People Watching on the Clapham Omnibus: Reasonableness in Commercial Contracts

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Introduction

SR1[61] A typical commercial contract will often, in one if not more places, require a party's conduct to be reasonable (or not unreasonable). But what, exactly, do commercial lawyers mean by 'reasonableness'?

The classic image a practitioner may call to mind in answering this is 'the passenger on the Clapham omnibus', who will bring to bear on the matter at hand a disinterested, objective assessment informed by a dose of common sense. However, as the Supreme Court has noted:

> 'The Clapham omnibus has many passengers. The most venerable is the reasonable man, who was born during the reign of Victoria but remains in vigorous health. Amongst the other passengers are the right-thinking member of society, familiar from the law of defamation, the officious bystander, the reasonable parent, the reasonable landlord, and the fair-minded and informed observer, all of whom have had season tickets for many years.'[1]

'Reasonableness' is brought into sharper focus when considered in a specific context. A common occurrence in commercial contracts is where a party, whose consent the contract requires before its counterparty can take some action, agrees not to 'unreasonably withhold' such consent. Another common occurrence is where a party agrees to use its 'reasonable endeavours' to perform an action, instead of promising such performance absolutely.

This article first gives an overview of the English courts' approach to construing 'consent not to be unreasonably withheld' clauses and 'reasonable endeavours' standards. It outlines the important elements the court will consider for each, as well as the manner in which the courts' approach involves an objective test. It then looks at two cases decided in 2022, which considered 'reasonableness' in these contexts: *Gama Aviation (UK) Limited, International Jet Club Limited v Mwwmmwm Limited*[2] and *MUR Shipping BV v RTI Ltd*.[3] It concludes by assessing the significance of those recent cases for interpreting 'reasonableness' going forwards.

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1 *Healthcare at Home Limited v The Common Services Agency* [2014] UKSC 49, [2014] 4 All ER 210 at [1].

[2] [2022] EWHC 1191 (Comm).
[3] [2022] EWCA Civ 1406.

Background

SR1[62] The purpose of requiring a party's consent not to be 'unreasonably withheld' is to limit the circumstances in which that party can withhold its consent. If consent is unreasonably withheld, it is treated as no longer being required.[1]

A few examples of consent rights in commercial contracts that are often limited in this way include:

- consent to assigning the benefit of a contract;
- consent to deviating from interim operating covenants requiring a business to be run in a particular way prior to completion of a share purchase agreement;
- consent to settling claims or admitting liability in the context of a conduct of claims clause; and
- consent to the other party announcing details of a transaction.

A 'reasonable endeavours' standard limits the steps a party must take to satisfy an obligation.

A few examples of obligations in commercial contracts that are often qualified by a 'reasonable endeavours' standard include:

- steps to be taken to satisfy a condition (eg antitrust or regulatory conditions in a share purchase agreement);
- steps to be taken to obtain a third party consent in relation to a commercial contract;
- steps to be taken to convene shareholder meetings or obtain shareholder approvals; and
- co-operation covenants, such as co-operating with an expert to resolve a dispute.

Although the courts have traditionally been reluctant to definitively state the limits that will be imposed by using 'reasonableness' in each of these two contexts, and have emphasised that each use falls to be construed on the facts, case law does provide some guidance.

[1] *F W Woolworth & Co Ltd v Lambert* [1937] Ch 37.

'Consent Not to Be Unreasonably Withheld'

Landlord and tenant cases

SR1[63] As the phrase 'consent not to be unreasonably withheld' is commonly used to qualify a landlord's right to withhold consent to the

assignment of a lease, much of the court's approach to construing this phrase stems from landlord and tenant cases.

Of particular importance are the seven principles derived from previous authorities and set out by the Court of Appeal in *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd*:[1]

> '(1) The purpose of a covenant against assignment without the consent of the landlord, such consent not to be unreasonably withheld, is to protect the lessor from having his premises used or occupied in an undesirable way, or by an undesirable tenant or assignee ...
>
> (2) As a corollary to the first proposition, a landlord is not entitled to refuse his consent to an assignment on grounds which have nothing whatever to do with the relationship of landlord and tenant in regard to the subject matter of the lease ...
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> (3) The onus of proving that consent has been unreasonably withheld is on the tenant ...
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> (4) It is not necessary for the landlord to prove that the conclusions which led him to refuse consent were justified, if they were conclusions which might be reached by a reasonable man in the circumstances ...
>
> (5) It may be reasonable for the landlord to refuse his consent to an assignment on the ground of the purpose for which the proposed assignee intends to use the premises, even though that purpose is not forbidden by the lease ...
>
> (6) ... while a landlord need usually only consider his own relevant interests, there may be cases where there is such a disproportion between the benefit to the landlord and the detriment to the tenant if the landlord withholds his consent to an assignment that it is unreasonable for the landlord to refuse consent.
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> (7) Subject to the propositions set out above, it is in each case a question of fact, depending upon all the circumstances, whether the landlord's consent to an assignment is being unreasonably withheld ... .'[2]

