

Force Majeure and Discharge of Performance in Contracts: The UK Supreme Court's Judgment in *RTI v MUR Shipping BV* and the Ensuing Repercussions on Contractual Interpretation

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Abstract

In *RTI Ltd v MUR Shipping BV* (UKSC, 2024), the Supreme Court held that a party's obligation to use reasonable endeavors to overcome a force-majeure event does not require acceptance of non-contractual performance: mitigation must proceed strictly by the contractually stipulated mode. This formalist stance sits uneasily with the mainstream of English mitigation doctrine and with interpretive commitments to commercial common sense, business efficacy, and relevant background facts, which often privilege attainment of contractual purpose over rigid adherence to form. The article contends that the Court's reasoning is under-theorized: it engages only lightly with the implicated authorities on contractual interpretation and leaves unaddressed the bearing of privity and separate corporate personality. The result, the article argues, is a decision insufficiently attuned to commercial practice and the expectations of reasonable businesspeople. Unless overruled, it risks chilling transactions in a sanctions-sensitive trading environment and misaligning English contract legal framework with contemporary market realities.

Keywords

Force Majeure, Contractual Performance, Privity of Contract, Separate Corporate Personality, Contractual Interpretation, Compensatory Damages, Specific Performance, Braganza Principle

1. Introduction: Mapping out the Topical Themes

The act of interpretation in English contract law is driven largely by the core aim of ascertaining the consensus ad idem of the parties. To accomplish this delicate

task, English contract law, as stated by the UK Supreme Court in *Re Sigma Finance Corporation*,¹ often focuses on discovering what constitutes the ‘purpose’ of the parties’ contract by scrutinizing both the contract language and the ‘matrix of facts’² that ultimately underpin the contract. Based on reasonable expectations, commercial parties usually enter into contracts for economic purposes.³ This claim hardly requires any supporting evidence because the inverse (i.e., parties contract for no purpose) would be bizarre and difficult to logically sustain in commerce.

Yet, the UK Supreme Court in *RTI v MUR*⁴ opined that this inverse view is possible—that parties could enter into contracts for no particular purpose.⁵ Arguably, it is more commercially reasonable to believe the economic purpose view than its inverse counterpart, which posits that commercial parties could contract for no (economic) purpose. The former view is typically grounded in commercial realities and further evidenced in the prevalent wordings (boilerplate clauses) of commercial contracts, whereby *recitals* contain the background facts, and the *operative clause* (i.e., the words of agreement, usually worded as ‘NOW THEREFORE, the parties agree as follows’) indicates the existence of an economic bargain as well as purpose.

An avalanche of English case law across several generations agrees that ‘purpose’ when combined with the ‘matrix of facts’ of a contract could precisely determine the consensus ad idem of parties, and thus help enormously in resolving any impasse regarding the meaning and effects of contract terms (McMeel, 2003). In this regard, Males LJ (with whom Rose LJ and Haddon-Cave LJ agreed) stated in *Classic Maritime Inc v Limbungan Makmur SDN BHD*,⁶ that:

‘[u]ndoubtedly the question is one of construction of contract, and the answer can be determined by the language which the parties have chosen, having regard to *the context and purpose* of the clause.’⁷

Males LJ’s perspective aligns with the UKSC’s view in *Wood v Capita Insurance Services Ltd*.⁸ a position ‘[w]hich necessitates the court to check its tentative conclusions against the terms of the contract as a whole and the commercial consequences of the proposed construction.’⁹ Similarly, in *Schuler AG v Wickman Ma-*

¹*Re Sigma Finance Corp* [2009] UKSC 2, para 35 (“An over-literal interpretation of one provision without regard to the whole may distort or frustrate the commercial purpose.”) per Lord Collins (with whom Lords Hope and Mance concur).

²This term was first used by Lord Wilberforce in *Prenn v Simmonds* [1971] 1 WLR 1381 (HL).

³*Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2021] UKSC 40.

⁴[2024] UKSC 18; [2022] EWCA Civ 1406; [2022] EWHC 476 (Comm). In this article, unless otherwise mentioned, references would be made only to the UKSC version of the case. Hereinafter referred to as the ‘RTI case’ or ‘*RTI v MUR*’.

⁵*Ibid*, paras 53-54.

⁶[2019] EWCA Civ 1102.

⁷*Ibid*, per Males LJ at [32]. Emphasis by author.

⁸[2017] UKSC 24.

⁹*Ibid*, paras 10, 12, 23. Lord Mustill held a similar view in *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, 384H.

chine Tool Sales Ltd,¹⁰ Lord Simon of Glaisdale adopted the view that ‘...[t]he question to be answered always is, “what is the meaning of what the parties have said?” not, “what did the parties mean to say?”.’¹¹

In the UKSC *RTI v MUR*, the relevance of ‘purpose’ in ascertaining the contracting parties’ intention was fundamentally recalibrated to revolve exclusively around the chosen contractual method in overcoming a force majeure (FM) event.¹² In the case, the Contract stipulated that government sanctions or delay in performance would constitute an impediment that suspends the obligation to perform on the basis of force majeure, unless such impediment could be ‘overcome by reasonable endeavors.’¹³ In the circumstance, MUR feared that US sanctions against Russia impacting RTI’s parent-company, would delay its payment in US dollars, given that RTI’s parent is a corporate citizen of Russia. But RTI offered to send euros, which would be converted into US dollars upon receipt by MUR’s bank, and also offered to pay any conversion fees that would be incurred for this purpose.¹⁴ In other words, the end (ultimate payment in US dollars to MUR Shipping) was meant to justify the means (transfer of euros and conversion fees by RTI), being a functional equivalence of the contractual performance, in overcoming the foreseen impediment of delay so that the force majeure clause would not be triggered.

If RTI’s offer was accepted by MUR, it would have constituted as overcoming the alleged impediment, though not strictly in accordance with the stipulated method of contractual performance.¹⁵ This article questions whether based on commercial reasonableness and the business common sense rule, RTI’s offer was sufficiently capable of satisfying the contractual requirement of overcoming a force majeure event? The UK Supreme Court emphasized that RTI’s pursuit of overcoming a force majeure through a non-contractual method diminishes predictability and denies a party its contractual right to terminate contract based on force majeure.¹⁶ The UKSC strongly discouraged the assumption that a contract necessarily revolves around a purpose. According to it, the inquiry into purpose is potentially problematic because a contract may have no clear purpose, or it may have many purposes in which case it will be unclear whether all of them would be met via the non-contractual method, or whether it would suffice that the main or predominant purpose is met (assuming that there is one), and that it can be identified in overcoming a force majeure through an alternative (non-contractual) performance.¹⁷ The Court’s policy rationale in rejecting non-contractual alternatives to performance allegedly anchors on contractual certainty and predictability that parties are entitled to rely strictly on their agreed performance methods. By

¹⁰[1974] AC 235 (HL).

¹¹*Ibid*, 263.

¹²*RTI v MUR* (UKSC), para 22.

¹³*Ibid*, para 4.

¹⁴*Ibid*, para 7.

¹⁵For a similar holding, see *British Westinghouse Electric and Manufacturing Co v Underground Electric Railways Co of London* [1912] AC 673.

¹⁶*RTI v MUR* (UKSC), para 45.

¹⁷*Ibid*, paras 53-54.

prioritizing formal compliance, the Court allegedly sought to protect freedom of contract and avoid unpredictability in force majeure disputes.

The forgoing UKSC view seems overtly academic and arguably lacks the degree of pragmatism required to bring about viable business solutions in an unprecedentedly volatile and unpredictable market. In opposition to the Court's view, this paper advances the position that RTI's euro offer should have been construed as a functional equivalence of contractual performance rather than a mere substitute performance. By ensuring MUR ultimately received the agreed US dollars, with RTI also covering the conversion costs, the offer preserved the economic bargain and protected the Contract's underlying purpose. Treating such performance as equivalent is therefore consistent with doctrines of substantial performance and the principle that the essence of contract lies in effectuating agreed value. Thus, UKSC's refusal to recognize this equivalence undermines commercial pragmatism, and the judgment should have embraced this more coherent approach.

