should be conducted, under which at least four points are relevant. Three are set out briefly:

- (a) The first relates to the wording of the reasonable endeavours proviso itself.<sup>45</sup> Instead of “reasonable endeavours”, parties might go further to agree to exercise “all reasonable endeavours” or “best endeavours”. There should be some differing standards depending on the words chosen.
- (b) The second point is the seriousness of the effect of the *force majeure* event on parties’ ability to fulfil their obligations. Specifically, if the event completely affects performance such that no amount of reasonable endeavours would suffice, then parties should generally not be faulted if no effort was spared, since such efforts would be meaningless.<sup>46</sup> This may be compared to a situation where some greater, but still reasonable, effort could prevent the adverse effect.
- (c) A third point is the extent to which the *force majeure* clause affects the contract *as a whole*. The standard of reasonable endeavours may be more stringent, for example, if the effect of the *force majeure* clause is the immediate discharge of the contract, a more extreme outcome than that of mere suspended performance. This is because a *force majeure* clause with a more drastic effect should generally attract greater obligations to prevent such an effect.

The fourth consideration is relevant where non-contractual performance is concerned. Having set out their contractual obligations, it is not necessarily clear when parties would have intended to depart from them to deal with *force majeure* events. The analysis of whether a party must accept non-contractual performance would therefore depend on, among other things, the contractual obligation(s) being substituted and the alternative performance suggested.

It is suggested that the non-exhaustive factors relevant to the analysis would include:<sup>47</sup>

- (a) Whether the term(s) was a condition, innominate term, or a warranty;
- (b) Any detriment caused, or is likely to be caused, by the breach;
- (c) Any delay caused, or is likely to be caused by the breach;
- (d) The cost of making any performance, given or tendered by the party in breach, conform with the requirements of the contract;

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<sup>45</sup> For helpful academic commentary in the context of Singapore law, see Benjamin Wong YongQuan, “Endeavours Clauses in Singapore Contract Law” (2019) 31 SAclJ 1068. See also *Brooke Homes (Bicester) Ltd v Portfolio Property Partners Ltd & Ors* [2021] EWHC 3015 (Ch) at [97]–[100].

<sup>46</sup> See also Chee Ho Tham, “Discharge By Agreement”, in Andrew Phang Boon Leong, gen ed. *The Law of Contract in Singapore*, 2d ed (Singapore: Academy Publishing, 2022), ch 18 at [18.020].

<sup>47</sup> Mostly adopted from J W Carter, *Carter’s Breach of Contract*, 2d ed (Oxford: Hart Publishing, 2018) at [6.57].

- (e) Any offer by the party in breach to remedy the breach; and
- (f) Whether the innocent party will be adequately compensated.

This list is heavily derived from the law of termination: both are concerned with the effects of the non-fulfilment of term(s), as well as the importance that the parties have placed on them.<sup>48</sup>

#### IV. FURTHER POINTS ON INTERPRETING *FORCE MAJEURE* CLAUSES

The upshot of the prevailing discussion, in the context of reasonable endeavours provisos, is the need to give primacy to the words used, yet be sensitive to the surrounding context. Such an approach is in line with the general contextual approach to interpretation, as well as the interpretation in *force majeure* clauses more generally.<sup>49</sup> Further elaboration on some points is apposite.

First, it may be useful to provide contrasting examples as to when words or context would be more decisive. In *Holcim*, the court undertook a detailed and fact-specific examination of the words “disrupt”, “hinder”, and “prevent” in considering the extent to which an event had to affect contractual performance in order to qualify as a *force majeure* event:<sup>50</sup>

