In the Court of Appeal of Alberta

Citation: Atcor Ltd. v. Continental Energy Marketing Ltd., 1996 ABCA 40

Date: 19960208
Docket: 94-15517
Registry: Calgary

Between:

Atcor Ltd.

Respondent
(Plaintiff)
(Defendant by Counterclaim)

- and -

Continental Energy Marketing Ltd.

Appellant
(Defendant)
(Plaintiff by Counterclaim)

The Court:

The Honourable Mr. Justice Kerans
The Honourable Mr. Justice Irving
The Honourable Madam Justice Russell

Reasons for Judgment of The Honourable Mr. Justice Kerans
Concurred in by The Honourable Mr. Justice Irving
And Concurred in by The Honourable Madam Justice Russell

APPEAL FROM THE JUDGMENT OF THE HONOURABLE MR. JUSTICE DEYELL
Dated the 27th day of September, 1994, Filed the 28th day of September, 1994

COUNSEL:

J. P. Peacock, Q.C. for the appellant (defendant and plaintiff by Counterclaim)

B. C. Yorke-Slader, for the respondent (plaintiff and defendant by Counterclaim)

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE KERANS

---

[1] This is an appeal from a finding at the liability section of a trial. In 1992, the respondent supplier Atcor entered into a contract with the appellant buyer Continental for

1996 ABCA 40 (CanLII)

the supply of natural gas through a pipeline run by the Nova corporation. The contract had a force majeure clause. After Nova encountered some problems, Atcor defaulted in delivery of some supply and gave notice under that clause. The buyer refused to accept that the clause applied, and sued for damages. The parties agreed to a trial of the issue of liability. The trial was very brief, because most facts were agreed upon.

1996 ABCA 40 (CanLII)

[2] These agreed facts will become important:

> 1. … By the Agreement, ATCOR agreed to supply and Continental agreed to purchase certain volumes of natural gas during the term May 1, 1992 to October 31, 1992 …
>
> 2. Pursuant to paragraph 1 of the Agreement, and subject to the terms and conditions of the Agreement, ATCOR agreed to deliver daily at certain TransCanada Pipelines Limited ('TCPL") facilities near Burstall, Saskatchewan (the "Delivery Point") a volume of gas nominated by Continental, equal to 210 $10^3m^3/d$. The Delivery Point is immediately downstream of Empress, Alberta.
>
> …
>
> 5. The deliveries of natural gas were required to be delivered by ATCOR off the NOVA Corporation of Alberta ("NOVA") pipeline system at the Delivery Point and then transported by Continental on the TCPL pipeline system to destinations downstream of the Delivery Point.
>
> …
>
> 8. During the Term, various compressor breakdowns, pipeline repairs and pipeline connections occurred on the NOVA system, resulting in the partial curtailment by NOVA of firm transportation service provided to ATCOR and other firm service shippers at Empress (collectively, the "NOVA Curtailments"). In each case, ATCOR was advised by NOVA that its firm capacity would be curtailed, and by how much. In no case did NOVA formally declare force majeure; under its Gas Transportation Tariff, NOVA is entitled to curtail firm service, partially or entirely, without making such a declaration.
>
> 9. The said compressor breakdowns, pipeline repairs and pipeline connections, which resulted in the NOVA Curtailments, were outside the control of ATCOR and were not, by the exercise of due diligence, events which ATCOR would have been able to overcome.
>
> 10. By reason of the NOVA curtailments, ATCOR curtailed a portion of its firm service obligations at Empress. To the extent that its deliveries were curtailed by NOVA, and only to such extent, ATCOR reduced deliveries to its customers. ATCOR first reduced and ceased deliveries under its interruptible supply contracts, and only thereafter reduced or ceased deliveries to Continental under the Agreement. ATCOR did not reduce deliveries to its other firm supply customers on a pro rate basis or any other basis …
>
> 12. Continental did not curtail or claim force majeure to its purchasers of gas in response to ATCOR's force majeure notices and consequent reductions in deliveries described in paragraph 10 hereof. Instead, to the extent possible, Continental elected

to contract for alternative deliveries of gas to such purchasers, at prices in excess of $0.96 per GJ.