A further implication of this UKSC's decision is whether, going forward, a strict compliance with the contractual method will always be required irrespective of unamendable conditions, or whether there will be deserving conditions in which a contractual purpose is pursued for actualization via a non-contractual method? And, if so, what the applicable limits are? In other words, will acceptability be limited to a *de minimis* departure or will it be based on some other standard? Whether an outcome is within reasonable bounds of the identified contractual purpose is ineluctably a question of fact and degree, on which judicial perspectives may reasonably differ. The Court's confusion in the RTI case regarding the dollar-euro payment dichotomy seemed to have stemmed from its improper appreciation of the difference between money and payment (Goode & McKendrick, 2020). In contract law literature, courts have emphasized heavily that the 'essence of contract is performance...'.¹⁸ However, imbedded in that performance is the issue of money, payment, the mode of payment, the currency of payment as well as any reasonable alternatives in the market (Ingham, 2004). In contracts, these issues could be as important to the account-creditor as the mode of contract performance is to the account-debtor.¹⁹

At the heart of the forgoing inquiry is the meaning and mode of assessing monetary value based on the stipulations of the underlying contract of parties. If the contract for interpretation stipulates that a particular mode of payment will be utilized—for example, cash payment with bank notes as opposed to an electronic bank transfer, would a proposal to pay via the latter approach be considered a non-contractual performance, and thus entitle the innocent party to refuse payment? Similarly, if the contract stipulates that payment would be made in US dollars, would a bank transfer of euros, which eventually converts to US dollars in the payee's bank account, be actually considered a non-contractual performance,

¹⁸ *George Mitchell v Finney Lock (Seeds) Ltd* [1983] 1 All ER 108, 118 (per Lord Oliver).

¹⁹ See *Adelaide Electricity Supply Co v Prudential Assurance Co* [1934] AC 122 (HL); *Pollway v Abdullah* [1974] 1 WLR 493; *Homes v Smith* [2000] Lloyd's Rep Bank 139.

and thus inadequate, simply because the account-debtor began the payment process by transferring euros?

Arguably, UKSC's confusion in the RTI case stemmed from their improper appreciation of the currency conversion process in electronic banking. RTI's offer to send euros for the ultimate payment of MUR in US dollars most likely proceeded as follows: first, upon RTI's initiation, its bank transfers euros to MUR's bank. Second, MUR's bank then considers the stipulated US dollar amount that MUR is owed, and takes as much euro as it requires (including the conversion fees) from RTI's money. Third, MUR's bank credits MUR's account in US dollars. Cross-currency settlement in modern banking is largely automated. As [Poenisch \(2023, p. 2\)](#) similarly elaborated, euro-to-USD payments executed through systems such as CLS or SWIFT *gpi* are typically completed within minutes to a few hours, underscoring the efficiency and predictability of conversion processes. Another point worthy of highlight, is that there is a world of difference between a legal tender and payment—the former refers to coins and bank notes that must be accepted if offered for payment of debts and its determination relates to the jurisdiction that governs the contract; whereas payment refers to the transfer of value (usually money) for the discharge of a debt obligation ([Proctor, 2009](#)).

This article challenges the reasoning of the UK Supreme Court in the RTI case precisely due to its inconsistencies with preexisting legal rules in contract and corporate law jurisprudence. As earlier stated, the court's willingness to accept MUR's view that a force majeure event cannot be overcome by a non-contractual method should have been tested by inversion. In other words, would the court's view be the same if it was RTI that discontinued performance and sought to rely on the force majeure event on the basis that its parent-company (which is not signatory to the Contract) had come under US sanctions? The logical gaps in MUR's contention as well as the unreasonableness would have been more apparent if it was RTI that stopped performance owing to the US government sanctions: the doctrine of unclean hands and the rule (as explicated by Lord Mackay) against profiting from one's own wrong,²⁰ would have required RTI to explore other reasonable alternatives to overcome the restrictions on US dollar payment.

Thus, the legal rule that would have made RTI's hypothetical reliance on anticipatory breach owing to the sanctions against its parent untenable should equally have made MUR's reliance on it unacceptable. Indeed, MUR's overall position that, absent express wording, a reasonable endeavours proviso does not require acceptance of an offer of non-contractual performance, is self-defeating because of its readiness to deem RTI and its parent-company one and the same person even in the absence of any express contractual wording to the effect that both corporate entities would be jointly and severally liable in respect of the Contract and its performance.

²⁰ *Mackay v Dick* (1881) 6 App Cas 251: ('It is a principle of law that no man can take advantage of his own wrong.' Per Lord Mackay). Also see *King Crude Carriers SA & Ors v Ridgebury November LLC & Ors* [2024] EWCA Civ 719.

In English contract law, courts have held *ad nauseam* that the essence of contract is performance: commercial parties contract for the main purpose of receiving their contractual bargains, and courts are usually willing to overlook minor inadequacies in performance owing to the doctrine of substantial performance (McKendrick, 2023).²¹ This theory is tested in the meaning and effect of compensatory damages as established in *Robinson v Harman*.²² Accordingly, the measure of damages is realized by ascertaining the [monetary] position the innocent party would have been had the contract been performed.²³ If compensatory damages is the prevalent formula for curing a breach of contract, then a method used in averting such breach of contract (mitigation of an FM event) can be tested for suitability and validity by inquiring the extent such method of cure put the innocent party in the monetary position they would have been had the contract been performed (Pearce & Halson, 2007; Al-Tawil, 2013).

Theory should not be unamenable to practice. Thus, the right to performance ought to always be juxtaposed with actual performance, because the latter ensures that the party obtains the (monetary) value of its contractual right or bargain. Unlike the UKSC's position in the RTI case, it is a commercial rarity that a contract has no purpose.²⁴ The fact that in contract law, specific performance is hardly awarded where there is a reasonable/alternative method of performance indicates that commercial courts prioritize actual performance that satisfies contractual bargain over satisfaction of a mere contractual right that is devoid of commercial value (Burrows, 2019).²⁵

The issues raised by the RTI case have become increasingly relevant in contemporary times, whereby global trade has been considerably ruptured by unpredictable trade sanctions. Specifically, the Russian-Ukrainian War as well as the Israel-Hamas War have negatively impacted businesses that were caught up in these geopolitical tensions and trade wars, precisely as countries shift alliances and impose sanctions and countermeasures (Bamiatzi et al., 2025; Markus, 2022). Explicitly, the facts of the RTI case derive from the speculated difficulty which MUR will allegedly encounter as a result of the US sanctions against Russia which prevented RTI's parent-company from transacting in US dollars.

Usually, government sanctions which prevent a contractual performance would qualify as force majeure given the element of legal impossibility. Notably, a force majeure clause (similar to clause 36 of the parties' Contract) contains an express or implied necessity of overcoming the force majeure event with reasonable endeavors. The main issue that preoccupied the courts in the RTI case was whether such use of reasonable endeavours must be in strict accordance with the method stipulated for contractual performance or whether a non-contractual method could be used to

²¹*Hoening v Isaacs* [1952] EWCA Civ 6.

²²(1848) 1 Ex Rep 850.

²³*Ibid*, 855.

²⁴*RTI v MUR* (UKSC), paras 53-54.

²⁵Also see *Beswick v Beswick* [1968] AC 58; *Sky Petroleum v VIP Petroleum Ltd* [1974] 1 WLR 576; *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1.

overcome the force majeure event by aiming at the purpose of contract?

This article expresses dissatisfaction with how the English courts, particularly the Supreme Court handled the RTI case. For too long, English courts emphasized the important roles of business common sense and contractual purpose in contractual interpretation. Of course, prospective litigants could be influenced by such notions in their favorable choice of English law and forum. The RTI decision was arguably unsatisfactory of the business common sense rule and does not offer practical solutions for businesses that are caught up in force majeure events where there is little or no room in mitigating the force majeure event through the contractual method. Where a force majeure event derives from a legal impossibility, a reasonable alternative in overcoming the challenge cannot honestly insist on that same method which falls within the threshold of the legal impossibility. As stated earlier, given that the essence of contract is performance based on preexisting legal rule, the Supreme Court in the RTI case should have treated RTI's euro offer as a functional equivalence of contractual performance, instead of as an unacceptable substitute performance.