A later case, *Mount Eden Land Limited v Straudley Investments Limited*,[3] concerned a lease that prevented subletting without the consent of the landlord, such consent 'not to be unreasonably withheld or delayed'. The landlord was willing to consent to a sublease provided that 50 per cent of the rental deposit the subleasee was to pay would be held for the landlord's benefit. The tenant alleged that this condition was unreasonable. Finding in favour of the tenant, the Court of Appeal applied the principles set out in *International Drilling Fluids* and from these principles formulated two further propositions:

> '(1) It will normally be reasonable for a landlord to refuse consent or impose a condition if this is necessary to prevent his contractual rights under the headlease from being prejudiced by the proposed assignment or sublease.
>
> (2) It will not normally be reasonable for a landlord to seek to impose a condition which is designed to increase or enhance the rights that he enjoys under the headlease.'[4]

International Drilling Fluids was further considered by the House of Lords in *Ashworth Frazer Ltd v Gloucester City Council*,[5] a case about refusing consent to an assignment. The House of Lords effectively con-

densed the seven principles from *International Drilling Fluids* into three principles (broadly reflecting principles (2), (4) and (7) from *International Drilling Fluids* above).[6] Nevertheless, the seven principles remain good law. As noted by the Supreme Court in *Sequent Nominees Ltd (formerly Rotrust Nominees Ltd) v Hautford Ltd*,[7] 'the summary of the relevant principles which best combines completeness and conciseness is to be found in ... *International Drilling Fluids*'; in *Ashworth Frazer* 'they were, without being disapproved, helpfully condensed ... into three overriding principles'.[8]

Although the two further propositions set out in *Mount Eden* were not considered by the House of Lords in *Ashworth Frazer* or by the Supreme Court in *Sequent Nominees*, *Mount Eden* has been favourably cited in later commercial cases – as discussed below.

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1 [1986] Ch 513, [1986] 1 All ER 321.
2 *International Drilling Fluids* [1986] Ch 513 at 519–21.
3 (1997) 74 P & CR 306.
4 *Mount Eden* (1997) 74 P & CR 306 at 310.
5 [2001] UKHL 59, [2002] 1 All ER 377.
6 *Ashworth Frazer* [2001] UKHL 59, [2002] 1 All ER 377 at [3]–[5].
7 [2019] UKSC 47, [2020] AC 28, [2020] 1 All ER 1003.
8 *Sequent Nominees* [2019] UKSC 47, [2020] AC 28, [2020] 1 All ER 1003 at [21].

Key commercial cases before Gama Aviation

SR1[64] The applicability of the principles from landlord and tenant cases to commercial contracts was established in *British Gas Trading Limited v Eastern Electricity*,[1] and later in *Porton Capital Technology Funds and Others v 3M UK Holdings Limited and 3M Company*.[2]

British Gas required a straightforward read across from the relevant landlord and tenant cases mentioned above as it concerned the refusal of consent to an assignment of the supplier's rights and obligations under a long-term gas contract.

Porton Capital, however, concerned an earn-out arrangement under a share purchase agreement. The buyer had agreed to pay additional consideration to the vendors post-acquisition based on the levels of sales made by the acquired business. Under the agreement, the buyer was entitled to cease to carry on the development and marketing of the acquired business' products with the consent of the vendors, such consent 'not to be unreasonably withheld'. The market turned against the products and the buyer wrote to the vendors asking to terminate the business, offering compensation substantially less than the maximum potential earn-out payment. The vendors refused consent and the buyer alleged that it was entitled to terminate the acquired business because consent had been unreasonably withheld.