[A.B. 144-145]

[3] The <u>force majeure</u> clause provides:

> 9. Subject to the other provisions of this paragraph, if either party to this Agreement fails to observe or perform any of the covenants or obligations herein imposed upon it and such failure shall have been occasioned by, or in consequence of force majeure, as hereinafter defined, such failure shall be deemed not to be a breach of such covenants or obligations.
>
> (a) For the purposes of this Agreement, the term “force majeure” shall mean any acts of God, including therein, but without restricting the generality thereof, lightning, earthquakes and storms and in addition shall mean any strikes, lockouts or other industrial disturbances, acts of the Queen’s enemies, sabotage, wars, blockades, insurrections, riots, epidemics, landslides, floods, fires, washouts, arrests and restraints, civil disturbances, explosions, breakages of or accidents to plant, machinery or lines of pipe, hydrate obstructions of lines of pipe, freezings of wells or delivery facilities, well blowouts, craterings, pipeline tie-ins, pipeline connections, pipeline repairs and reconditioning, the orders of any court or governmental authority, the invoking of force majeure pursuant to any gas purchase contracts, any acts or omissions (including failure to take gas) of a transporter of gas to or for Seller which is excused by any event or occurrence of the character herein defined as constituting force majeure, or any other causes, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension and which, by the exercise of due diligence, such party is unable to overcome.
>
> [A.B. 145-146]
>
> 9(b) Neither party shall be entitled to the benefit of the provisions of paragraph 9 hereof under any or all of the following circumstances:
>
> …
>
> • to the extent that the failure was caused by the party claiming suspension having failed to remedy the <u>condition,</u> and to resume the performance of such covenants or obligations with reasonable dispatch;
>
> • if the failures was caused by lack of funds or with respect to the failure of payment of any amount or amounts then due hereunder.
>
> [A.B. 156]

[4] It is common ground that the problems on the Nova line were an event within the meaning of Clause 9(a). I will hereafter refer to this as the event. The judge found that the event had occurred, that notice was adequate, that the event caused the non-performance, and that the supplier was not in breach of any duty to mitigate or avoid the problem. The buyer, Continental, appealed.

[5] On the appeal, the buyer limited its challenge to three matters:

1996 ABCA 40 (CanLII)

- Intervening matters, not the event caused the non-performance;
- Clause 9(b) applied on these facts; and
- Atcor breached its alleged duty to prorate available supply among all customers.

[6] The learned trial judge, after a review of the law, said that one "cannot overemphasize" that each case must turn on the special wording found in the contract. He then pointed to what he said was the operative word in clause 9, a "failure" of delivery. He distinguished this usage from a contract that speaks of inability or impossibility of delivery. He did acknowledge the need for a causal tie between the event and the nondelivery. But, it was a sufficient causal tie, in his view, for the supplier to show, as was here done, that the event was the triggering factor. In other words, his decision was that it was enough that the event, and later rationing of access by Nova, led to the decision by the supplier to cut supply to the buyer. In his view, the use of a weak verb like "fail" was a sign that there was no contractual obligation on the supplier to look any further for a solution to any shortage caused by the breakdowns.

[7] The contract, as noted, contains two express limits on the ability of a supplier to invoke <u>force majeure</u>. First, clause 9(a), which defines a <u>force majeure</u> event, declares itself inapplicable when the event is one "… not within the control of the (supplier) … and … by the exercise of due diligence … (that party) is unable to overcome… (it)" The learned trial judge found that these words in no way hindered the position of the supplier in this case. He relied on the conjunction "and" to decide that, even if the supplier could easily overcome the event, it was under no obligation to do so unless the event was within its control. The event (the pipeline breakdowns) was, he correctly observed, up the chain from the supplier and not within its control.

[8] Clause 9(b) adds that, in any event, the supplier cannot invoke <u>force majeure</u> if "… the failure was caused by the party claiming suspension having failed to remedy the condition, and to resume the performance of such covenants or obligations with reasonable dispatch." Again, the learned trial judge found no solace for the buyer in this term. He said that the "condition" to which the term adverts is the event, not its consequences. He again relied on the fact that the event itself was not something that the supplier could remedy.

[9] In this case, the event unquestionably created a problem for Atcor. But that was not the basis of the decision of the trial judge. I take his position to be that the wording of the contract was such that, even if the supplier Atcor could have performed its obligations to the buyer without any significant cost to itself, it was nevertheless excused from

1996 ABCA 40 (CanLII)

performance if its stated reason for non-performance was the event. Having regard to the broad contractual definition of a force majeure event ("any other cause … not within the control of the party claiming suspension"), he thus would be driven to concede that any contract for supply could be cancelled under this contract by the supplier upon the happening of any event in the business life of the supplier, whether or not it was significant. A tax increase is, for example, an event. By the reasoning of the trial judge, that would justify a cancellation so long as the real motive for cancellation was the tax increase.