This paper adopts a doctrinal methodology, grounded in close textual analysis of case law, statutory provisions, and academic commentary. The critique proceeds by comparing the RTI judgment with a line of earlier English cases that placed greater weight on contractual purpose and commercial common sense, thereby exposing areas of inconsistency and doctrinal shift. Alongside this comparative lens, the paper evaluates the broader policy rationales underpinning force majeure and contract performance, testing whether UKSC's reasoning in this case aligns with commercial realities and the foundational objectives of contract law.

In its five parts, including this introduction, the article claims that the RTI decision radically conflicts with many settled legal rules in contract and other areas of law. Part 2 maps the essential facts of the case as well as address some of the legal issues that have arisen therefrom. In part 3, the implicated legal issues that were either unaddressed or addressed only perfunctorily by the UKSC will be discussed. It further explores the confluence between contract law and company law and how the pressure points arising from their intersections were ignored in the case. [Goff \(1984: p. 385\)](#) once described contractual interpretation as the 'staple diet' of the commercial court. Thus, part 4 examines the various intersections between force majeure and contractual interpretation, exploring the various canons of contractual interpretation which English courts have used in major contract cases. Part 5 is the conclusion and discusses some lessons from the RTI case in respect of how prospective contracting parties should treat issues of force majeure and contractual performance.

2. *RTI v MUR Shipping BV*: Mapping the Relevant Facts and the Matters Arising

2.1. The Relevant Facts of the RTI Case

In 2024, the UK Supreme Court (UKSC) in *RTI Ltd v MUR Shipping BV* (hereinafter: the 'RTI case', or '*RTI v MUR*') held a significant ruling in contract law

that has arguably reshaped the legal architecture of English contract and company laws, precisely as it relates to the doctrine of force majeure, privity of contract, corporate personality, and the duty to mitigate or overcome a force majeure event by reasonable endeavors. Its crucial importance is further underscored by the unpredictable trade and political sanctions among major economies of the world, and how international businesses relying on contractual performance face increased uncertainty in light of the preexisting canons of contractual interpretation.

The Claimant, RTI Ltd is a Jersey-based 100 % subsidiary of UC Rusal, a Russian company. RTI Ltd was the charterer of the vessels in the contract of affreightment (the 'COA' or 'Contract') between it and the Defendant, MUR Shipping BV, a Dutch shipping corporation and the owner of the vessels under the COA. In 2016, both parties entered into the COA in which MUR was to ship approximately 280,000 metric tons of bauxite per month from Guinea to Ukraine. Both parties agreed under the Contract that payments would be made in US dollars. Use of US dollars as the contractual currency implicated involvement of US intermediary banks in processing the contractual payments.

Additionally, the COA included a force majeure clause, which operated to excuse either party from performance if certain events beyond their control occurred, provided they "could not be overcome by reasonable endeavors." Indeed, clause 36 of the COA provides for force majeure as follows:

"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) gives reasonable estimated duration of the Force Majeure Event to the extent [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.

2.2. The US Government Sanctions on RTI's Parent-Company and the Alleged Effects on Performance

In April 2018, sanctions were imposed by the US Department of the Treasury's Office of Foreign Assets Control (OFAC) against RTI's parent-company, raising fears of significant banking complications that could mature into delays of performing the COA. In effect, per MUR's view, the payment in US dollars required that a US intermediary bank would process the transfer payments and a US bank could not have afforded to violate the OFAC sanction regulations. Although this point was hardly emphasized during the trial, it is important to note that RTI itself was not directly sanctioned. However, per the COA which covered government regulations, the ownership of RTI by a sanctioned Russian entity allegedly raised "compliance and reputational risks" for MUR's banks. Clause 36.3 (d) of the COA required each party to 'overcome' a force majeure event with 'reasonable endeavors'.

On the basis of the forgoing clause, RTI offered to make payments in euros, and guaranteed to bear any conversion costs in order for MUR to receive full payment in their US dollar account. It was thought by RTI that their offer (if accepted) would be a sufficient reasonable endeavor to overcome the force majeure event, given the offer's practical effect of completely neutralizing the impact of the sanctions on MUR. The offer was however rejected by MUR, consequently invoking

the force majeure clause and suspending its obligations under the Contract. MUR argued that the US dollar payment obligation had become impossible to perform, and that the force majeure clause was therefore triggered. Its force majeure notice to RTI contended that continued performance of the Contract would breach the US government sanctions against RTI's parent company. Similarly, it argued that the potential involvement of US intermediary banks in processing US dollar payments indicates a possibility that the sanctions would prevent or significantly delay the processing of payment under the Contract (Kaiser & Hovsepyan, 2024).

At the arbitration, the Tribunal held in favor of RTI, finding that MUR could have used "reasonable endeavors" to accept the offer of RTI to pay in euros as well as its promise to bear the cost of the payment conversion to US dollars: RTI contended that its proposed workaround would have prevented the force majeure clause from being triggered into effect.²⁶ The High Court overturned the arbitral award, siding with MUR. The Court of Appeal of England and Wales restored the arbitral award, siding with RTI. The matter then proceeded to the UK Supreme Court (UKSC). At UKSC, a unanimous majority held for MUR.²⁷ Arguably, the UKSC did not satisfactorily resolve some of the underlying issues (e.g., the doctrines of privity and separate corporate personality) that border on some aspects of contract and company laws.

The obligation by RTI to utilize 'reasonable endeavours' in mitigating the force majeure event so that MUR's payment would not be delayed, was assessed by the UKSC solely within the ambit of contractual rights. Similarly, it was determined whether such use of reasonable endeavours to mitigate force majeure required MUR to accept a non-contractual performance, such as acceptance of RTI's offer to pay in euros instead of in US dollars even if MUR will eventually receive its full payment in US dollars upon conversion. The UKSC held that the Contract specifically required US dollar payments. Thus, the offer to accept payment in euros, even if economically equivalent, would amount to accepting a non-contractual performance. According to it, there was no obligation to accept an alternative performance that departed from the express terms, even if it ultimately overcame the force majeure: in the Court's view, the requirement to use 'reasonable endeavours' to mitigate force majeure by a party, does not require the counterparty to accept non-contractual terms.²⁸

In *Tennants (Lancashire) Ltd v CS Wilson and Co Ltd*,²⁹ Lord Atkinson provided an illuminating perspective on the threshold required to mitigate a force majeure event. The word being considered in *Tennants* was 'prevention' and his Lordship stated that its meaning must be something reasonably impossible for the mitigating party to undertake: "Preventing" delivery means, in my view, rendering delivery impossible; and "hindering" delivery means something less than this,

²⁶ *RTI v MUR* (UKSC) paras 7 and 11.

²⁷ *Ibid*, para 103.

²⁸ *Ibid*, para 36-39.

²⁹ *Tennants (Lancashire) Ltd v CS Wilson and Co Ltd*. [1917] AC 495.

namely, rendering delivery more or less difficult, but not impossible...³⁰ *Tenants* and other cases show that prior to the RTI case, the jurisprudence vis-à-vis mitigation of force majeure was solution-driven and had maintained a practical rather than a theoretical appreciation of contractual performance: in other words, to successfully invoke force majeure, it must be clearly demonstrated that no other reasonable effort within the powers of the mitigating party was left unexplored.

In part three below, the article discusses some of the conflicting legal issues that are implicated in the RTI case, which were arguably not reconciled by the UKSC.