Applying the principles set out in *International Drilling Fluids*, and their condensed version in *Ashworth Frazer*, the High Court held that the vendors had withheld their consent reasonably. In particular, the judge agreed with the vendors' claims that:

(1) The burden was on the buyer to show that the vendors' refusal to consent to the cessation of the business was unreasonable.
(2) It was not for the vendors to show that their refusal of consent was right or justified, simply that it was reasonable in the circumstances.
(3) In determining what is reasonable, the vendors were entitled to have regard to their own interests in earning as large an earn-out payment as possible.
(4) The vendors were not required to balance their own interests with those of the buyer, or to have any regard to the costs that the buyer might have been incurring in connection with the ongoing business.[3]

Crowther v Arbuthnot Latham & Co Limited[4] concerned the withholding of consent, under a loan facility agreement, to the sale of a property over which security for the loan had been granted. The bank withheld its consent on the basis that the proposed sale price of the property was insufficient to repay the entirety of the loan, notwithstanding that the value of the property had never been sufficient to secure the loan in full.

Applying *Mount Eden*, the court concluded that it was unreasonable for the bank to seek to impose a condition to consent for a collateral purpose.[5] In addition, again applying *Mount Eden*, the court held that the correct test to apply when construing wording that consent is 'not to be unreasonably withheld' is the reasonable person test, which requires an objective assessment of reasonableness.[6] This refers back to the fourth principle from *International Drilling Fluids* – it is not necessary for the party withholding consent to prove that the conclusions that led it to refuse consent are justified if they are conclusions that might be reached by a reasonable person in the circumstances. This was a significant finding; the court explicitly distinguished an earlier case, *Barclays Bank plc v Unicredit Bank AG (Formerly Known as Bayerische Hupo-Und Vereinsban AG)*.[7]

In *Unicredit*, the consent clause in issue was phrased: 'such consent to be determined ... in a commercially reasonable manner.' The court heard submissions in relation to whether this was to be regarded (alongside other possibilities that fall outside the scope of this article) as analogous to the landlord and tenant cases (where landlord consent to an assignment is 'not to be unreasonably withheld') or as equivalent to conferring a discretion to which the principles of *AP Picture Houses Ltd v Wednesbury Corporation*[8] applied.[9]

The *Wednesbury* test is different to the reasonable person test referred to in the landlord and tenant cases. Instead, it considers whether a decision making process and its associated outcome are rational:

> 'It is true the discretion must be exercised reasonably. Now what does that mean? ... For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that

> it lay within the powers of the authority. Warrington LJ in *Short v Poole Corporation* [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.'[10]

Although in *Unicredit* Longmore LJ initially found this debate to be 'interesting' but 'not ultimately helpful since the meaning of the clause has to be determined as a matter of construction of this particular contract in its particular context', he nevertheless went on to say that, if necessary or helpful, he would assign the clause to the category of cases conferring a discretion to which the principles of Wednesbury apply.[11] On its terms, the clause concerned the 'manner' in which the decision to withhold consent was determined.

The conclusion to be drawn from the court's decision in *Crowther* to distinguish *Unicredit* is that the exact wording of the clause matters, and will determine whether the reasonable person test or the *Wednesbury* rationality test applies. The wording in *Crowther* was 'not about process or manner, the words in *Unicredit*. It [was] about outcome'.[12] However, as discussed in the next section, *Gama Aviation* may serve to muddy the waters in this respect.

Lastly, in *Apache North Sea Limited v INEOS FPS Limited*,[13] the claimant sought an amendment to the terms of a shipment schedule in a contract for the transport to shore of its oil, which required the defendant's consent, such consent not to be unreasonably withheld. It was held that the defendant had conditioned its consent on the claimant agreeing to changes to the contract tariff. Having made reference to the landlord and tenant cases, including *International Drilling Fluids*, *Ashworth Frazer* and *Mount Eden*, as well as *Porton Capital*, *Crowther* and *Unicredit*, the High Court held in finding against the defendant that:

> '... while it may be legitimate for the consent-provider to impose a condition intended to protect or compensate for a benefit it enjoyed under the contract which the course for which consent is sought would impair. However, that is obviously very different from imposing a condition which would impair a right which the party seeking consent enjoys under the contract.'[14]

This provides further judicial support for the finding in *Crowther* and *Mount Eden* that withholding consent in order to revisit the original bargain is unlikely to be reasonable.

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1 *The Times*, 29 November 1996.
2 [2011] EWHC 2895 (Comm).
3 *Porton Capital* [2011] EWHC 2895 (Comm) at [223] and [228].
4 [2018] EWHC 504 (Comm).
5 *Crowther* [2018] EWHC 504 (Comm) at [33]. In *Crowther*, *Mount Eden Land Limited v Straudley Investments Limited* (1997) 74 P & CR 306 was incorrectly cited as *Mount Eden Land Limited v Bolsover Investment Limited* [2014] EWHC 3523 (Ch).
6 *Crowther* [2018] EWHC 504 (Comm) at [24].
7 [2014] EWCA Civ 302.
8 [1948] 1 KB 223.
9 *Unicredit* [2014] EWCA Civ 302 at [14].

