CTI Group Inc v Transclear SA [2008] APP.L.R. 07/22

CA on appeal from Commercial Court (Mr. Justice Field) before Ward LJ; Moore-Bick LJ; Rimer LJ. 22nd July 2008.

Lord Justice Moore-Bick :

1. This is an appeal against an order of Field J. varying an award made by an arbitration tribunal dismissing a claim by the respondent, CTI Group Inc. ("the buyers"), against the appellant, Transclear S.A. ("the sellers"), for damages for non-delivery of a cargo of cement. The dispute between the parties arose out of a contract made between the buyers and the sellers on 7th May 2004 for the sale of 27,000 m.t. of Indonesian cement in bulk f.o.b. the *'Mary Nour'* at Padang. The sellers were unable to provide a cargo for the vessel at Padang and on 17th May the parties entered into a substitute contract for the sale of the same quantity of cement on substantially the same terms save that shipment was to be made in Taiwan. In the event, however, the sellers failed to provide a cargo for the vessel in Taiwan either, and as a result the buyers made a claim against them for damages in the sum of US$449,726.96 representing the loss incurred in obtaining a cargo from an alternative source in Russia.

2. The background to the contract, as the sellers were aware, lay in an attempt by the buyers to import substantial quantities of cement into Mexico in breach of a cartel then operated by a local company, Cemex. The plan was to use the *'Mary Nour'* as a floating silo to bag and distribute into the Mexican market between 300,000 and 500,000 m.t. of cement a year. In April 2004 the vessel was about to complete a routine drydocking in Guangzhou and the buyers were therefore looking for a cargo of cement for the positioning voyage to Mexico.

3. The sellers intended to obtain the cargo from a supplier they had used on a number of previous occasions, PT Semen Padang, who had proved reliable. There was evidence before the arbitrators that spot contracts of this kind are normally concluded on the telephone with nothing being reduced to writing and that, although once agreement has been reached on terms the parties regard themselves as bound, either party may withdraw until a letter of credit has been opened. In the light of that evidence the tribunal found that it was unlikely that the sellers could show that they had entered into a legally binding contract with the supplier, but that by the date of the contract they had made arrangements for the shipment of a cargo that would have been effective had it not been for the intervention of Cemex. In paragraph 3 of the award the arbitrators record that it was common ground that the supplier at Padang had declined to provide a cargo because of pressure brought to bear on it by Cemex and that Cemex had also used its influence to persuade the supplier in Taiwan to withdraw its offer of a cargo.

4. In paragraphs 18-22 of the award the arbitrators made detailed findings about the circumstances which had led to the sellers' failing to ship a cargo in accordance with the contract. In view of the importance which Mr. Nolan attached to those findings I shall set them out in full. They are as follows:

"18. During the early part of the following week Mr. Paulovits [the sellers' managing director] pressed Mr. Laurenzi [sic] to *"get the factory's confirmation of the order"* but it quickly became clear that no such confirmation would be forthcoming. It was common ground that the explanation for this was that the parent organisation of the Padang factory, the Gresik Group, had become aware that the cargo was destined for Mexico and was unwilling to allow the transaction to proceed. There was no evidence as to how this interference with the contract had taken place but it was acknowledged by those concerned that Cemex is the holder of approximately 25% of the share capital of the Gresik Group, who were anxious not to offend Cemex.

19. Mr. Paulovits was made aware by 13th May that the Padang factory would not provide the contractual cargo and on his arrival in Singapore on 15th May he informed Mr. Mihyar [the buyers' managing director] in writing that he was "shocked" to be informed of the position but that it had to be considered final and irrevocable. He referred to the fact that he had contacted other independent producers in Indonesia but had been informed that there was no available material. He stated *"This extraordinary development is completely beyond our control"* but he suggested possibly procuring a replacement cargo from Black Sea, Russia. In his oral evidence Mr. Paulovits stated that this was the first and only occasion in his long career in the cement trading business in which he had been confronted with a situation in which a supplier had placed an embargo on the supply of a cargo to protect the position of an associated company in a particular market.