3. Implicated (But Unresolved) Legal Issues in *RTI v MUR* by the UK Supreme Court

3.1. Separate Corporate Personality, Applicable Law in Contracts, and the Privity Doctrine

Firstly, it was surprising that the doctrine of separate corporate personality as established in *Salomon v Salomon & Co Ltd*,³¹ was never raised or sufficiently discussed in the RTI case even though the doctrine was arguably implicated by the act of deeming RTI and its parent-company as one and the same without any justifiable basis. RTI is a Jersey-registered company under the jurisdiction of the United Kingdom, and as such, is subject to English law. The basis on which MUR Shipping triggered the force majeure clause was that RTI's parent-company (UC RUSAL, a company registered in Russia), came under sanctions by the US government. The sanctions were not directly imposed on RTI Ltd. Even as a subsidiary, RTI's corporate personality entails that it is separate from its parent-company/shareholder (s), and any sanctions meted on the latter could not have vicariously (and directly) impacted on RTI, on account of the separate corporate personality principle.³²

Based on the notable exceptions of this company law principle as discussed by the UK Supreme Court in *Prest v Petrodel Resources Ltd*,³³ RTI's separate corporate personality could only be unveiled if there was an element of fraud or collusion with its parent that consequently stained its hands in the transactions with MUR Shipping.³⁴ However, there was no accusation of fraud or collusion, or any evidence that RTI was involved in any fraudulent activity whatsoever. Therefore, the separate corporate personality principle should have been sufficient to shield it from any impact of the US sanctions against its parent-company.³⁵ The UKSC

³⁰Ibid, 518.

³¹*Salomon v Salomon & Co Ltd* [1897] AC 22.

³²The UK Supreme Court has thoroughly explained that a company is a separate legal entity that is separate from its shareholders: *VTB Capital plc v Nutritek International Corp* [2013] UKSC 5; *Lifestyle Equities CV v Ahmed* [2023] UKSC 24.

³³*Prest v Petrodel Resources Ltd* [2013] UKSC 34 (discussed the permissible instances under which a corporate veil could be lifted).

³⁴Ibid, para 18 ('fraud unravels everything') per Lord Sumption; *Woolfson v Strathclyde Regional Council* [1978] SC(HL) 90, per Lord Keith of Kinkell ("it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere facade concealing the true facts.").

³⁵*Lonrho Ltd v Shell Petroleum Co Ltd* [1980] 1 WLR 627.

ruling in this case has inarguably challenged the sufficiency of the protection conferred by separate corporate personality outside the context of fraud warranting the invocation of its exceptions.

Moreover, English courts have emphasized that piercing the corporate veil is only permissible in highly limited and exceptional circumstances. A recent reaffirmation can be found in *Vedanta Resources Plc v Lungowe*,³⁶ and more pointedly in *Okpabi v Royal Dutch Shell Plc*,³⁷ where the UK Supreme Court made clear that there is nothing inherently special or conclusive about the bare relationship of parent and subsidiary when determining liability. The existence of group structures does not, of itself, impose legal responsibility on the parent for the acts of its subsidiary; rather, responsibility must be established on ordinary principles of law, such as assumption of duty or control, and not by disregarding the doctrine of separate corporate personality. This underscores that even under contemporary pressures of sanctions regimes, veil piercing remains a remedy of last resort, requiring proof of impropriety or evasion of legal obligations.

Secondly, the RTI ruling challenged the issue of jurisdiction which is conferred by the applicable law of a contract. The COA was being governed by English law and courts. Based on the established English law on personal jurisdiction,³⁸ RTI was not personally subject to US jurisdiction and therefore could not have been subject to OFAC sanctions. Indisputably, a Jersey-registered company with a separate corporate personality, operating an English governed contract ought not to have been vicariously impacted by US sanctions against a Russian company with a distinct corporate personality, irrespective of whether the latter is the parent.³⁹ More importantly, RTI's parent-company was not signatory to the COA, neither was it mentioned as an agent of RTI for the purposes of performing the COA. Barring a few exceptions as established in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd*,⁴⁰ which do not apply in the circumstance, a contract binds only the parties that executed it.⁴¹ Therefore, the parent-company's relevance to the performance and interpretation of the COA are unsupported by the avalanche of English case law on privity of contract.

3.2. Force Majeure and the Duty of Mitigation

Generally, at the core of contract-making is party autonomy (Barnett, 1986; Atiyah, 1979). This feature distinguishes contract from other sources of obligations such as those that arise by operation of law (Beale, 2021). Based on the agency

³⁶[2019] UKSC 20, para 50, citing Sales LJ in *AAA v Unilever plc* [2018] EWCA Civ 1532, para 36.

³⁷[2021] UKSC 3, paras 141-152.

³⁸*Rubin v Eurofinance* [2012] UKSC 46, para 10.

³⁹*Bank of Tokyo Ltd v Karoon (Note)* [1987] AC 45, 64. Robert Goff LJ opined that in this domain “we are concerned not with economics but with law. The distinction between the two is, in law, fundamental”.

⁴⁰*Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847; *Beswick v Beswick* (1968) AC 58, HL; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* (1994) 1 AC 85, HL.

⁴¹*Beswick v Beswick* [1968] AC 58; *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446; *Shanklin Pier Ltd v Detel Products Ltd* [1951] 2 KB 854.

which contract law bequeaths to parties, English courts would only accept overpowering forces beyond a party's control in order to excuse them from performance. In that sense, force majeure is not synonymous with hardship—courts do not consider the latter as sufficient to excuse performance. However, in ascertaining and acting on the basis of force majeure, good faith has enormous role to play in ensuring that a party's reliance on it to excuse performance is devoid of opportunism.⁴² For this reason, English courts have reiterated at various instances that the essence of contract is performance and nothing else.⁴³ Thus, it is expected (to the extent it is reasonable to do so) that a party would accept the functional equivalence of their contractual bargain. However, in disputes, whereby the parties' testimonies cannot be solely relied upon in ascertaining each of their intentions, courts have often reverted to finding out the purpose of contracting so as to narrow down to what could qualify as a reasonable alternative to contractual terms and performance (Hoffmann, 1997; Mitchell, 2019).

Thus, even if the force majeure clause of a contract omitted the requirement for a party to take reasonable steps in overcoming a force majeure event prior to abdicating performance, the court in *B & S Contracts and Design Ltd v Victor Green Publications Ltd*,⁴⁴ opined that courts could imply it into existence. This agrees with the doctrine of implied terms as well as the hardened judicial view on the essence of contract as being performance. As elucidated by the UK Supreme Court in *Bunge SA v Nidera BV*,⁴⁵ mitigation efforts are generally assessed on the basis of effectiveness and commercial reasonableness as opposed to their strict alignment with contractual terms.

The expectation of reasonableness is not one-sided: it applies to both contracting parties by ensuring that each of them uses their best efforts to actualize performance and avoid escalation of losses.⁴⁶ In the RTI case, clause 36.3 (d) requires that following the occurrence of a force majeure event, the performing party takes reasonable steps to overcome it. Since the scope of meaning and effect of *taking reasonable steps to overcome a force majeure event* was in contention, the resolution ought to have been based on established legal rules such as the legal tests for ascertaining implied terms through a reasonable person, business efficaciousness⁴⁷ or an officious bystander's perspective.⁴⁸ The doctrine of implied terms has been well discussed in contract law and leaves little or no room for misconception.⁴⁹ The traditional tests for ascertaining implied terms are Lord Bowen's

⁴² *Cehave NV v Bremer Handels GmbH (The Hansa Nord)* [1976] QB 44, 55-56.

⁴³ *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 (HL), per Lord Hoffmann: "a contract is made to be performed, not to be avoided according to the whims of market fluctuations."

⁴⁴ [1984] ICR 419, 426, per Griffiths LJ; *RTI v MUR* (UKSC), para 28.

⁴⁵ *Bunge SA v Nidera BV* [2015] UKSC 43.

⁴⁶ *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] UKSC 29.

⁴⁷ *The Moorcock* (1889) 14 PD 64 (per Bowen LJ).

⁴⁸ *Southern Foundries (1926) Ltd v Shirlaw* [1939] 2 KB 206 (CA), per Lord Mackinnon.

⁴⁹ *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; *Geys v Société Générale, London Branch* [2012] UKSC 63; *Liverpool City Council v Irwin* [1977] AC 239 (HL).

Business Efficacy test and Lord Mackinnon's Officious Bystander test (Peel, 2001; Hooley, 2013; Mitchell, 2003). None of the tests was analyzed by the UKSC majority in the RTI case, to ascertain whether RTI's offer to make payment in euros with the possibility that MUR ultimately receives US dollars upon conversion, could be understood by an officious bystander as being part of the COA's express terms.