1996 ABCA 40 (CanLII)

[10] Here is another example, from this case. Continental argued that there was no failure of delivery caused by the event because, despite the event, the shipper could supply this buyer. It is quite correct that Nova did not shut out the supplier Atcor totally. Atcor continued to receive enough gas to meet all its commitments to Continental. But it chose instead to move available supply to another buyer. Can one say that a failure of performance is "caused" by the event when the proximate cause is not the event but the intervening decision by the shipper? Continental complained that the effective cause here was this decision, not the event. Because of his conclusion that a nominal causal tie between event and decision not to ship ended all duties of the shipper, the learned trial judge quickly rejected this argument.

[11] In my view, his was not a reasonable interpretation. I accept that parties who are well-advised and of equal bargaining power are at liberty to make improvident bargains. Nevertheless, one should not strain to place an interpretation upon a contract that permits one party to terminate the contract almost at will. In my view, the contractual requirement for a causal tie between event and non-performance evidences the intention of the parties that the relationship between the two must be substantial, not incidental. A supplier need not show that the event made it impossible to carry out the contract, but it must show that the event created, in commercial terms, a real and substantial problem, one that makes performance commercially unfeasible.

[12] Speaking about force majeure terms, Dickson, J., in Atlantic Paper Stock v. St. Anne-Nackawic & Paper (1975) said, for the Supreme Court, that "… The common thread is that of the unexpected, something beyond reasonable human foresight and skill….". The office of the clause is to protect the parties from events outside normal business risk. A force majeure clause, then, should address three questions:

- how broad should be the definition of triggering events;
- what impact must those events have on the party who invokes the clause;

• what effect should invocation have on the contractual obligation.

[13] This contract offered a very broad list of events. (It was quite clear about the third requirement: the contract was suspended, not terminated.) There is much to be said for that. The event need not be a catastrophe or “act of god”, just something not present in sound business calculations. I assume in this age that amounts to a list of events for which insurance is not available at a reasonable cost. Otherwise, the parties would be wiser expressly to fix an obligation to insure a risk upon one party or the other.

[14] But a broad list of force majeure events offers the risk of turning the bargain on its head if it can be used as an escape clause. When the list is broad, one reasonably expects to see in the contract that the event is tied to meaningful consequences. A good contract would expressly deal with several possible results, and different levels of obligation to mitigate, as did some samples from the trade put before the trial judge. This unfortunately did not. We are told only that, as a prerequisite to invocation, the invoking party must show a causal tie and also show it did not “fail to remedy the condition”. Those terms, unfortunately, are not very specific. It was a choice of words that assured litigation. The judicial assistance thereby rendered necessary should not, however, depart from the commercial context. On the one hand, the condition to be remedied includes the effect of the event, not just the event. On the other hand, the assessment of the effort at remedy must also keep in mind commercial reality. In my view, one is driven by the clause to inquire about a reasonable allocation of risk between the parties about the various events that might occur. That inquiry should be case and industry specific. The inquiry, as a result, would assess risk in terms of what, in commercial terms, were the mutual and reasonable expectations of the parties about risks that may arise. Cast in terms of the duty of the supplier here, the test is whether replacement purchases by Atcor were commercially reasonable and feasible.

[15] With one exception to which I shall come, the learned trial judge failed to offer any authority for the proposition that the use of the expression “fails to perform” instead of the expression “is unable to perform” clearly renders a dramatic impact on the scope of the force majeure rules. I accept that the expression “is unable” or its like very clearly raises a question about the duty of the supplier to mitigate or avoid the consequences of the event if he can do so without great cost or inconvenience. But I do not accept that the words “fails to perform” clearly offer the opposite rule. At best, the matter is left unclear. Indeed, there are cases where a judge has taken the opposite view in the face of words very similar to those under review. In Wildhandel (1975) the supplier of frozen Chinese rabbits

1996 ABCA 40 (CanLII)

was protected by a clause that excused nonperformance "should the sellers fail to deliver" (p. 241). Donaldson, J. (as he then was) nevertheless enforced an arbitration award against the supplier because the suppliers failed to prove that it "… was impossible for them to fulfil their contracts….". [p. 242. Emphasis mine].