20 Faced with this situation Mr. Paulovits attempted to revive the Sumitomo offer to load in Taiwan. Having had discussions with Sumitomo on 17th May, Mr. Paulovits (through his office in Switzerland) sent a message to Tradeland [the brokers] the same day confirming that cement was available from Taiwan for loading on "MARY NOUR", the quantity being 27,000 mt plus or minus 10% in the Sellers' option at a price of US$32.00 per mt FOB trimmed. The message included the remark:-

"Destination must remain Honduras and Master must be instructed accordingly."

Although the comments made in paragraph 16 above as to the informality of the contractual arrangements made for the original supply ex PT Semen Padang apply with equal force to the alternative arrangements made for a cargo ex-Taiwan, we shall refer to it for present purposes as "*the substitute contract*".

21. Having (as he thought) obtained the alternative source of supply in his discussions with Mr. Jovi Chen of Sumitomo in Taiwan, Mr. Paulovits began his return journey to Switzerland but on his arrival at Singapore, on 19th May, he received a phone call from Mr. Chen advising him that the Taiwanese supplier, China Rebar Ltd, had informed Mr. Chen that it was no longer in a position to supply the substitute cargo. The explanation from Mr. Chen was that China Rebar Ltd had been put under pressure by another Taiwanese company which had a major contract with Cemex for the supply of cement into the USA. Mr. Paulovits's evidence was that Mr. Chen had told him that there was absolutely nothing which he or Sumitomo could do to assist. He stated:-

"Transclear have no other sources of cement in the Far East, and no other existed. None of the "majors" would supply cement to Mexico, which they all regarded as the province of Cemex, and I am sure that no other small

factory other than those we have already approached would be willing, or able. The far reaching influence of Cemex, an inherent risk throughout this transaction from CTI's trading intentions had proved fatal."

22. By this time, as we find, it had become impossible for the parties' contract to be performed in accordance with its terms, particularly those relating to the geographical source and loading of the vessel, in that there was simply no way in which cargo of the contractual description could be provided FOB for the "Mary Nour", whether in Indonesia or Taiwan."

5. The arbitrators held that in those circumstances the contract had become impossible of performance. They expressed their conclusion in the following terms:

"39. The only conclusion which we could reach on the evidence was that there could be no doubt that performance of the substance of the contract – the provision of a cargo of bulk cement to be shipped from Asia to Mexico on the "MARY NOUR" – had become commercially impossible by 17th May 2004. Although (as one would expect) the precise means by which this commercial embargo on the project was effected was unclear, it seemed to be equally incontrovertible that it had resulted from pressure placed by Cemex on the potential suppliers once Cemex became aware that the contract had been concluded. From that perspective, it struck us that this was indeed a situation in which the contractual performance had become commercially impossible and the only alternative performance (involving a shipment from the Mediterranean or Black Sea area) was fundamentally different from that contemplated by the parties. . . . . "

6. The arbitrators considered a number of authorities dealing with the principles of frustration generally, including ***Davis Contractors Ltd v Fareham Urban District Council*** [1956] A.C. 696 and ***Ocean Tramp Tankers Corporation v V/O Sovfracht ('The Eugenia')*** [1964] 2 Q.B. 226 and also authorities considering the frustration of contracts of sale as a result of the inability of the ultimate supplier to make the goods available. They were not persuaded that the parties had foreseen, or must be taken to have foreseen, that any action Cemex might take to interfere with the supply of cargo would make it impossible to perform the contract on terms which bore any real commercial resemblance to those agreed. They therefore held that in what they described as *"the altogether exceptional circumstances of the case"* it would be positively unjust to hold the parties bound and that the contract was therefore frustrated.

7. Having reached that conclusion, it was unnecessary for the arbitrators to consider the sellers' alternative argument that there was to be implied into the contract a term to the effect that the buyers would do nothing to impede the performance of the contract or that, if the suppliers refused to supply cement for reasons relating to the use to which the buyers intended to put it, the parties would be discharged from performance. However, they held that, if the parties had been asked at the time of contracting what should happen if Cemex intervened to prevent a contractual cargo becoming available in Asia, they would have acknowledged that the contract would have to be cancelled. Accordingly, they would, if necessary, have held that there was to be implied into the contract a term to the effect that, if the suppliers refused to supply cement because of the buyers' intended use of or dealings with it or because of its intended destination, the parties were to be discharged.