The *Oxford English Dictionary* (“OED”) defines the word “*disrupt*” as follows: “To break or burst asunder; to break in pieces, shatter; to separate forcibly”. The same work defines the word “*hinder*” in various ways, including the following: “To put or keep back”; “To do harm to; to injure, impair, damage”; and “To keep back, delay, or stop in action; to put obstacles in the way of; to impede, deter, obstruct, prevent”. Although there is, in the last-mentioned phrase, a reference to the word “*prevent*”, that word itself is defined in the OED quite differently (as is to be expected since the presumption is that no word in the English language ought to be redundant) and, *inter alia*, as follows: “To forestall, balk, or baffle by previous or precautionary measures”; “To cut off beforehand, debar, preclude (a person or other agent) *from*, deprive of a purpose, expectation, etc.”; and (perhaps, most appropriately, having regard to the legal context as well as case law considered above) “To frustrate, defeat, bring to nought, render void or nugatory (an expectation, plan, etc.)”.

The definitions of the words “disrupt” and “hinder” are – at a general level at least – not dissimilar. Both words connote a lower degree of negativity compared

<sup>48</sup> To the extent that frustration and *force majeure* bear a “close affinity” (William Swadling, “The Judicial Construction of Force Majeure Clauses”, in Ewan McKendrick, ed. *Force Majeure and Frustration of Contract*, 2d ed (United Kingdom: Lloyd’s of London Press, 1995), ch 1 at 5), see also the strong link between termination and frustration as observed in *eg, Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at 70–71 [*Hong Kong Fir*]; and Andrew Phang, “Doctrine and Fairness in the Law of Contract” (2009) 29(4) LS 534.

<sup>49</sup> See, *eg, Classic Maritime Inc v Limbungan Makmur Sdn Bhd and another* [2019] 4 All ER 1145 at [32].

<sup>50</sup> *Holcim*, *supra* note 3 at [55]–[56].

to the word “prevent”. And, perhaps more importantly, both words suggest a datum measure of difficulty that interferes with the successful completion of the transaction concerned. However, unlike a situation involving “prevention”, the “disruption” or “hindrance” does not render further performance by one party (or both parties) impossible (which would be akin to a situation of (legal) frustration). It is also clear that difficulty that manifests itself in the form of an increase in costs is – in and of itself – insufficient to result in a finding of “disruption” or “hindrance”. However, the level of guidance at this point is unfortunately, not very helpful. One can explain this, in part, by the fact that there are myriad situations of “disruption” or “hindrance”. [citations omitted; emphasis in original]

The court had earlier cited with approval the following observation in *Goldlion Properties Limited v Regent National Enterprises Limited*:<sup>51</sup>

As a matter of language, it is clear that the word ‘hinders’ sets a substantially lower threshold than the word ‘prevents’ (with the word ‘obstructs’ occupying a position perhaps somewhere in between).

This approach may be contrasted with that in *RTI Ltd*, where the Supreme Court concluded that a number of synonyms of “overcome” were equivalent.<sup>52</sup> But it would likely be a different question if, for example, these words were qualified by the words “partially” or “fully”.

As for context, two points will be made. First, it is suggested that if any examination of the effects of a *force majeure* event is required, then the court should consider the underlying contractual purpose of the parties.<sup>53</sup> The examination of that purpose was rejected in *RTI Ltd* because an identification of such a purpose may generate uncertainty.<sup>54</sup> Yet, it is not foreign to the courts<sup>55</sup> and should not dissuade them.<sup>56</sup>

Second, it is also important that the court should correctly identify the context in which the words are used. It is pertinent to note that there are generally four elements in a *force majeure* clause:<sup>57</sup> “The definition of the event”; “Obligations as to reporting”; “The effect of the event”; and “Questions of adjudication”.

The relevance of this point is that a question may be raised as to the correctness of the holding in *Holcim* that the “beyond the control” element of a *force majeure* clause is equivalent to the “reasonable steps” (*ie*, reasonable endeavours) element. No authority was cited for this proposition. It is suggested that these two elements

<sup>51</sup> *Goldlion Properties Limited v Regent National Enterprises Limited* [2009] HKCFCA 58 at [82], cited in *Holcim*, *supra* note 3 at [51].

<sup>52</sup> See text accompanying footnote 17 above.