[16] The distinction offered by the respondent and accepted by the learned trial judge is very like the distinction between contracts that permit nullification of contractual obligations when a force majeure event merely hinders execution of the contract, and those where the event prevents execution. Chitty on Contracts 26th ed. (London: Sweet & Maxwell, 1989) at p.626. Curiously, however, the judge did not accept this distinction for this case. After noting that the clause under review employed neither term, he added:

> The parties have used the words "occasioned by" and "in consequence of. These will govern. It is not open to Continental to argue now that Atcor must demonstrate the Nova curtailments "prevented" it from performing its obligation.
>
> [A.B. 158]

[17] In any event, and with great respect to those of a different view, the distinction between hindering and preventing is, in my view, unsatisfactory. This is because they are the two extremes. A "preventing" contract would require the supplier here to show that it was impossible to perform. A "hindering" contract would require it merely to show that the Nova cutback was a nuisance. As I have said, the test more likely intended by the parties would ask whether the event made performance commercially impracticable or unreasonable. I will not strive to force a contract into the one bag or the other when both are unsatisfactory. I repeat that, in my view, the test is this: A supplier need not show that the event made it impossible to carry out the contract, but it must show that the event created, in commercial terms, a real and substantial problem.

[18] Returning to the issue of causation in this case, I agree with the buyer on the one hand that the decision by the supplier to select the buyer as the victim is a key element in the causal chain. On the other hand, I reject the suggestion by the buyer that I should say that the supplier had a positive duty to distribute the available product proportionately amongst all its customers. That solution may or may not be commercially feasible in a given case. The facts here seem to be that the supplier could have without difficulty covered the shortfall by passing it on to specific buyers whose contracts explicitly permitted this, but chose instead to favour a certain buyer because it was of more commercial importance to the supplier than was the buyer. This decision was made despite the fact that the contract with that other buyer had an explicit term permitting

1996 ABCA 40 (CanLII)

prorated deliveries in a case like this. A senior officer of the supplier explained that, after deciding that the buyer's contract did not require prorated delivery.

> … we also took into consideration the fact that the Continental agreement was the agreement of the shortest term and it was the last agreement that we entered into and we looked at the other small contracts… and we decided that since the total contract quantity … represented by those contracts was so small and the fact that we had long term relationships with those three buyers, we decided that we would exercise the curtailments on the Continental agreement basically for the reasons that it was the clause, the force majeure clause allowed us the opportunity to do that….
>
> [AB 110]

[19] Counsel were unable to find any Canadian case on point. The U.K. Court of Appeal, however, dealt with this issue in a definitive way in 1983 in Bremer v. Continental (1983). Ackner, L.J. (as he then was) reviewed all the authorities, including Intertradex (1978). He stated this rule, which he quoted from an earlier unreported trial decision and which he thought applicable even when the contract permitted non-delivery when the supplier was merely hindered by the event from making delivery:

> … the question resolves itself into a question of causation; in my judgment, at least in a case in which a seller can (as in the present case) claim the protection of a clause which protects him where fulfilment is hindered by the excepted peril, subsequent delivery of part of his available stock to other customers will not be regarded as an independent cause of, shortage, provided that in making such delivery the seller acted reasonably in all the circumstances of the case. This is because, in the absence of any contractual term to the contrary, the buyer under a contract containing such a clause must contemplate that the seller has other customers besides himself, and must also contemplate that the seller will take reasonable steps to fulfil the needs of other customers; and reasonable action so taken by the seller should not in these circumstances be regarded as a cause or shortage independent of the expected peril.
>
> [Bremer v. Continental Grain (1983) at p.292]

[20] Ackner, L.J. concluded that it was open to a shipper to show that:

> … a proportional distribution of goods between the buyers would have been a reasonable method of allocation any available goods between buyers, although not necessarily the only method. The question of how the goods should have been distributed is a question of fact …
>
> [Bremer v. Continental Grain (1983) at p.293]

[21] I accept this statement of the rule, which I think agrees with what I have already said. I acknowledge that the House of Lords in an earlier case said that suppliers "… cannot be allowed to excuse non-performance by reference to their other commitments…" Hong Guan (1960) p. 107. With respect, I agree with Ackner, L.J. that any decision must turn on the commercial circumstances of the case. In order to show the appropriate causal

1996 ABCA 40 (CanLII)

tie between the event and the decision to favour another buyer over the buyer here, the supplier had to show that this decision was, in all the circumstances, reasonable. I emphasize again that this means reasonable in commercial terms. The learned trial judge failed to address that largely factual issue, respecting which of course the onus lay on the supplier.