8. On the appeal Field J. took a different view of the matter. He held that the contract was not frustrated because the sellers had taken the risk of a failure of their contemplated source of supply. He put it in this way:

"38. . . . . In my opinion, where a seller makes an unqualified promise to sell he bears the risk of a failure of his contemplated source of supply where that source is not the specified source or the goods are not specific goods and the supplier is not excused by frustration, e.g. it is physically and legally possible for the supplier to make delivery but he chooses not to. This is because there is always a risk of supplier failure and as between the buyer and the seller, it is the seller who is in a position to guard against the risk either by making a binding and enforceable contract with the supplier with an appropriate jurisdiction or arbitration clause, or, as Lord Denning said in ***Intertradex [Intertradex SA v Lesieur Tourteaux SARL****, [1978] 2 Lloyds Rep 509] by protecting himself by making his promise conditional on the goods being available for delivery. This is no more than good sense and common justice. In a commercial age in which wealth is made up largely of promises, it is of the greatest importance that contractual obligations are enforced in accordance with their terms save only in a most limited range of circumstances."*

9. The judge also rejected the sellers' alternative argument that there was an implied term that both parties were to be discharged in the circumstances that had arisen. He did so because he considered, rightly in my view, that the proposed term was inconsistent with the effect of the express terms of the contract, was not necessary to give it business efficacy and was not so obvious as to go without saying. The judge refused permission to appeal against that part of his judgment and we are therefore only concerned with the question of frustration.

10. Mr. Nolan for the sellers submitted, quite rightly, that it is for the arbitrators to find the facts and that the court is not entitled to reinterpret their findings in order to reach a different conclusion on the question of frustration. He naturally laid some emphasis, therefore, on the findings in paragraphs 22 and 39 of the award that by 19th May it had become impossible for the contract to be performed in accordance with its terms and that shipment from the only alternative sources of cement in the Mediterranean or Black Sea involved a fundamentally different exercise from that which had been contemplated by the parties. He also relied on the arbitrators' apparent acceptance in paragraph 36 of the award that the intervention of Cemex to prevent the loading of a cargo was unprecedented.

11. Mr. Nolan submitted that the judge's statement of the law in paragraph 38 of his judgment was wrong. Everything, he submitted, depends on the circumstances of the case and whether the test propounded by Lord

Radcliffe in ***Davis v Fareham*** is satisfied. He submitted that there is high authority in the form of the observations of Lord Roskill in ***Pioneer Shipping Ltd v B.T.P. Tioxide Ltd (The 'Nema')*** [1982] A.C. 724, 753 that where frustration is in issue the court should generally accept the arbitrators' conclusion. However, the issue of frustration arises in a wide range of different factual circumstances. At one end of the scale there are cases, of which ***The 'Nema'*** is a prime example, in which the question is essentially one of fact and degree, calling for the evaluation of a range of factors which a commercial tribunal is particularly well equipped to undertake. At the other there are cases which call for the application of established principles to a clearly defined event rendering performance impossible. Such cases give rise to a clear-cut issue of law. The present case falls very much towards the latter end of the scale, requiring little more than the application of established principles to the particular facts of the case. Accordingly, although I accept that the court must accept loyally the findings of fact made by the arbitrators, I do not think it need be unduly inhibited by the arbitrators' conclusion that the facts they have found are sufficient to satisfy the legal test for frustration.

12. The primary facts found by the arbitrators are not in doubt. Stripped to their essentials they are these: the sellers entered into a contract on 7th May to sell a cargo of cement f.o.b. the *'Mary Nour'* at Padang; the sellers made arrangements with a local supplier, PT Semen Padang, for the shipment of the cargo, but did not enter into a binding contract with it for the loading of the vessel; Cemex used its commercial influence to persuade PT Semen Padang not to provide the goods; Cemex also used its commercial influence to dissuade other potential suppliers in the region, in particular the alternative supplier that the sellers had identified in Taiwan, China Rebar, from making goods available for shipment on the vessel. That being the case, it is important, in my view, to recognise that the root cause of the sellers' inability to deliver the goods they had contracted to sell was the abuse by Cemex of its commercial position combined with the willingness of suppliers to acquiesce in its demands. The primary question in this case is whether such conduct was sufficient to frustrate the contract.

