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SHARP CORP LTD (RESPONDENT) V VITERRA BV (PREVIOUSLY KNOWN AS GLENCORE AGRICULTURE BV) [2024] UKSC 14

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SUMMARY

Lord Hamblen's lead judgment in the Supreme Court case of *Sharp Corp Ltd v Viterra BV (previously Glencore Agriculture BV)* [2024] UKSC 14, concerned an appeal and cross-appeal of two Grain and Feed Trade Association (**"GAFTA"**) Appeal Awards. This article considers in detail the cross-appeal, which related to the assessment of damages by the GAFTA Appeal Board (the **"Appeal Board"**) under Clause 25 of GAFTA Contract No. 24 being the standard GAFTA default clause (the **"Default Clause"**).

In finding that the Appeal Board had erred in relation to the assessment of damages under the Default Clause, Lord Hamblen's judgment which also considers the common law measure of damages under the Sale of Goods act 1979 (**"SGA"**) clarifies that (1) both the principle of mitigation and the compensatory principle are the *'fundamental principles of the law of damages'* [83] and (2) together with the commercial realities of the circumstances, they are central to establishing a default price for goods by reference to *'the actual or estimated value of the goods, on the date of default'* under the Default Clause.

Further, Lord Hamblen's decision states that in circumstances where there is no available market for the substitute sale/purchase of goods on identical terms, it may be possible to extrapolate a price from market evidence and if that is not possible then the estimated value of the goods under the Default Clause should be assessed based on the goods *'as is where is'* on the date of default.

Therefore, although this case serves a narrow purpose in the context of the interpretation and application of the Default Clause, it establishes broader principles in the context of the assessment of damages under the SGA and generally.

BACKGROUND

The Buyers and Sellers entered into two contracts for the sale of Canadian lentils in bulk, and Canadian yellow peas in bulk. Both contracts were on C&FFO Mundra terms and incorporated GAFTA Contract No. 24 which contained the Default Clause. The Default Clause provided:

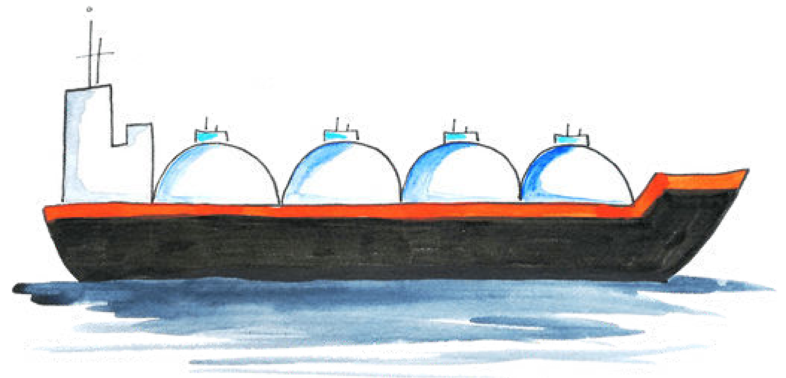
> *"25. DEFAULT*
>
> *In default of fulfilment of contract by either party, the following provisions shall apply:*
>
> *[a] The party other than the defaulter shall, at their discretion have the right, after serving a notice on the defaulter to sell or purchase, as the case may be, against the defaulter, and such sale or purchase shall establish the default price.*
>
> *[b] If either party be dissatisfied with such default price or if the right at [a] is not exercised and damages cannot be mutually agreed, then the assessment of damages shall be settled by arbitration.*
>
> *[c] The damages payable shall be based on, but not limited to, the difference between the contract price of the goods and either the default price established under [a] above or upon the actual or estimated value of the goods, on the date of default, established under [b] above."*

The peas and the lentils were loaded in Vancouver, and buyers chose to pay 'cash against documents'. The Buyers did not pay for the goods and despite agreeing to settlement by payments of instalments under (1) a washout agreement and (2) addenda to the two contracts, to give Buyers further time, the Buyers still did not pay. The goods were customs-cleared, discharged and put into storage in Mundra against an LOI from Buyers.

The government of India imposed an import tariff on yellow peas of 50%. Thereafter, the Sellers declared the Buyers in default and commenced proceedings in India to obtain possession of the goods. After commencing such proceedings, India imposed an import tariff of 30.9% on lentils.