[22] I should add that the learned trial judge offered two additional grounds for rejecting the buyer's argument. He first said that there was no duty to prorate unless the contract contained express terms to that effect. He added that, if there was such a duty, it was merely to act reasonably having regard to trade practice and he had no evidence of that practice upon which he could rely. As to the second, he erred about the consequence of his finding. The onus, as I have said and he acknowledged, is upon the shipper to prove that the event caused the non-performance. If non-performance could in the circumstances be excused by regard to trade practice, that was for the supplier to prove. If it was not established, the case for the supplier would fail, not the case for the buyer.

[23] As to his first reason, that there is no duty to prorate reasonably unless the contract expressly provides, he cited Bremer v. Vanden. (1978) and Intertradex (1978) for this proposition. With respect, neither decision supports his view. The issue did not arise in Bremer v. Vanden (1978). But Donaldson, J. (as he then was) faced an issue like this in Intertradex S.A. v. Lesieur-Tourteaux S.A.R.L. (1977). He said (at p. 155):

> … My own view is that if the seller appropriates the goods in a way which the trade would consider to be proper and reasonable - whether the basis of appropriation is pro rata, chronological order of contracts or some other basis - the effective cause is not the seller's appropriation, but whatever caused the shortage.

[24] On appeal, the Court of Appeal ordered a new hearing before the arbitrators because the original findings were not clear on what was the effective cause of the failure to ship. As a result, it did not need to deal with this issue. Denning, M.R., however, approved the quoted comment in his judgment. Intertradex (1978) p. 513.

[25] Intertradex (1978) was one of the earlier decisions considered by the Court of Appeal in Bremer v. Continental. In my view it supports the position taken in that case, which I quoted, and does not support the suggestion that there is no regard to be had to the proration issue unless the contract expressly requires it.

[26] I turn now to the main ground of appeal. In this case, the supplier had two possible means to mitigate the temporary rationing imposed on it by Nova. First, it might have rationed all its customers, as I have discussed. Second, it might have bought additional gas supplies to pass on to the buyer. This it also refused to do. The learned trial

1996 ABCA 40 (CanLII)

judge, because of his reasoning, would be driven to say that the buyer must fail also on the second ground even if that solution would solve the shortage in a way that was mutually satisfactory. As I have said, I cannot accept that approach. An assessment of commercial practicality and trade practice is required

[27] The question of re-supply from new sources very much requires one to ask what is the real purpose of the force majeure clause. The key here is not so much causation as a duty to mitigate, although I suppose one may contend that lack of mitigation is a sort of cause of non-delivery. For example, Donaldson J. in Wildhandel (1975) at 242 said that the simple words "cause beyond their control" import a duty to mitigate because a cause that could be alleviated was not a cause beyond control.

[28] Assuming that the matter is about mitigation, I have already observed that the mitigation duty here was tacked on to the definition of a force majeure event by these words: "any cause … not within the control of the party claiming suspension and which, by the exercise of due diligence, such party is unable to overcome." The learned trial judge said that the duty to mitigate created by these words was limited to overcoming the event, as opposed to the effect of the event. Because the supplier could not repair the upstream breakdowns in the Nova system, no further duty existed. It would follow from this view that, even if other gas was available at the same price and with no inconvenience to the supplier, that company nevertheless was not obliged to buy it and live up to its contract with the buyer.

[29] In my view, that stringent interpretation is not in keeping with the real purpose of a force majeure clause, which again is to deal with "… the unexpected, something beyond reasonable human foresight and skill…". In my view a force majeure clause is all about the effect of the event, not simply the occurrence of the event. It follows that the intended meaning of the words is that in paragraph 9(a) says "any cause … not within the control of the party claiming suspension and the effect of which, by the exercise of due diligence, such party is unable to overcome.