Similarly, although the parties did not include the possibility to pay in another currency other than US dollars, any officious bystander eavesdropping at the parties' conversation about contract terms, would likely agree that an ultimate payment in US dollars following a transfer of euros could, of course, be implied into the parties' Contract. Similarly, transfer of euros in the circumstance could be implied on the basis of business efficacy: the UKSC in *Marks and Spencer Plc* held that terms could be implied into a contract if they are "necessary for business efficacy".⁵⁰ Based on court decisions regarding the forgoing tests for implied terms, it is argued that the RTI set of facts, particularly as it relates to overcoming the force majeure event through the offer to transfer euros for conversion, instead of US dollars, could have easily met the threshold of the 'business efficacy' test, and an officious bystander could have likely deemed RTI's offer to pay in an alternative currency as an integral element of the express term.

However, the core challenge with the forgoing tests is the fact that only the sitting judge can apply them—the judge is the one who determines whether an effort by a contracting party is sufficiently business efficacious, and he or she is also the so-called officious bystander. Thus it was understandable why these tests were not examined for potential application in the RTI case, given that the judges had the power to jettison their application.

3.3. Force Majeure and Contractual Performance

As Lord Radcliffe opined in *Campbell Discount Co Ltd v Bridge*,⁵¹ contractual parties are inherently aware that externally overpowering factors may restrict a full-scale enjoyment of their contractual rights or performance of their obligations.⁵² A force majeure (FM) clause for example is an acknowledgment of this possibility. Thus, it is implied that for an event to qualify as force majeure and thus discharge a party from performance, such a party must have nothing left within their powers to reasonably mitigate the force majeure event. This, or a similar view, has to be the perception of force majeure in commercial settings whereby the primary focus or purpose of contract is performance. If English law is truly committed to its longstanding position that a party cannot be discharged from

⁵⁰*Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC 72.

⁵¹[1962] AC 600, 622: "[t]he intention of the parties themselves is never conclusive and may be overruled or ignored if the court considers that even its clear expression does not represent 'the real nature of the transaction' or what 'in truth' it is taken to be". Also see *Street v Mountford* [1985] AC 809, 819 per Lord Templeman.

⁵²See *Cavendish Square Holding BV v Makdessi* (2015) UKSC 67.

performance on the basis of hardship,⁵³ then it should not allow its counterparty to refuse acceptance of it owing to an opportunistic use of force majeure, especially where the performing party has shown good faith by using reasonable endeavors to overcome the FM event.

In the RTI case, MUR arguably weaponized force majeure as a renegotiation tactic given that the cost of chartering replacement vessels had significantly increased beyond the COA price.⁵⁴ Perceptibly, it was using the FM clause to wriggle away from hardship given that continuous performance had become less profitable compared to the opportunity cost of utilizing the same vessels to perform new contracts at the forgoing market rates. The fact that RTI and MUR agreed on a term and further agreed in the FM clause to use reasonable endeavors to overcome a force majeure event is indicative of their common prediction that the chosen currency of payment (US dollars) will likely become difficult (but not impossible) to fulfill.⁵⁵ In that circumstance, it makes sense that use of reasonable endeavor to overcome the FM challenge cannot be the same method (or currency) that has proved impracticable to actualize under the express words of the Contract. The duty to mitigate an FM event ought to include the exploration of other acceptable methods of performance in the market which stand in close proximity with the contractual method as well as commercial reasonableness.

A functionally equivalent (hypothetical) example of the problems underlying the RTI decision could be stated as follows: assume that under a contract with a force majeure clause similar to that of *RTI v MUR*, Mr. A residing in point Y, agreed over a period of twelve months to transport a certain quantity of goods by road each month to Mr. B, residing in point Z, through the only bridge that links points Y and Z. Then it happened that the bridge collapsed in the tenth month of performance of the contract. Based on this scenario, if Mr. A offers to deliver the remaining goods to Mr. B, by flying them across at his (Mr. A's) own expense, would Mr. B be reasonably entitled to refuse such a non-contractual performance?

Before the UKSC decision in RTI, most common law courts would agree that such an offer to remedy the FM event through air transportation would qualify as a reasonable endeavor to overcome the FM event. A court focusing on outcome, performance, fairness and continuity of commercial relations which reasonable contractual parties are assumed to desire, would see good reasons to uphold the perspective of Mr. A in the forgoing hypothetical scenario, and by extension that of RTI in the case. Similarly, Mr. B's undertaking to fly the remaining goods at his own expense would also prevent a backward chain of breaches if he (Mr. B) had relied on other contracts with people to perform its contract with Mr. A.⁵⁶ Based

⁵³*Davis Contractors Ltd v Fareham UDC* (1956) AC 696; *Tsakiroglou & Co Ltd v Noble Thorl GmbH* [1962] AC 93. In both cases the House of Lords held that hardship alone does not relieve a contractual party from performance.

⁵⁴*RTI v MUR* (UKSC), paras 7 and 12.

⁵⁵See generally *Classic Maritime Inc v Limbungan Makmur SDN BHD* [2019] EWCA Civ 1102.

⁵⁶In *Tennants (Lancashire) Ltd v CS Wilson and Co Ltd* [1917] AC 495, 510, Lord Earl Loreburn reflected on a similar problem, stating that 'to place a merchant in the position of being unable to deliver

on the UKSC position in the RTI case, an FM event can hardly be remedied by a non-contractual method that is business efficacious, even when the party offering it promises to shoulder whatever extra cost or responsibility that would be implicated in the mitigation process. However, this article's view would be different if MUR was the party unilaterally imposing the burden by requiring RTI to perform the contract by a non-contractual means and at RTI's expense.

The market is imperfect and unstable. Therefore, UKSC's strict binary classification of performance into contractual and non-contractual in the RTI case radically departs from its previous holdings, and would likely be a problematic precedent due to the seeming incompatibility with commercial realities. Similarly, it is unrealistic for the Court to justify such a strict stance on the basis of party autonomy and freedom of contract even though English courts arm-twist contractual parties all the time by overlooking their contractual terms and insisting on reasonableness and justice.⁵⁷ Moreover, in the circumstance, MUR was under a *Braganza* duty,⁵⁸ which is applicable where parties rely on mutual trust and cooperation. Since its creation in 2015, the *Braganza* duty is now typically implied in English contract law, and requires a party with contractual discretion to exercise that discretion reasonably and bona fide. The UKSC has a judicial notice of the *Braganza* duty, and should have analyzed it to essentially require MUR to act honestly, rationally, and not in an arbitrary or capricious way since it was in a position of making decisions that significantly affected it and RTI in the Contract.⁵⁹

In light of the forgoing, it is important to note for example, that transfer of euros instead of US dollars is different from payment in cryptocurrency—in the RTI case, while payment in euros or cryptocurrency would have broadly qualified as a non-contractual performance, there is no doubt to any reasonable person that both are uniquely different in the business world and cannot therefore be treated similarly by the law in respect of monetary payments. At least the court should have made such a distinction, and also straighten the line between where the reasonable endeavor to overcome a FM event is undertaken willingly and at the expense of the party offering such non-contractual performance, and where it is being imposed by a party who will not bear the cost.

3.4. On Monetary Loss and Braganza Duty in the RTI Case

It is common knowledge that contracting parties generally care more about monetary gains and losses: this, perhaps, is why compensatory damages focuses solely on monetary loss.⁶⁰ In terms of pecuniary cost, MUR did not lose any money

unless he dislocates his business and breaks his other contracts in order to fulfil one surely hinders delivery.⁷

⁵⁷ *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, para 25.

⁵⁸ *Braganza v BP Shipping Ltd* [2015] UKSC 17.

⁵⁹ A similar expectation not to exercise discretion arbitrarily can be seen in *Socimer International Bank Limited v Standard Bank London Limited* (2008) EWCA Civ 116; *Abu Dhabi National Tanker Co v Product Star Shipping Ltd (The Product Star)* [1993] 1 Lloyd's Rep 397.

