STEPHENSON HARWOOD

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Sharp v Viterra – Supreme Court clarifies the law of damages in GAFTA Default Clause case

Introduction

On 8 May 2024, the Supreme Court handed down judgment in *Sharp Corp Ltd v Viterra BV* [2024] UKSC 14[1], finding that the compensatory principle and principle of mitigation were both fundamental to the law of damages. In respect of the GAFTA Default Clause, this meant that damages were to be assessed by reference to "*the market in which it would be reasonable for the seller to sell the contract goods*" at the date of default.

Facts

Pursuant to two contracts dated 20 January 2017, Viterra ("**Sellers**") sold to Sharp ("**Buyers**"): (i) 20,000MT of Canadian lentils at US$600/MT; and (ii) 45,000MT of Canadian yellow peas at US$339/MT (collectively, the "**Cargo**"), both on C&F Free Out Mundra terms. Both contracts incorporated Clause 25 of the GAFTA Contract No. 24 ("**GAFTA Default Clause**"), which provided that: *"(c) The damages payable shall be based on, but not limited to, the difference between the contract price of the goods and… the actual or estimated value of the goods, on the date of default…".*

The Buyers did not pay for the Cargo prior to the vessel's arrival at Mundra on 19 June 2017, as required by the contracts, which meant that under the non-payment provisions of the contracts, the Sellers retained property in the Cargo and had the right to resell the Cargo.

By 20 June 2017, the Cargo was customs cleared and remained at the discharge port pending payment. During this time, the Buyers refused to authorise the release of the Cargo to the Sellers. On 9 November 2017, the Sellers declared the Buyers in default under both contracts, claiming damages and notifying the Buyers of their intended exercise of the right of resale.

Of note, on 8 November 2017 and 21 December 2017 respectively, the Indian Government imposed import tariffs of 50% on yellow peas and 30.9% on lentils respectively. As a result of these import tariffs, the Cargo had significantly increased in value in the domestic market.

After the Sellers regained possession of the Cargo on 2 February 2018, they resold the Cargo to an associated company.

GAFTA Board of Appeal

On the GAFTA Default Clause, the GAFTA Board of Appeal found that damages should be assessed "*on the market value of the goods on or about 2 February 2018 C&FFO Mundra in bulk*" and rejected the Buyers' case that the relevant market value was that of the domestic market.

Lower Court Decisions

The Buyers' appealed against the Board's decision. In the Commercial Court, the appeal was rejected by Mrs Justice Cockerill, holding that the correct approach was to value the goods based on the same terms and conditions as the contracts breached. In the absence of any evidence of a market on C&F Free Out Mundra terms, the Board was entitled to prefer the Sellers' evidence of a theoretical cost of buying goods FOB plus the market freight rate for transporting those goods to the discharge port Free Out.

The Court of Appeal overturned Mrs Justice Cockerill's decision, finding that the Board had erred in treating the notional substitute contract under Clause 25(c) of the GAFTA Default Clause as one on C&F Free Out Mundra terms. It held instead that damages should have been assessed on the basis of terms ex warehouse Mundra, in instalments, with risk having passed on

[1] https://www.supremecourt.uk/cases/docs/uksc-2023-0029-judgment.pdf

shipment, as the parties had varied the contracts to be on ex warehouse Mundra terms.

(Please see our full analysis on the Commercial Court's decision here, and on the Court of Appeal's decision here.)

Issues before the Supreme Court

The Sellers appealed against the Court of Appeal's decision on grounds that it exceeded its jurisdiction under Section 69 of the Arbitration Act 1996 ("**Act**") in finding that the contracts had been varied.

The Buyers cross-appealed on the basis that, if the appeal succeeded, damages should be awarded on an "*as is, where is*" basis, being the estimated ex warehouse Mundra value of the Cargo.

Supreme Court Decision

The Supreme Court held that the Court of Appeal had exceeded its jurisdiction under the Act. In particular, as the question of whether the contracts had been varied was not one that was before the Board and on which it had made a finding of law or fact, it was impermissible for the Court of Appeal to introduce such a question of law on appeal or to make its own finding of fact.

On the issue of damages, the Supreme Court reversed the basis on which the Board and the Lower Courts had assessed damages. The Supreme Court held that the compensatory principle and principle of mitigation were both fundamental to the law of damages,[2] and that this was reflected in the GAFTA Default Clause, and also more generally, in Sections 50(3) and 51(3) of the Sale of Goods Act 1979. Applying the principle of mitigation alongside the compensatory principle meant that the Board should have considered "*the market in which it would be reasonable for the seller to sell the contract goods*" at the date of default.

In the present case, the Sellers were left with Cargo which had been landed, customs cleared and stored in a warehouse in Mundra, in circumstances where its value had increased significantly because of the imposition of customs tariffs. It was held that this made it the clear market in which it would have been reasonable to sell the goods, instead of a sale in the international market involving the costs of re-exporting the goods and losing the significant uplift in Cargo value. The value of goods was thus to be measured by reference to a notional sale of the Cargo in bulk ex warehouse Mundra on 2 February 2018.

[2] The compensatory principle aims to put the injured party in the same position as if the breach had not occurred, and the principle of mitigation requires the injured party to take all reasonable steps to avoid the consequences of a wrong.

Commentary

The Supreme Court's decision in *Sharp v Viterra* helpfully clarifies that damages are to be assessed not solely on the basis of the compensatory principle, but also the principle of mitigation. This approach departs from earlier case law in *Bunge SA v Nidera BV [2015] UKSC 43 and Golden Strait Corpn v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12 which focused heavily on the compensatory principle.

As a practical consequence, when faced with a breach of contract, parties should bear in mind their duty to mitigate their losses and act reasonably, as a failure to do so would certainly affect their recoverable damages.

A key question for the injured party to ask is what it could reasonably do to mitigate its loss, the answer to which should then guide the assessment of compensatory damages. This necessitates considering where the goods are and the available markets at the time. If there is an available market for a substitute transaction on the same or similar terms, that would typically be the appropriate market price to take. If there is no such available market, then one would need to identify an alternative market in which it would be reasonable to sell the goods, bearing in mind price, costs and any special circumstances which may apply to the sale of the goods.

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