[30] I therefore conclude that the supplier had a duty to mitigate by acquisition of new supply if to do so in all the circumstances was reasonable. This is the view expressed in the cases. Again, counsel could find no Canadian cases. There is, however, an analogy available from one. In Tom Jones & Sons Ltd. (1981) a developer sought to cancel a construction contract on the ground financing was not available, a force majeure event. The trial judge, however, denied relief because financing in fact was available, albeit at an

1996 ABCA 40 (CanLII)

unexpectedly higher price. And, from the U.K., counsel cite Wildhandel (1975), the case about the sudden unavailability of Chinese rabbits, Donaldson J. said:

> They have quite failed to obtain any finding from the arbitrator that they were unable to buy Chinese frozen rabbits from some supplier other than the one with whom they have a contract. Unless they can do that, they are unable to show that they were prevented from fulfilling their contract by a cause beyond their control.
>
> [p.242]

[31] In opposition to this simple proposition, the supplier cites the soya bean embargo cases. The U.S.A. in 1973 imposed a series of export embargoes on soya beans. These events spawned many cases turning on the effect of a standard contract (GAFTA 100) used in the international movement of grain and feed. Tradax (1976), Bremer v. Vanden (1978), Intertradex (1978) and Bremer v. Continental (1983), Bremer v. Bunge (1983). Clause 22, the delayed shipment provision, is reproduced in full in the decision of Viscount Dilhorne in Bremer v. Vanden (1978). It deals with the responsibility of a shipper for a "delay in shipment". To avoid liability for any delay occasioned by a named event, the shipper had to give notice. The clause, and the notice requirements, led to considerable litigation because it was not the trade practice simply to ship from one seller to one buyer. Brokers sold and resold parts or all of shipments before, during, and after shipment. As Ackner, L. J. said the clause "… is extremely difficult to apply in a situation where there are a number of shippers, numerous traders, and lengthy and complex strings…". Bremer v. Continental (1983) at 283. Mr. Justice Roger Parker described the many arguments raised by counsel in this situation as " a seething cauldron of fevered ingenuity…". Bremer v. Bunge (1983) at 114.

[32] In the leading case of Bremer v. Vanden (1978), the House of Lords had to deal with the idea of "buying afloat". It was said of a particular shipper that it could have, in furtherance of the re-supply rule accepted in cases like Wildhandel (1975), purchased contracts from other suppliers whose shipments were already underway when the embargo hit. Lord Wilberforce said, Viscount Dilhorne and Lord Salmon concurring,

> My Lords, dealing, as we are, with a trade in a U.S. original commodity, c.i.f. Rotterdam, on the terms of GAFTA 100, a contract which provides for shipment followed by "string" and "circle" contracts, and for carefully timed notices of appropriation; and dealing as we are with an export embargo which would create a maximum of buyers chasing a minimum of goods, I am of opinion that the existence of a duty to buy afloat is impracticable and commercially unsuitable.
>
> [p. 115]

1996 ABCA 40 (CanLII)

[33] In two later cases, the U.K. Court of Appeal had to decide whether these rulings had a wider application. In both cases, they affirmed the more general rule and held the soya bean cases to their unique facts. Exportelisa (1978) and Warinco (1978). In Warinco (1978), Megaw, L.J. at 154 held:

> … whatever may have been the true basis of the decision of the particular issue as to goods afloat in Tradax. I do not think that it should be treated as extending to a case such as the present, where … there is no evidence of any impossibility, or even of any difficulty, commercial or otherwise, in the way of the seller fulfilling the contract in accordance with its terms…. [Warinco. supra at 154 per Megaw L.J.]

[34] Again in Exportelisa (1978) at 437 he said that the soya bean embargo rule "… does not provide a general exemption from the pre-existing principle …". Roskill and Cumming-Bruce, JJ. concurred. They applied the rule in Wildhandel (1978), and did so in a case where the supplier himself had intended to acquire from a single source. In that case, the supplier contracted to deliver Argentinean wheat to an English buyer. It had a purchase contract with an Argentinean supplier. Supply was interrupted when the Argentinean government established a state monopoly for the sale of wheat, and the base contract was frustrated. The Courts held that the supplier to England could not invoke force majeure because it could have bought wheat, albeit at a higher price, from the state monopoly. They said:

> … it is no defence to a seller who fails to deliver goods and who has in his contract a clause such as cl. 14, to show that he had intended to buy the goods from a particular seller in order to fulfil his contract with his own buyer, and that, for reasons outside his control, such as acts of the executive branch of the government, he was unable to procure the fulfilment of that contract of sale to him by another seller to him.
>
> [Exportelisa v. Giuseppe (1978) at p.436]

[35] Accordingly, I do not agree that the rule fashioned for the soya bean cases governs here. Moreover, I doubt that it is a different rule. It is merely an application of the rule I stated, which provided that the obligation to mitigate by re-supply must be commercially feasible. On the one hand, the supplier should not be able to cancel a contract merely because an expected profit will not occur as a result of new events. On the other hand, the purpose of the term is to protect the supplier from effects that are, in terms of what is commercially feasible or reasonable, out of his control. In sum, and in the absence of clearer words to the contrary, a supplier is not excused from non-performance by a force majeure event if the sole consequence of that event is to drive him to buy from another supplier and make a smaller profit. He is excused, however, if that solution, in all

1996 ABCA 40 (CanLII)

the circumstances, is not reasonable. This, again, was largely a question of fact and was not addressed by the trial judge.