The Sellers obtained possession of the goods on 2 February 2018 (which the Appeal Board found was the date of default) (the **"Default Date"**), which they then sold.

According to the Appeal Board, the import tariffs imposed had *'undoubtedly increased'* the value of the goods on the domestic market.



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THE ARBITRAL AWARDS

As to the quantification of damages, the Appeal Board found that damages should be assessed *'on the market value of the goods on or about 2 February 2018 C&FFO Mundra in bulk'.* However, as there was no evidence of independent trades of that contract description on the Default Date, the Sellers submitted their *'best evidence'* of the market value of the goods, based on (1) the FOB market price of each of the lentils and peas in Vancouver on the Default Date, and (2) the market freight rate for the carriage of the cargo from Vancouver to Mundra commencing on or around the Default Date. The Appeal Board awarded damages to Sellers on the basis of that evidence.

THE COMMERCIAL COURT AND COURT OF APPEAL JUDGMENTS

The Buyers were granted permission to appeal the Appeal Board's Awards on a question of law, namely whether the *'actual or estimated value of the goods, on the date of default'* was to be assessed by reference to (1) the market value of the goods at the discharge port (where they were on the Default Date), or (2) the theoretical costs of buying the goods FOB at the port of shipment on the Default Date plus the market freight rate from that port to the discharge port free out (as per the Appeal Board's approach).

Cockerill J in the Commercial Court dismissed the appeal but granted further permission to appeal.

The Court of Appeal concluded that damages payable under the Default Clause were to be assessed based on a notional substitute contract for the goods on the same terms as the parties' contract, save as to price, on the Default Date. On the basis that by the Default Date the contracts had been varied to become sales of goods 'ex-warehouse' (which was later found by the Supreme Court to have been a finding which the Court of Appeal had not been entitled to make), the Court of Appeal found that the Appeal Board had erred in treating the notional substitute contract as one on C&FFO terms.

THE SUPREME COURT DECISION

On cross-appeal by the Sellers, the Supreme Court considered the question of whether damages should have been awarded on an 'as is where is' basis, being the estimated *'ex-warehouse Mundra' value of the goods. In doing so, Lord Hamblen considered, built upon and clarified the judgment of Bunge v Nidera BV* [2015] UKSC 43, in which the Supreme Court had (a) defined how the Default Clause operates, (b) stated that the compensatory principle (i.e. the intention to put the injured party (so far as money can do) in as good a position as if the contract had been performed), is fundamental to assessing damages under the Default Clause and (c) rejected an argument that the Default Clause precludes the operation of that principle (meaning that the amount of damages recoverable may be affected by an act of mitigation by an innocent party).

The following salient points can be drawn from Lord Hamblen's analysis:

1. The Default Clause applies where there is non-performance of the contract.

2. If the injured party buys/sells the goods against the defaulter, (which is recognised by Sections 50(3) and 51(3) of the Sale of Goods Act 1979 as what an injured party would be expected to do in mitigation of its losses where there is an available market), then, so long as neither party is dissatisfied with the price under the substitute transaction, the price under that sale/purchase will set the default price and the damages payable will be the difference between that and the contract price of the goods. In this way, the damages are established by the reasonable steps taken by the injured party in mitigation of its losses.

3. If there is no default price because the injured party did not go into the market to buy/sell against the defaulter, or if one or both parties disagrees with the default price established by a substitute contract, then damages are to be settled by arbitration.

A tribunal could assess damages on two alternative bases:

> a) The tribunal could decide that it is appropriate to take the default price as being the one which was set by a substitute contract, or
>
> b) If a) is not appropriate (or there is no substitute sale/purchase transaction), the Tribunal can set the default price as being *'the actual or estimated value of the goods on the date of default'.*

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5. In deciding whether it is appropriate to set the default price as the one which was established by a substitute contract, a tribunal will have to be able to be able to conclude that, by the application of the principle of mitigation and the compensatory principle, such price is appropriate i.e. the default price from the substitute contract reasonably made resulted in a reasonable measure of the injured party's loss in accordance with the compensatory principle.