13. The dictum of Lord Radcliffe in ***Davis v Fareham*** at page 729 that:

> *"frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do."*

is generally accepted as encapsulating the modern law on frustration. However, not every supervening event which prevents performance of the contract will result in its being frustrated because it may be apparent from the general nature of the contract, its particular terms and the context in which it was made that it was intended to apply in the circumstances that have arisen. Thus in ***Davis v Fareham*** Lord Reid said at page 720:

> *"It appears to me that frustration depends, at least in most cases, not on adding any implied term, but on the true construction of the terms which are in the contract read in light of the nature of the contract and of the relevant surrounding circumstances when the contract was made. . . . . On this view there is no need to consider what the parties thought or how they or reasonable men in their shoes would have dealt with the new situation if they had foreseen it. The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end."*

14. As each of these passages makes clear, it is essential to the doctrine of frustration that the performance of the contract in the new situation should be fundamentally different from that originally contemplated. In deciding whether that is the case it is necessary to have regard to the general nature of the contract as well as its specific terms, the context in which it was made and the contemplation of the parties as to the range of circumstances in which it might come to be performed. Having regard to the nature of the arbitrators' findings it is important to recognise that a contract will not necessarily be frustrated simply because performance has become impossible, as some of the cases to which our attention was drawn show, and that it will not be frustrated simply because one party is prevented from performing in the manner originally intended if performance in some other manner is possible.

15. A good example of this latter point is to be found in ***J. Lauritzen A.S. v Wijsmuller B.V. (The 'Super Servant Two')*** [1990] 1 Lloyd's Rep. 1, in which this court considered the position of a contracting party placed, as a result of a supervening event for which he had no responsibility, in the position of being unable to perform one or other of two contracts. In that case Wijsmuller had agreed to transport a drilling rig belonging to Lauritzen from Japan to Rotterdam using one or other of two specialised vessels, *'Super Servant One'* and *'Super Servant Two'*. Wijsmuller intended to perform the contract using *'Super Servant Two'*, but after the contract had been made *'Super Servant Two'* sank. Wijsmuller had entered into other contracts which they could only perform with *'Super Servant One'* and in the event they chose to perform those contracts instead of their contract with Lauritzen. In proceedings brought by Lauritzen Wijsmuller contended that the contract had been frustrated as a result of the sinking of *'Super Servant Two'*, but that was rejected on the grounds that since the contract provided for the use of either vessel, the loss of *'Super Servant Two'* did not render performance impossible or fundamentally different.

16. Having regard to the nature of the present case, it is not surprising that Mr. Nolan and Mr. Kenny each drew our attention to a number of authorities relating to contracts for the sale of unascertained goods by description where a failure by the ultimate supplier had led to the seller's failing to perform the contract. In most, but not all, of those cases the supplier's failure to make goods available to the seller did not have the effect of frustrating the contract. The first of these was ***Blackburn Bobbin v T.W. Allen*** [1918] 2 KB 467 in which the defendant had agreed to sell the plaintiff a certain quantity of Finnish timber free on rail Hull to be delivered between June and November 1914. It was the practice of timber merchants not to keep stocks of Finnish timber in this country but to

ship timber from Finland to meet contracts of that kind. At the outbreak of war in August 1914 the defendants had not made any deliveries under the contract and after that date it became impossible due to the disorganisation of traffic for them to obtain Finnish timber for delivery to the plaintiffs. The court rejected the submission that the contract had been frustrated. Pickford L.J. held that having regard to the nature and terms of the contract the continuance of the usual shipping arrangements (which were unknown to the plaintiffs) was not fundamental to the existence of the contract. Another way of putting it might be to say that, having contracted in unqualified terms, the seller took the risk of being able to obtain the goods needed to perform his contract.