⁶⁰ *Robinson v Harman* (1848) 1 Ex Rep 850, 855.

prior to invoking the FM clause, and could not have lost any money in respect of its fears of not being paid in US dollars since RTI promised to shoulder any conversion costs. MUR would have still been paid in US dollars at the end of the conversion, and there was no concrete evidence (other than mere speculations) that its payment was (or would be) delayed: its argument of delay was solely based on perceptive fears that did not actually materialize.

Longmore LJ in *Great Elephant Corp v Trafigura Beheer BV*,⁶¹ observed that corporations have a relatively high degree of control over their operations, and it is a high threshold for a corporation to show that a particular matter or event is ‘beyond their control’.⁶² Thus, RTI’s willingness to pay in euros and cover any conversion fees proves their good faith and the higher threshold of responsibility it was willing to undertake towards fulfilling its duty to mitigate the FM event. In any case, English case law in relation to force majeure tends to prefer a low threshold meaning of *delay*—thus, its impact must be quite significant as to almost ground performance to a halt before it can trigger a force majeure. A case in point is Lord Esher’s opinion in *Bulman & Dickson v Fenwick & Co*,⁶³ in relation to whether an exceptions clause did excuse charterers for late unloading caused by a strike. Lord Esher MR (with whom Lopes and Kay LJJ concurred) stated that:

“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.”⁶⁴

In the RTI case, delay was merely speculated and thus unjustifiable when paired with Lord Tucker’s view in *Fairclough, Clough, Dodd & Jones Ltd v JH Vantol*.⁶⁵ In that case, the relevant portion of the FM clause provided that “should the shipment be delayed by fire, strikes, . . . , or any other cause comprehended in the term force majeure other than war, hostilities, blockade, the time of shipment shall be extended by two months.” Lord Tucker, reading the word ‘delayed’ in the context of the FM clause considered that ‘delayed’ meant just that, and he did not consider that it should mean ‘shipment by the contract date be prevented’.⁶⁶

Furthermore, on the authority of *The Sea Angel*,⁶⁷ “the doctrine of frustration is not to be lightly invoked. . . mere incidence of expense or delay or onerousness is not sufficient. . . there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances.”⁶⁸ Yet in the RTI case, delay was only speculated and MUR’s justification

⁶¹[2013] EWCA Civ 905.

⁶²*Ibid*, para 46.

⁶³*Bulman & Dickson v Fenwick & Co* [1894] 1 QB 179.

⁶⁴*Ibid*, 185.

⁶⁵[1957] 1 WLR 136.

⁶⁶*Ibid*, per Lord Tucker at 143.

⁶⁷[2007] ECWA 547.

⁶⁸*Ibid*, para 111. Also see *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 (HL).

to discontinue performance was based on the likely restrictions the US government sanctions against RTI's parent-company would have on RTI towards its own performance of the COA. It would have been different if MUR based its objection upon an actual experience: for example—if it had experienced delays in the past with RTI under the same or similar FM event, and was thus unprepared to relive the same experience—that would have been a satisfactory example in which it would be justified to cite RTI's incapability to overcome the FM event through what it thought was a reasonable endeavor.

In any event, the burden was on MUR to prove that delay happened—it was insufficient to argue the possibility of delay when it did not happen or have any reasonable possibility of happening given that processing euro payment and converting same to US dollars is typically an instantaneous exercise. Even though the FM clause in the COA did not give MUR a one-sided power to determine what and when FM occurred, the way and manner in which it exercised its judgment seemed as if it had such a power. The case of *Dwyer (UK Franchising) Ltd v Fredbar Ltd and Mr Shaun Rowland Bartlett*,⁶⁹ provides a good example of an instance in which a force majeure clause empowered a party to unilaterally declare a force majeure event. In that case, the FM clause of the franchise agreement read as follows:

“This Agreement will be suspended during any period that either of the parties is prevented or hindered from complying with their respective obligations under any part of this Agreement by any cause which the Franchisor designates as force majeure including strikes, disruption to the supply chain, political unrest, financial distress, terrorism, fuel shortages, war, civil disorder, and natural disasters.”⁷⁰

Jones J held that Dwyer had to exercise this discretion in accordance with the *Braganza* duty or principle.⁷¹ In the *Braganza* case, Lady Hale held that “[a] court would generally imply a term that the decision-making process in relation to the discretion was to be exercised lawfully and rationally in the public law sense.”⁷² That is, the decision was made rationally, taking account of relevant considerations, and ignoring irrelevant considerations; made in good faith and in consistency with the purpose of the contract.⁷³ Based on these *Braganza* principles, MUR's insistence that an FM event had occurred and was incapable of being remedied based on RTI's offer to transfer euros did not align with the requirements of consistence with good faith and contractual purpose.

Another important point to this discourse relates to the way courts treat specific performance and damages in contracts. Courts usually award either damages or specific performance following a breach of contract. The first option a court ex-

⁶⁹[2021] EWHC 1218 (Ch).

⁷⁰Ibid, para 261 (which reproduced Clause 30.1 of the parties' Agreement, entitled 'Force Majeure').

⁷¹*Braganza v BP Shipping Ltd* [2015] UKSC 17.

⁷²Ibid, para 30.

⁷³Ibid, paras 28-30.

plores is compensatory damages, aimed at putting the innocent party to the position he would have been as far as money can do it, had the contract been performed. It is crucial to note that courts typically award specific performance when it can be determined that damages are an inadequate remedy for the breach, especially where the subject matter of the contract is unique or irreplaceable. A grant of specific performance compels the breaching party to fulfill its contractual obligations as agreed upon, rather than simply compensating the injured party with damages. In evaluating whether or not to grant it, courts will consider the existence of a reasonable alternative, fairness and justice in the case, and this includes assessing the conduct of both parties and to what extent a party had acted in good faith.

Prior to the UKSC decision in RTI, courts granted specific performance quite rarely by reserving it for instances where the subject matter of contract was unique and irreplaceable, especially if the performing party was willfully avoiding performance or saw payment of damages as an easier way out. This was not the case in the RTI case, in which RTI insisted on performance even though it would ultimately cost it more to actualize: thus, UKSC's insistence on contractual performance which is another term for specific performance, was inconsistent with settled law as well as the *Braganza* principle.

4. Force Majeure and the Differing English Rules on Contractual Interpretation

4.1. Textualism and the RTI Case

Commercial contracts are largely underpinned in the concept of party autonomy and freedom of contract which emphasize the importance of contract language rather than its purposive meaning (Nelson, 2005). In other words, the exact words used in drafting the terms of a contract arguably embody its complete meaning such that any attempt to import aid from pre-contract negotiations of the parties is viewed as an aberration of their contractual intention. Therefore, in dispute, the primary duty of a court exploring textualism would be to interpret the contract terms by exploring their ordinary dictionary meaning;⁷⁴ this judicial exercise must also be accomplished without any exclusive reliance on each of the parties' post-dispute account regarding their contractual intention.

The English commercial contract law developed from the activities of merchants whose sophistication underlines their heightened capacity to comprehend their actions vis-à-vis consensus ad idem. Textualism views a court's intervention of exploring outside the four walls of contract as a rude disbelief in the contractual words of reasonable commercial parties and purporting to deem them incapable of making their own decisions. Textualism operates on the formalistic conception of law and the parole evidence rule holds the written words of a contract as the

⁷⁴*Lovell & Christmas Ltd v Wall* (1911) 104 LT 85, 88 (Cozens-Hardy MR) (CA). See also *Leader v Duffy* (1888) 13 App Cas 294, 301 (Lord Halsbury LC) (HL).

supreme version of the parties' intention (Posner, 1998; Zuppi, 2007). An integral part of textualism is the stipulation that the intention of parties must intrinsically be gleaned from the contract document without recourse to any pre-contract negotiations or what Lord Wilberforce refers to as the 'matrix of facts'.⁷⁵ In *Melanesian Mission Trust Board v Australian Mutual Provident Society*,⁷⁶ Lord Hope stated that:

'the intention of the parties is to be discovered from the words used in the document. Where ordinary words have been used they must be taken to have been used, according to the ordinary meaning of these words. If their meaning is clear and unambiguous, effect must be given to them because that is what the parties are taken to have agreed to by their contract.'⁷⁷

Given that English contract law positions itself as capable of being used globally by commercial parties, English courts have long seen themselves as the prevalent forum of choice for commercial dispute resolution. In that case, textualism offers that degree of certainty which sophisticated parties would need in order to forecast the consequences of their actions.