[10] *Wednesbury* [1948] 1 KB 223 at 229.
[11] *Unicredit* [2014] EWCA Civ 302 at [14] and [20].
[12] *Crowther* [2018] EWHC 504 (Comm) at [35].
[13] [2020] EWHC 2081 (Comm).
[14] *Apache North Sea* [2020] EWHC 2081 (Comm) at [45].

Gama Aviation

SR1[65] *Gama Aviation* involved an application for summary judgment and was heard in the High Court. In 2008, the second claimant and the defendant entered into an agreement for the provision of services for the management and operation of aircraft owned by the defendant. In 2014, the second claimant was merged into the first claimant's corporate group and the combined group was reorganised. The claimants claimed that, in 2017, the agreement was novated such that the first claimant took over the second claimant's rights and obligations. The agreement continued to be performed until 2019, when the defendant stopped paying sums owed under it. In 2020, the claimant initiated proceedings to recover the unpaid sums and in 2021 obtained default judgment in respect of sums owed up to the date of the default judgment, as the defendant failed to submit a defence. An application to set the default judgment aside failed and an order was made debarring the defendant from defending the outstanding claim and taking any part in the proceedings unless it paid the debt on time. The defendant did not pay on time and so was unable to participate in the hearing with which we are concerned.

In its defence, the defendant had asserted that the terms of the services agreement rendered the novation ineffective. In response, the second claimant assigned its rights under the agreement to the first claimant. The defendant challenged the effectiveness of the assignment on the basis that the agreement prevented assignment without the consent of the defendant, such consent 'not to be unreasonably withheld'. The defendant submitted that it had refused its consent to the assignment for several reasons. First, the defendant may have some potential claim against the second defendant, which would be prejudiced if the agreement were assigned to the first defendant and, second, the assignment was for the purposes of the litigation rather than ordinary business purposes. (The defendant also made other arguments about the wording of the assignment and whether the claimants could argue that there had been an assignment because that was inconsistent with the implied novation, but these are not relevant for this article.)

Kramer J dismissed these arguments and held that the assertion that the assignment was invalid was unsustainable and has no prospect of success. In reaching this conclusion, he gave a very short summary of relevant case law, including *Ashworth Frazer* and *Sequent Nominees*. However, he also cited *Victory Place Management Company Limited v Kuehn*[1] in stating that reasonableness 'involves both the reasonable process and a rational outcome'.[2]

In *Victory Place*, a pair of tenants contested the decision of their building's management company not to consent to their keeping their dog at the

property. The consent clause in the lease did not include the qualification 'consent not to be unreasonably withheld'. Instead, it was unqualified: 'No dog bird cat or other animal or reptile shall be kept in the [property] without the written consent of [the management company].'[3] It was common ground at appeal that a term should be implied into the contract limiting how this consent could be exercised that amounted to at least the process limb of *Wednesbury*. This was by virtue of the decision in *Braganza v BP Shipping Ltd*,[4] which found that the *Wednesbury* test may constrain exercises of contractual discretion.

The judge's application of *Victory Place* in *Gama Aviation* is significant in that it sits uneasily with the decision in *Crowther* that the phrase 'consent not to be unreasonably withheld' invoked the objective, reasonable person test rather than the *Wednesbury* rationality test. However, in our view this application is obiter dicta and so may not be followed in subsequent decisions relating to the use of this phrase. However, one thing is clear – the courts are still not completely settled on how to interpret a phrase that is used in most commercial contracts in some form or other.

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1 [2018] EWHC 132 (Ch).
2 *Gama Aviation* [2022] EWHC 1191 (Comm) at [41].
3 *Victory Place* [2018] EWHC 132 (Ch) at [4].
4 [2015] UKSC 17, [2015] 4 All ER 639.

Reasonable Endeavours Standard

Key cases before MUR Shipping

SR1[66] As discussed in the previous section, determining whether a party has 'unreasonably withheld' its consent requires the objective, reasonable person test to be applied.