[36] In my view, it is not often commercially reasonable to drive a supplier to make fundamental changes to the way he does business. This I think was the point made by Laskin, J.A. in dissent in Parrish v. Gooding (1968). Before us, Mr. Yorke-Slater said that the supplier was a seller of gas, not a buyer of gas, and his client should not be asked to go into the market in a way fundamentally at variance with its business. With deference, however, the agreed facts provide that his client did not sell only gas from its own wells, but other gas from other producers, the purchase of which presumably was negotiated on the open market. Moreover, I think I should take notice that, in general terms, recent years have seen new developments in the commerce of gas supply. Those who distribute natural gas to consumers tend today to buy pipeline supply rather than well production, and brokers deal in that supply. Wright, Contractual Issues in Marketing Natural Gas in the 1990's (1990) at 16-4. A spot market now exists for natural gas. Are purchases on that market utterly foreign to the supplier's business? I see no evidence of that.

[37] One last issue arises. As a further and alternative answer to the argument for the buyer about the duty to mitigate, the learned trial judge found as a fact that, at least after August 1, 1992, the supplier could not find replacement gas in the pipeline to buy and then sell to the buyer.

[38] The buyer makes two points. He first argued before us that this was an unreasonable finding based upon a misunderstanding of the testimony. The learned trial judge had relied upon a statement from Examination for Discovery that Nova had forbidden any replacement of supply, so that"… we could not replace anyone, we had to reduce our deliveries at Empress one way or the other. …" He did not, however, deal with the other evidence on that very topic.

[39] The first suggestion for the buyer before us was that the witness should not be understood as saying that he could not have purchased extra gas from other suppliers. He was, it was suggested, merely addressing the Nova rules about allocation of whatever supply a shipper happened to own. The witness was cross-examined at trial about this, but was extremely evasive.

[40] Mr. Peacock made a second point. The contract obliges the supplier to supply at the Burstall entrance to the TCPL system. The only connection at that point is from the Nova line through Empress. Thus, the only available supply must be in the Nova line. But the supplier was not the only firm employing that line. Others presumably owned gas that

1996 ABCA 40 (CanLII)

was also moving through the line. Counsel for the buyer led evidence at trial that it in fact bought replacement gas at Empress during the period of nonperformance by the supplier. Indeed, that is an agreed fact. It is difficult to understand how the supplier could not buy it if the buyer could. The Continental witness said this:

Q Was gas and transportation available for purchase on a spot basis during the times of the NOVA curtailments from June to October of 1992 at Empress?

A Yes.

Q And how do you know this?

A We were actively buying. Other companies were actively buying supply at the same time.

Q Was that supply equally available to Atcor during those periods of time?

A I would presume so.

[A.B. 129]

[41] The learned trial judge did not deal with any of this critical evidence. In my view, his failure to address all the evidence about access to replacement gas indicates that it was missed. (It was also argued for Continental that replacement gas could be purchased in Saskatchewan to be entered into the TCPL line slightly downstream from Empress. The response was that this was not provided for in the contract. The learned trial judge also did not deal with that issue.)

[42] The conclusion to which I have come about the meaning of the contractual terms is not quite exactly the same as that proposed by either party. Neither led evidence on the question whether the cost of replacement gas, for example, was a crushing burden for the supplier. Nor was there much evidence on the scope of the supplier's business, and what actions would be reasonable for it. Atcor contended instead that the case was much simpler than that, and for the buyer also it seems to have been thought enough to show that replacement gas was available.

[43] In the light of this, and the problem about the re-supply evidence, I am of the view that the just result here is to order a new trial. I expect that the parties can agree that the new trial will have a very narrow focus.

DATED at CALGARY, Alberta,

this 8th day of February,

A.D. 1996

1996 ABCA 40 (CanLII)