The *Arnold* case⁷⁸ reasserted the importance of the actual language used, warning against overreliance on context or commercial common sense. In the case, Lord Neuberger said: "...the clearer the natural meaning, the more difficult it is to justify departing from it."⁷⁹ Thus, textualism's primary focus on the ordinary meaning of contract words as appreciated in the English language dictionary basically underlines what a reasonable language user would understand from the terms. But textualism leaves an important exception to the effect that where the meaning of words as used would seem absurd in a given circumstance, the court is expected to jettison its application and explore any other suitable canons of interpretation.⁸⁰ The challenge with textualism is its disinterestedness in context which may harbor crucial evidence—this lack of openness to consider background facts arguably contradicts with textualism's ultimate ambition of finding the true intention of parties.

In the RTI case, the unanimous majority applied textualism, reinforcing the textualist view that the ultimate mission of finding the true intention of parties can only be safely achieved by limiting findings within the four walls of the contract. But in the *Rainy Sky SA* case,⁸¹ Lord Clarke stated that 'if there are two possible constructions, the court is entitled to prefer the construction which is

⁷⁵ *Prenn v Simmonds* [1971] 1 WLR 1381 (HL).

⁷⁶ [1997] 1 NZLR 391 (PC).

⁷⁷ *Ibid*, 394-95.

⁷⁸ *Arnold v Britton & Ors* [2015] UKSC 36.

⁷⁹ *Ibid*, para 18.

⁸⁰ *Thompson v Goblin Hill Hotels Ltd* [2011] UKPC 8, para 24, per Lord Dyson. Also see *R (on the application of O) v Secretary of State for the Home Department* [2022] UKSC 3; *Public Prosecutors Office of the Vienna Area v Doebling* [2018] UKSC 3; *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, HL.

⁸¹ *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50.

consistent with business common sense and to reject the other.’⁸² Similarly, in *Wood v Capita*,⁸³ the court stated that contractual interpretation is a ‘unitary exercise’: i.e. textual and contextual elements should be weighed together.⁸⁴ Yet, judges including the UKSC unanimous majority in the RTI case, continue to be polarized on commercial interpretation.

4.2. Contextualism: The Meaning of a Document Versus Its Wording

English courts explore contextualism as another method of fathoming the intention of contracting parties by focusing on the surrounding context and commercial purpose of the contract rather than relying solely on the literal meaning of the words used in drafting the contract (Gerhart & Kostritsky, 2015). Unlike textualism, words in the contextual approach derive their meaning from context, that is, the background facts known to both parties (or the factual matrix as Lord Wilberforce called it in *Prenn v Simmonds*), the commercial purpose of the contract (which can be ascertained from a contract’s recital and pre-contractual negotiations), the industry practices and reasonable expectations of parties. These important factors were largely ignored in the RTI case.

Lord Hoffmann is a towering and influential figure in English contract law. He deepened the popularity of contextual interpretation during his reign in the UK House of Lords. In his famous speech in *Investors Compensation Scheme Ltd. v West Bromwich Building Society*,⁸⁵ he propounded five principles of contractual interpretation that seek to avoid unjust or absurd results that might arise from a literal interpretation of contract language. According to Hoffmann’s fourth re-statement in the *ICS* case:

‘the meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.’⁸⁶

Thus, in ascertaining a contractual meaning the court must look beyond the blackletters of a contract into its background facts, knowledge, as well as the underlying purpose so as to truly determine what the parties mean. Similarly, Hoffmann warned in *Mannai Investment Co Ltd v Eagle Star Assurance*,⁸⁷ that we must not ‘confuse the meaning of words with the question of what meaning the use of the words was intended to convey’.⁸⁸ Therefore, if the *rationes decidendi*

⁸²Ibid, para 21.

⁸³*Wood v Capita Insurance Services Ltd* [2017] UKSC 24.

⁸⁴Ibid, paras 12 and 13.

⁸⁵*Investors Compensation Scheme Ltd. v West Bromwich Building Society* [1998] 1 WLR 896 (HL). Referred to as the ‘ICS’ case in this article.

⁸⁶Ibid, 912-13.

⁸⁷[1997] AC 749.

⁸⁸Ibid, 779.

in *ICS* and *Mannai Investment Co Ltd* were considered in the RTI case, the court would likely have interpreted the FM clause in a way that prioritizes a reasonable overcoming and performance of the COA, even if by a non-contractual method rather than insistence upon an impracticable contractual method of performance that seemingly overrode the contractual purpose.

A contextual interpretation especially as advanced by Hoffmann aims ultimately at reflecting the real-world commercial environment in which the contract in question operates. However, the critics to this approach have bemoaned its tendency to create uncertainty due to its heavy dose of subjectivity which could create a needless room for disagreements, disputes, and longer trials that require courts to consider more evidence, even beyond the contract document. The relentless pursuit of finding the intention of parties at all cost through background facts seems to conflict with the speed that commercial parties generally crave in dispute resolution (Havelock, 2016).⁸⁹ Moreover, reliance on the contextualist approach does not seem to help England fulfill its promise to prospective litigants of being the jurisdiction of choice for commercial parties seeking to speedily resolve their disputes.

4.3. Business Common Sense and the Notion of Non-Contractual Performance

As earlier stated, the English contract law has a mercantile genealogy—this heritage is largely visible in how commercial disputes are interpreted. In between the wide spectrum of contractual interpretation, that is textualism and contextualism which according to McLauchlan (2009: p. 14) are ‘poles apart’, is the business common sense (BCS) rule which refers to the principle that commercial contracts should be interpreted in the light of how reasonable, practical, and commercially logical businesspeople would expect it. Lord Wilberforce developed a test for this approach in *Prenn v Simmonds* (supra) which it called the ‘commercial good sense.’ Lord Diplock later advanced it as a more coherent rule of interpretation in *Antaios Cia Naviera S.A. v Salen Rederierna AB*,⁹⁰ when he said that “if detailed and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense it must yield to business common sense.”⁹¹ In 2011, the UKSC in *Rainy Sky SA* (supra) stated that “if there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense.”⁹²

The core underpinning of the BCS rule does not lie in rewriting contracts or

⁸⁹In the *ICS* case, 912-13 Hoffmann stated that ‘subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next [the exclusion of previous negotiations and declarations of subjective intent], [the background] includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.’

⁹⁰[1985] AC 191 (HL).

⁹¹Ibid, 201.

⁹²*Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, para 21.

rescuing parties from bad bargains, but to choose between competing meanings when a contract is ambiguous or unclear from a commercial lens such as the facts in the RTI case. In other words, if two competing interpretations of a contract clause are available, English courts, per the BCS rule, tend to choose the version that is more commercially sensible given that the commercial parties are transacting to achieve commercial outcomes. It is quite likely that the vastness of commercial contracts as well as the series of negotiations that often underpin them may expose them to the underbelly of drafting inadequacies such as ambiguities and unintended consequences. In such a situation, it would make little sense if a court were to become mechanical and unresponsive to background facts, ultimately failing to recognize what could be a glaring error or anti-business sense.

But Hoffmann tried to address this kind of possibility in his recommendation in *Chartbrook v Persimon Homes Ltd.*⁹³ Although the BCS rule appears corrective in approach, it is not typically designed to rewrite the contract of parties where it is perfectly clear and reasonable. Instead, its sparing use eschews interpretations that are likely to produce absurd or irrational outcomes that ultimately undermine the parties' commercial purpose, or provide a party with a platform to be opportunistic if a textual approach were to be exclusively explored such as in the RTI case where the UKSC decision seemed contradictory with how electronic money transfers work. The court's understanding of money (and payment) in the RTI case seemed similar with the definition of money in the old English case of *Moss v Hancock*,⁹⁴ where money was defined as "that which passes freely from hand to hand throughout the community in final discharge of debts... being accepted equally without reference to the character or credit of the person who offers it and without the intention of the person who receives it to consume it...".⁹⁵ Arguably, the court misunderstood RTI's remedial offer to send euros in MUR's Dutch bank account with the promise that the latter would receive enough euros which could be converted to US dollars, including any conversion costs incurred by MUR's bank in the process. In electronic banking terms, the timeframe for the entire process of receiving euros from RTI's bank and converting same to US dollars would be nearly instantaneous and the issue of delay would never have arisen as to trigger the FM clause.