The same is true when assessing whether a party has used its 'reasonable endeavours' to do something. In *Minerva (Wandsworth) Ltd v Greenland Ram (London) Ltd*,[1] Rose J found that the appropriate test to determine whether someone has used their 'reasonable endeavours' is: 'what would a reasonable and prudent person acting properly in their own commercial interest and applying their minds to their contractual obligation have done to try to [achieve the objective].'[2]

UBH (Mechanical Services) Ltd v Standard Life Assurance Co,[3] found that the person subject to the 'reasonable endeavours' obligation (ie the obligor) is entitled to carry out a balancing act between the obligation it has undertaken to perform, on the one hand, and all relevant commercial considerations, on the other, which may include the obligor's relationships with third parties, the ease of fulfilling the obligation, the costs and uncertainties of any proposed litigation and the expense to be incurred. In relation to any proposed course of action, the chances of achieving the desired result would also be of prime importance. However, if the contract

specifies certain steps that the obligor must take, the obligor will still have to take those steps even if that involves sacrificing its own commercial interests.[4]

The High Court's obiter dicta in *Rhodia International Holdings Ltd v Huntsman International LLC*[5] provides some (non-binding) guidance about how the courts may construe a 'reasonable endeavours' provision where more than one reasonable course of action is open to the obligor. Mr Flaux QC suggested that 'reasonable endeavours' may require the obligor to take only one such course. However, the exact wording of the clause is again important; it was also considered, obiter dicta, that an 'all reasonable endeavours' provision may instead require the obligor to take all reasonable courses it can.[6]

More generally, 'reasonable endeavours' is understood to be a less onerous standard than 'all reasonable endeavours' or 'best endeavours'. (It remains uncertain whether this is because 'all reasonable endeavours' falls between 'reasonable endeavours' and 'best endeavours' or because 'all reasonable endeavours' is equivalent to 'best endeavours'.[7])

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1 [2017] EWHC 1457 (Ch).
2 *Minerva* [2017] EWHC 1457 (Ch) at [255].
3 *The Times*, 13 November 1986.
4 *Phillips Petroleum Company United Kingdom Limited v Enron Europe Limited* [1997] CLC 329.
5 [2007] EWHC 292 (Comm), [2007] 2 All ER (Comm) 577.
6 *Rhodia* [2007] EWHC 292 (Comm), [2007] 2 All ER (Comm) 577 at [33].
7 Contrast, for example, Rougier J's obiter dicta in *UBH* with Mr Flaux QC's obiter dicta in *Rhodia*.

MUR Shipping

SR1[67] *MUR Shipping* concerned a contract between the owner of a vessel and its charterer. The owner had agreed to transfer goods to Ukraine on behalf of the charterer in return for payment in US dollars. The contract defined a 'Force Majeure Event' as an event or state of affairs that met four criteria, the last of which was that 'it could not be overcome by reasonable endeavours from the Party affected'.

In 2018, the US Department of the Treasury's Office of Foreign Assets Control sanctioned the charterer's parent company. The owner sent a notice to the charterer invoking the force majeure clause on the basis that continuing to perform the agreement would breach the sanctions. It also noted that the sanctions would prevent payments in US dollars, which were required by the contract. In response, the charterer offered to make payment in euros (instead of US dollars) and to bear any additional costs or exchange rate losses in converting euros to US dollars. The owner refused and the charterer obtained alternative tonnage and brought a claim in LMAA arbitration for the additional costs involved. The case turned on whether the owner could rely on the force majeure clause to avoid performing the contract where it had rejected an offer by the charterer of non-contractual performance as a proposed solution to the

event of force majeure: and therefore whether the state of affairs was really a 'Force Majeure Event' as defined in the contract.

The arbitrators ruled that the owner was not entitled to rely on the force majeure clause because the state of affairs could have been overcome by the owner's reasonable endeavours – ie by accepting the charterer's offer of payment in euros – and therefore it was not a 'Force Majeure Event' as defined in the contract.

The owner appealed the decision to the High Court. The question for the High Court to decide was 'whether "reasonable endeavours" from the Party affected ... can include accepting payment in € instead of the US$ for which the contract provides'.[1] Jacobs J held that the exercise of reasonable endeavours did not require the owner to sacrifice its contractual right to payment in US dollars, and so found in favour of the owner.