17. In ***Lebeaupin v Crispin*** [1920] 2 K.B. 714 the defendant entered into two contracts with the plaintiff, one for the sale of the first 2,500 cases of ½ lb. tins of Fraser river salmon packed by the St. Mungo Cannery during the season of 1917 and one for the sale of the first 2,500 cases of ½ lb. tins of Fraser river salmon packed by the Acme Cannery during the same season. Each contract contained a wide exception clause and a force majeure clause. The St. Mungo cannery failed to produce more than a small number of ½ lb. tins because the tins it had purchased for the purpose proved defective and by the time it had acquired a new stock the run of salmon had finished. The Acme cannery failed to produce sufficient ½ lb. tins because it chose to use its 1 lb. tins first and before it could fill its ½ lb. tins the run of fish had ceased. McCardie J. held that the sellers were in the same position as the canneries and could not rely on any defence by way of frustration that would not have been available to them. There was no failure of the fish run and clearly neither a lack of sound tins nor a decision to pack a larger size first would provide a defence to the canneries if the contracts had been made with them.

18. In ***Re Thornett & Fehr and Yuills Ltd*** [1921] 1 K.B. 219 Yuills agreed to sell Thornett & Fehr 200 tons of Australasian beef tallow of specified brands, 1919 make. In the event the manufacturer produced no tallow at one of its works, although it could have done so, and produced only 161 tons of the specified brand at the other because of a strike. The seller claimed that the contract had been frustrated, but the court rejected that argument. Lord Reading C.J., with whom Darling J. and Acton J. agreed, held that since the contract was one for the sale by description of unascertained goods, the failure of the manufacturer to produce the goods did not result in its frustration.

19. ***Lewis Emanuel & Son Ltd v Sammut*** [1959] 2 Lloyd's Rep. 629 concerned a contract made on 14th April 1958 for the sale of Maltese potatoes c.i.f. London, shipment on or before 24th April 1958. The seller was unable to obtain space on the only vessel that called at Malta between 14th and 24th April and was therefore unable to perform the contract. The seller argued that the contract was frustrated, or that it was subject to an implied term that if shipping space could not be obtained it should be discharged. Pearson J. rejected both arguments. He expressed the view that there is nothing exceptional in principle about c.i.f. contracts for unascertained goods, but recognised that the very nature of such contracts is likely to make frustration less likely than in the case of other types of contract. Applying the principles enunciated in ***Davis v Fareham*** he held that the contract was not frustrated because under a contract of that kind the seller undertakes an obligation to find or provide a cargo, shipping space and insurance and that nothing distinctive, unusual or extraordinary had occurred that would constitute a frustrating event.

20. In ***Intertradex v Lesieur-Tourteaux S.A.R.L.*** [1978] 2 Lloyd's Rep. 509 the sellers agreed to sell to the buyers 800 tons of Mali groundnut expellers c.i.f. Rouen, shipment in March 1973. A breakdown of the machinery at the supplier's factory resulted in the sellers' being able to deliver only 511 tons and the sellers contended that the contract was frustrated. Donaldson J. at first instance and this court on appeal rejected that argument on the grounds that in the absence of a term to the contrary in the contract the seller takes the risk of disruption resulting from commonplace occurrences of that kind.

21. In ***Atisa S.A. v Aztec A.G.*** [1983] 2 Lloyd's Rep. 579 the parties entered into a contract for the sale of 13,000-14,000 tonnes of Kenyan sugar f.o.b. stowed Mombasa. The sellers intended to fulfil the contract using sugar purchased from the Kenyan government, which was the sole exporter. In the event, however, the Kenyan government decide not to perform the contract which it contended was invalid. In an arbitration brought by the buyers the sellers maintained that the contract had been frustrated. The arbitrators found that the Kenyan government had simply been unwilling to deliver the goods and had decided that the contract should be cancelled, acting under private law rather than in the exercise of its sovereign powers. They therefore rejected the sellers' argument. On appeal Parker J. upheld their decision. He put the matter in this way at page 585 col. 2:

"It is to be observed that for the question to be answered in the affirmative it is not enough to show that without default of either party the contract has become incapable of being performed. It must be shown that the incapability is because the circumstances at the time would render performance radically different from that which was undertaken by the contract. . . . . There was, here, no change in the law and nothing of the nature of a failure or destruction of the subject matter. . . . . In essence no more has happened than that (1) the sellers' supplier which was the sole supplier did not wish to supply partly for financial reasons and partly to preserve the build up of stocks and (2) that, having been advised that the contract was not binding, the supplier refused to perform. If the Attorney-General's advice was correct the sellers failed to make a proper supply contract. If it was incorrect then they will have an action upon the supply contract."

22. Finally it is necessary to refer to the case of ***Société Co-operative Suisse des Céréales et Matières Fourragères v La Plata Cereal Company S.A.*** (1946) 80 Ll. L. Rep 530 on which Mr. Nolan placed some reliance. In that case the buyers and the sellers entered into two contracts in December 1944 and January 1945 respectively for the sale of Plate maize f.o.b. Buenos Aires for shipment 16th May/June 1945. On 30th April and 2nd May 1945 the Argentine government promulgated two decrees which provided that all maize destined for export must be

purchased exclusively from the Agricultural Products Regulating Board. There was no formal prohibition on the export of maize during 1945, but the Agricultural Products Regulating Board did not have goods of the contract description which they were willing to sell for export before 30th June 1945. Morris J. held that the contract had been frustrated. He said at page 543 col. 1:

"In my judgment, the basis of the contract did become overthrown. Although there was no prohibition of export in the sense that any exporting was absolutely forbidden, there was on the facts as found a de facto prohibition which prevented the sellers from exporting. They were by law prohibited from exporting any maize that they had not purchased from the Argentine Agricultural Products Regulating Board, and that Board had no maize which they were willing to sell. The sellers had 6750 tons of maize. It became illegal for them to export it. The new conditions created by the changes in the law fundamentally altered the situation. Exportable maize was, by law, removed from the scope of private obligation. The parties ought not to be regarded as having contracted to impose upon the sellers a continuing obligation to export goods, even at a time when such exporting would be contrary to the law of the land."

23. These authorities, in particular ***Société Co-operative Suisse des Céréales et Matières Fourragères v La Plata Cereal Company S.A.*** and ***Lewis Emanuel & Son Ltd v Sammut,*** make it clear that the principles of frustration are capable of applying to a contract for the sale by description of unascertained goods of a specified origin, a conclusion that is also supported by the observations of Russell J. in ***In re Badische Co Ltd*** [1921] 2 Ch. 331 at pages 381-383, another case on which Mr. Nolan relied. However, they also make it clear that, in the absence of some exceptional supervening event, such a contract will not be frustrated simply by a failure on the part of the ultimate supplier to make goods available for delivery. The reason for that is not far to seek: it is implicit in a contract of this kind that the seller will either supply the goods himself or (more likely) will make arrangements, directly or indirectly, for the goods to be supplied by others. In other words, he undertakes a personal obligation to procure the delivery of contractual goods and thereby takes the risk of his supplier's failure to perform. That obligation will be discharged by frustration if a supervening event not contemplated by the contract renders that performance impossible or fundamentally different from what was originally envisaged, but most events which result in the failure of a supplier to provide the goods will not fall into that category. A few, however, such as a prohibition of export rendering the shipment of the goods unlawful, usually will. It is not surprising, therefore, that the authorities support Mr. Kenny's submission that the contract will not be frustrated if, although delivery remains physically and legally possible, the seller's supplier chooses (for whatever reason) not to make the goods available.