However, UKSC seemed to have appreciated the payment scenario from a physical (*Moss v Hancock*) perspective in which RTI's proposal sounded as if it wanted to physically hand MUR some euro cash that is equivalent to the US dollars that was agreed. MUR's refusal caused RTI to explore alternative charters at a substantially higher rate than that agreed with MUR under the COA. Based on the authority of *B&S Contracts*,⁹⁶ which RTI correctly relied on, MUR's insistence could qualify as an economic duress and RTI's additionally incurred costs should have been recoverable after MUR resumed nomination of vessels to perform the remainder of the contract following the lifting of sanctions by the US government

⁹³[2009] UKHL 38, para 25.

⁹⁴*Moss v. Hancock* [1899] 2 Q.B. 111 (Que. B.D.).

⁹⁵*Ibid*, 116.

⁹⁶*B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419.

which permitted the contracting parties to finalize existing contracts.

UKSC's erroneous conception of what the parties were trying to accomplish was visible in its distinction between a contractual and non-contractual performance in overcoming a force majeure event. Thus, based on the rich case law of BCS rule, which the English apex court created but ignored willfully in the circumstance, the RTI case would have been a perfect circumstance for applying the BCS rule. English contract law often boasts of being predictable or aspires to be so, but the unpredictable swings to different directions of contractual interpretations specifically undermine this claim or ambition. In the RTI case, the court did not to cite the leading cases in contractual interpretation, as if these decisions were totally irrelevant in determining the outcome of the RTI case. Thus, provided that no judicial or legislative effort has been launched to create a unitary system of commercial interpretation as envisaged by Lord Hodge in *Wood v Capita* (supra)⁹⁷, contractual parties utilizing English contract law will always be faced with multiple possibilities of their contractual actions.

Irrespective of the adopted canon of contractual interpretation, it is undeniable that some measure of common sense is necessary in arriving at fair and justifiable interpretations (Kramer, 2003). Lord Wright's bold comment on a 'common sense' approach is relevant here when he opined in *Yorkshire Dale Steamship Co Ltd v Minister of War Transport*,⁹⁸ that:

'this choice of the real or efficient cause from out of the whole complex of the facts must be made by applying commonsense standards. Causation is to be understood as the man in the street, and not as either the scientist or the metaphysician, would understand it. Cause here means what a business or seafaring man would take to be the cause without too microscopic analysis but on a broad view. Thus in the *Lonides* case, the court held that the cause of the loss was the fact that the captain was out of his reckoning to the extent of about 50 miles when he changed his course and that the extinction of the light was not the cause, though there was a remote chance that, if it had been alight as in peace time it used to be, the stranding might have been averted. The question always is what is the cause, not merely what is a cause. The cause so ascertained must then be within the description of consequences of warlike operations if the shipowner is to recover.'⁹⁹

5. Conclusion: What Lessons Can Be Learned from the RTI Case?

The UK Supreme Court's judgment in the RTI case is undoubtedly unprecedented and offers a smorgasbord of crucial lessons on the interpretation and application of force majeure clauses in commercial contracts. Amongst several lessons, the article highlights a few below.

⁹⁷ *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, para 12.

⁹⁸ [1942] 2 All ER 6.

⁹⁹ *Ibid* at 15, per Lord Wright.

5.1. On the Duty to Mitigate an FM Event

The effect of force majeure largely depends on which party in a contract is seeking its application. In many circumstances, the party seeking to rely on force majeure is the performing party who would consequently be discharged if the FM clause is successfully triggered. For a long time, the position of law has been that force majeure clauses apply only when performance is rendered legally or factually impossible, not merely more difficult or inconvenient. Perhaps this is why English law does not accept hardship as a defence to a lack of performance. In the RTI case, RTI did not consider the restrictive sanctions on its parent as sufficient to render it incapable of continuing with performance. RTI was interested in mitigation by exploring a reasonable alternative that is agreeable to commerce and business common sense. However, irrespective of the supporting precedents, the court insisted that the duty to mitigate an FM event can only be fulfilled within the method chosen for contractual performance. The court insisted on a strict binary classification of performance into contractual and non-contractual methods—there was no room for a middle ground in assessing whether an offered alternative stands in reasonable proximity to the contractual method.

As stated earlier, based on the business common sense rule which English courts are highly familiar with, there is a world of difference between satisfying payment of debts in US dollars as agreed by contract on one hand, and seeking to pay the same debt with (euros or) cryptocurrency, on the other hand, as an alternative. While the alternative to pay in cryptocurrency (or euros) qualifies as a non-contractual method, many reasonable businesspeople would likely agree that US dollars and euros stand in very close proximity, while US dollars and cryptocurrency stand poles apart and could easily qualify as a non-contractual method. Inherent in the duty to mitigate an FM event is also the duty to accept a reasonable alternative.

Thus, MUR's refusal to accept euros (which could have mitigated the force majeure) ought to sufficiently undermine its force majeure claim owing to its *Braganza* duty. English case law on contracts richly emphasizes business common sense and commercial pragmatism. In other words, alternatives need not be identical but must functionally achieve the contractual purpose. If this be the case, then a party should not be allowed to ignore practical solutions that ultimately achieve their contractual purpose. However, in the wake of the RTI decision, contracting parties may need to ensure that they specify exactly what would constitute mitigation of force majeure, and whether a non-contractual method can be explored for that purpose. Similarly, it is important to keep the records of every interaction before and after dispute to enable a party to prove or disprove the breach or satisfaction of the *Braganza* duty.

5.2. The Doctrines of Privity of Contract and Separate Corporate Personality

Although the RTI case revolved primarily around contract law, corporate law is-

sues were implicated, even though their confluence was inadequately addressed by the court. Recall that RTI Ltd was not a Russian company and was not directly impacted by the US government sanctions. A limited liability company is separate from its parent or shareholders—in this case, there ought to be a distinction between RTI and its human or corporate shareholders unless there is a justifiable ground to lift the corporate veil, which was absent in the RTI case. Sanctions were meted on RTI's parent-company—both the parent and subsidiary should not have been viewed as being jointly and severally liable in the circumstance.

Oddly, the doctrine of separate corporate personality was not discussed in the RTI case. RTI has its own corporate personality and signed the COA which binds it alone. The doctrine of privity of contract stipulates that only the parties that executed a contract would be bound by its provisions. Similarly, barring exceptions, the doctrine of separate corporate personality ensures that what an incorporated company does cannot be taken to have been done by its subsidiary or parent. Both of these concepts were not addressed by the court in the RTI case.

5.3. Prescriptive Drafting of Force Majeure Clauses

Although every FM clause is usually interpreted based on its own peculiar facts, the RTI case shows that contracting parties would need to be as imaginative and detailed as possible when drafting an FM clause. Precisely, if the parties are genuinely interested in performance of contract to actualize their economic purpose, then the duty to mitigate an FM event could specifically state that the party with the obligation to mitigate could explore both contractual and non-contractual methods. Such specificity would prevent literalist judges from ever deviating from the intention of parties.

Although a non-contractual method could mean different surprising things, judicial interpretations ought to limit them to commercially reasonable alternatives that satisfy business common sense and contractual purpose. In other words, while government/currency sanctions feature regularly in many FM clauses, parties can indicate what an alternative currency could be in the event the contractual currency is impacted by sanctions.

Given the geopolitical tensions in international trade as well as the proliferation of payment methods and currencies, such as cryptocurrencies, it is important that parties specifically mention or exclude the exact types of currency that would be acceptable as payment alternatives or what would happen in the event of trade sanctions such as an unexpected hike in tariffs.

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Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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