The charterer appealed to the Court of Appeal and the appeal was heard by Males LJ, Newey LJ and Arnold LJ. Males LJ gave the majority judgment in favour of the charterer, with Arnold LJ dissenting. As to whether or not it was 'reasonable' for the owner to accept payment in euros in order to overcome the state of affairs giving rise to the force majeure event, Males LJ observed that, if the charterer's proposal would overcome the state of affairs caused by the imposition of sanctions on its parent, 'it would have been a very straightforward matter for [the owner] to accept that proposal, requiring no exertion on its part'.[2] He also found that the state of affairs being 'overcome' (within the meaning of the force majeure clause) did not necessarily require that the contract must be performed in strict accordance with its terms. He concluded that the state of affairs would have been overcome by the charterer's proposal and that it therefore was not a 'Force Majeure Event' as defined in the contract.

The fact that the proposal would have solved the problem of the owner receiving the right quantity of US dollars in its bank account at the right time and with no detriment to the owner was decisive. Males LJ acknowledged that 'the position would be different if [the charterer's] proposal would have resulted in any detriment to [the owner] or in something different from what was required by the contract'.[3]

Dissenting, Arnold LJ considered that although 'plainly it would have been reasonable' for the owner to accept the charterer's proposal, the owner was nevertheless entitled to insist upon its strict contractual right to receive payment in US dollars.[4] In his judgment 'an "event or state of affairs" is not "overcome" ... by an offer of non-contractual performance, and in particular an offer of non-contractual performance by the counterparty to the Party affected'.[5]

Given Males LJ's acknowledgement that *MUR Shipping* was decided on its (unusual) facts, and the caution expressed in Arnold LJ's dissenting judgment, it remains to be seen whether future cases will be distinguished from *MUR Shipping*. In principle, at least, the rationale from *MUR Shipping* could extend to requiring acceptance of non-contractual performance of obligations other than payment obligations. However, in a case involving more substantial obligations, it seems unlikely that the facts would readily allow the courts to find that, despite non-contractual

performance, the obligee had suffered no detriment and had received what it was entitled to under the contract. Payment currencies are, in a sense, fungible; most other terms of a contract are not.

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[1] *MUR Shipping BV v RTI Ltd* [2022] EWHC Civ 1406 at [31].
[2] *MUR Shipping BV v RTI Ltd* [2022] EWHC Civ 1406 at [55].
[3] *MUR Shipping BV v RTI Ltd* [2022] EWHC Civ 1406 at [59].
[4] *MUR Shipping BV v RTI Ltd* [2022] EWHC Civ 1406 at [69].
[5] *MUR Shipping BV v RTI Ltd* [2022] EWHC Civ 1406 at [74].

Conclusion – Future Significance of *Gama Aviation* and *MUR Shipping*

SR1[68] *Gama Aviation* and *MUR Shipping* do not diminish the established principle that ascertaining whether a party to a commercial contract has unreasonably withheld its consent, or has failed to use its reasonable endeavours, entails an assessment of what the reasonable person would have done in the circumstances.

Although *Gama Aviation* referred to the *Wednesbury* rationality test rather than the reasonable person test, the case should be treated cautiously. The judgment gave only a brief treatment of the authorities and did not reference *Porton Capital*, *Crowther* or *Unicredit*. Moreover, *Victory Place* was in some respects a curious decision to apply. As mentioned above, the consent clause in *Victory Place* did not include the usual 'consent not to be unreasonably withheld' wording and it was common ground that the process limb of the *Wednesbury* rationality test should be implied into the contract. In our opinion, it would have been more appropriate to apply *Porton Capital* and *Crowther*, which, like the contract in *Gama Aviation*, were concerned with express terms that consent was not to be unreasonably withheld. Lastly, *Gama Aviation* was heard on an application for summary judgment, rather than a full trial, following a prior default judgment and where the defendant was unrepresented and, in any event, the relevant part of the judgment was obiter dicta. Until the courts further consider the issue, we believe that the principles derived from the landlord and tenant cases, including the reasonable person test, should continue to be determinative when assessing whether or not a party has 'unreasonably withheld' its consent under an express clause in a commercial contact.

MUR Shipping was decided on unusual facts and in our view is of limited assistance when considering what 'reasonable endeavours' entails in most commercial contracts. Cases such as *Minerva*, *UBH* and *Rhodia*, which consider the meaning of the words more generally, will usually be more instructive. *MUR Shipping* does show that, in a force majeure context and depending on the circumstances, 'reasonable endeavours' may require a party to accept payment in a currency other than the contract currency. But Males LJ's acknowledgement that he would have decided differently if the charterer's proposal would have resulted in any detriment to the owner or in the owner not receiving what it was entitled to under the contract,

along with Arnold LJ's dissenting judgment, indicate that *MUR Shipping* is likely only to be applied to future cases with a similar fact pattern as that case.