<sup>53</sup> See further Sir George Leggatt, “Negotiation in Good Faith: Adapting to Changing Circumstances in Contracts and English Contract Law” (2019) 2 JBL 104.

<sup>54</sup> *RTI Ltd*, *supra* note 1 at [53].

<sup>55</sup> See, *eg*, the question as to whether the right to terminate arises on a breach of contract (*eg*, *Hong Kong Fir*, *supra* note 48 at 66) or in considering whether part performance amounts to substantial performance (*eg*, EG McKendrick, “Performance”, in Beale, *supra* note 37, ch 25 at [25-031]–[25-032]).

<sup>56</sup> Indeed, it did not dissuade the court in *Holcim*, *supra* note 3.

<sup>57</sup> Michael P Furmston, “Drafting of *Force Majeure* Clauses — Some General Guidelines”, in McKendrick, *supra* note 48, ch 4 at 58.

are not the same. Traditionally, the “beyond the control” element focuses on the *qualifying event* which *prima facie* triggers the force majeure clause.<sup>58</sup> By contrast, the reasonable endeavours element is focused on whether the party seeking to invoke the clause had exercised reasonable endeavours to limit the *effect* of the *force majeure* event.<sup>59</sup> The conflation of these two concepts explains the observations in a leading Singapore contract text that the judgment in *Holcim* referred, confusingly, to both *force majeure* events and its effects in its analysis.<sup>60</sup>

This conflation threatens to lead Singapore contract law down the same path as that taken in *RTI Ltd*. This is because the “beyond the control” element of a *force majeure* clause is arguably inherent in the clause at some level, even if not expressly included.<sup>61</sup> If this is correct, it follows from *Holcim* that the reasonable endeavours element similarly subsists in a *force majeure* clause. Such reasoning could lead a future court to follow *RTI Ltd* and read down what reasonable endeavours requires, given the need for certainty.

## V. CONCLUSION

A summary of the points made in this comment is as follows:

- (a) The correctness of *RTI Ltd* may be questioned. It has been argued that the decision stems from an incorrect premise that a reasonable endeavours proviso is to be implied in a *force majeure* clause. That premise is due to a view on causation that deserves reconsideration.
- (b) In the interpretation of reasonable endeavours provisos, as well as *force majeure* clauses more generally, the contextual approach to interpretation should be adopted. Some points that have been made in this regard are: (i) courts should, in appropriate cases, pay regard to the contractual purpose where the effects of the *force majeure* event are concerned; (ii) courts should properly identify the surrounding context in which the words are used in interpreting the clauses; and (iii) on that last point, future review may be warranted for the conclusion in *Holcim* that the “beyond the control” element of a *force majeure* clause is equivalent to the “reasonable steps” element.

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<sup>58</sup> See Ben Symons and Joseph Dalby SC, “Beyond Reasonable Control”, in *Force Majeure and Frustration in Commercial Contracts* (London: Bloomsbury Professional 2022), ch 5.

<sup>59</sup> See Ben Symons and Joseph Dalby SC, “Prevent, Hinder and/or Delay”, in *ibid*, ch 4 at sec 4.6.

<sup>60</sup> Tham, *supra* note 46 at [18.017]–[18.027]. This conflation is also present in the *force majeure* clause in *RTI Ltd* (see text accompanying footnote 6 above), which referred to overcoming the *force majeure* event and not its effects. For well-drafted model clauses properly distinguishing the two, see, *eg*, subclause 1 of the ICC Force Majeure Clause 2020 (available online at <https://iccwbo.org/wp-content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf>); and subclause (a) of the BIMCO Force Majeure Clause 2022 (available online at <https://www.bimco.org/contractual-affairs/bimco-clauses/current-clauses/force-majeure-clause-2022/>).

<sup>61</sup> See *Ser Kim Koi v GTMS Construction Pte Ltd and others and another appeal* [2023] 1 SLR 1097 at [77]. This prevents, for example, parties from deliberately creating a *force majeure* event just so they may invoke the *force majeure* clause.