24. When applying these principles to the present case the starting point must be the contract itself. It was a contract for the sale of a cargo of cement to be shipped on board the *'Mary Nour'* at Padang. Accordingly, the substance of the contract (to use the arbitrators' expression) was the loading of goods of the contractual description on the named vessel at the specified place, not, as they appear to have thought, simply the provision of a cargo of bulk cement to be shipped from Asia to Mexico on the *'Mary Nour'*. Both parties understood that the goods would not be shipped by the sellers themselves but by a supplier acting in performance of separate arrangements in such a way as would fulfil the sellers' duty to the buyers and for that purpose it did not matter to the buyers whether the sellers had entered into a binding contract with the supplier or not. If the contract became frustrated, therefore, it became frustrated as soon as the shipment of cargo on the *'Mary Nour'* at Padang became impossible. On the arbitrators' findings that must have occurred at the latest by 13th May when Mr. Paulovits learnt that the factory at Padang would not provide the goods and of the reason for its refusal.

25. It was common ground at the arbitration, as is recorded in paragraph 27 of the award, that it was irrelevant whether the substitute contract for shipment from Taiwan, which the parties entered into on 17th May, was to be treated as an amendment of the original contract or as a completely new contract. That may be so in the sense that the precise nature of the contractual arrangements has no bearing on the new obligations which the parties assumed towards each other, but unfortunately that concession appears to have led the parties and the tribunal to ignore the fact that the commercial context in which those new obligations were undertaken was significantly different from that in which the original contract had been made. As a result, no one considered the possible significance to be attached to the fact that by 17th May Cemex had already shown itself willing and able to intervene in such a way as to disrupt the shipment of cement on the *'Mary Nour'*. That is unsatisfactory, but in the circumstances we have no choice but to approach the matter on the same basis and assume that the substitute contract was entered into under the same commercial conditions as the original contract.

26. Mr. Nolan laid some emphasis on the arbitrators' findings that performance of the contract had become commercially impossible as a result of an unprecedented event and also on the finding in paragraph 38 that *". . . . . it seems to us inconceivable that the parties should not implicitly have agreed that the contract should be terminated if provision of a cargo for this purpose [sc. the 'project' to break the Cemex cartel in Mexico] turned out to be impossible . . . . ."*

However, as Lord Reid made clear in ***Davis v Fareham*** in the passage cited earlier, the court is not concerned with what the parties thought or how they would have dealt with the new situation if they had foreseen it, and the finding that performance had become "*commercially impossible*" must be understood in the context of the award as a whole. Although the precise means by which Cemex had put pressure on potential suppliers remained unclear, the arbitrators found that the refusal of PT Semen Padang and others to provide a cargo for this vessel was the result of its intervention. There is no finding that cargo was physically unavailable for shipment, either at Padang or in Taiwan, or that shipment from either location was unlawful. In each case the supplier simply chose not to make the goods available for shipment. That was a matter of its own choice, which in this case it was free

to exercise, being under no contractual obligation to the sellers. The sellers had no recourse, and were therefore unprotected, because they had no binding contract with any supplier.

27. In my view it is impossible to hold that the contract in this case was frustrated. As the decided cases show, the fact that a supplier chooses not to make goods available for shipment, thus rendering performance by the seller impossible, is not of itself sufficient to frustrate a contract of this kind. In order to rely on the doctrine of frustration it is necessary for there to have been a supervening event which renders the performance of the seller's obligations impossible or fundamentally different in nature from that which was envisaged when the contract was made. In the present case, however much pressure Cemex put on suppliers, the nature of the performance called for by the contract remained the same. Whether the suppliers chose to succumb to that pressure was a matter of choice. Indeed, if the sellers had entered into a binding contract with PT Semen Padang, it would have been impossible for that company to argue that the contract had been frustrated as a result of commercial pressure from Cemex since it would still have had the choice between performing the contract and breaking it. Even if one were to regard the arrangements between the sellers and PT Semen Padang (or subsequently Sumitomo and China Rebar) as tantamount to a contract for these purposes, the operative cause of the failure to ship the goods was still the supplier's decision to succumb to pressure from Cemex. In those circumstances for the reasons given earlier the sellers bore the risk of a refusal on the part of the supplier to make goods available.

28. For these reasons I would dismiss the appeal.

Lord Justice Rimer:

29. I agree.

Lord Justice Ward:

30. I also agree.

Mr. Michael Nolan (instructed by Salans) for the appellant
Mr. Julian Kenny (instructed by Hill Dickinson) for the respondent