6. A tribunal may refuse to accept prices under substitute contracts which were not arms-length transactions as establishing the default price as they would not reflect the market price and therefore would not reflect the mitigation and compensatory principles.

7. Where the tribunal sets the default price as the one being *'the actual or estimated value of the goods on the date of default',* it is understood that this too should reflect the mitigation and compensatory principles, as the wording covers the same territory as Sections 50(3) and 51(3) of the SGA, which assume that where there is an available market, the reasonable injured party will go into that market to make a substitute sale/purchase and normally that market price will establish the default price. Such provisions are based on a 'deemed mitigation' to enable the innocent party to be put in the same financial position as it would have been in had the contract been performed.

8. The proper approach to determining the relevant market should be guided by the principle of mitigation and consideration of the market in which it would be reasonable for the Sellers to sell the goods. In the circumstances, Lord Hamblen considered that, given that (a) on the Default Date the goods were landed, customs-cleared and stored in a warehouse in Mundra, and (b) the value of the Goods in Mundra had increased so significantly because of customs tariffs being imposed, the obvious and reasonable market to sell into was the ex-warehouse Mundra market.

9. Where there is an available market, the normal or prima facie means of establishing the *'actual or estimated value of the goods'* is by reference to the price of a substitute sale or purchase in that market.

10. If there is no available market for a substitute transaction on identical terms, where a difference in terms is of no economic significance, it will not matter and the available market for a substitute transaction on those terms will be the appropriate market price to take. If the difference in terms is of some economic significance, then that may be addressed by an appropriate adjustment (a flexibility in establishing the default price made possible by the words *'estimated value of the goods'* in the Default Clause).

11. The 'goods' whose value is relevant to the assessment are the specific goods appropriated to the contract and left, in this case, in the Seller's hands.

The Supreme Court ultimately found that the Appeal Board's approach was incorrect as, amongst other reasons, it (1) was based on a notional purchase (rather than sale) of a further consignment (as opposed to the actual goods appropriated to the contract), (2) in a different market in a different continent, resulting in the arrival of the goods at Mundra weeks after the Default Date, (3) reflected neither the mitigation nor compensatory principles nor the commercial realities of the circumstances, and (4) did not consider the uplift in value of the goods which is a benefit to be taken into account under the compensatory principle.

The correct approach to the assessment of damages was that they would fall to be measured by reference to a notional sale of the goods in bulk ex-warehouse Mundra on the Default Date. If there was no available market for the sale of goods ex-warehouse Mundra on the Default Date, then Lord Hamblen suggested that it may be possible to extrapolate a bulk price from market evidence of prices on the Default Date – if that is not possible either, then he stated that the estimated value of the goods should be assessed based on the goods 'as is where is' on the Default Date.

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COMMENTARY

The Supreme Court has clarified and expanded upon *Bunge SA v Nidera*, which had considered that the compensatory principle was central in the assessment of damages. It is clear now that the principle of mitigation is just as fundamental not only in the context of damages under the GAFTA Default clause, but to the assessment of damages under the SGA and at common law in general.

In the context of the GAFTA Default Clause, where there has been a default and a substitute contract entered into, the parties ought to consider carefully whether they are satisfied with the 'default price' established by the substitute contract or whether to pursue assessment of damages by a tribunal instead.

The party challenging the *'default price'* will have to establish it is inappropriate in assessing the injured party's loss in accordance with the compensatory principle and the principle of mitigation.

In practical terms, whether a party seeks to challenge either the market at which the goods were sold, or the price achieved for the goods, the challenging party should be prepared both to adduce evidence:

1. That an alternative market existed for the sale of the goods or that a different price was achievable.

2. That these were available to selling party; and

3. That selling at that market or that price was what reasonably required of the selling party in all the circumstances.

In terms of drafting points, the parties could consider, with a view to circumventing protracted disputes if damages fall to be assessed by a tribunal, agreeing on definitions of:

1. Where the 'available market' is relevant (which would be the market that it might be reasonable to purchase/sell the goods in) in the event of default at a particular stage of the transaction (i.e. place of origin/destination, or location of the goods at the time of the default); and

2. 'Default Date' which could be the date of the non-performance, the first day after the date of non-performance or period allowed for performance, the last day of the delivery/shipment period, or the date upon which it becomes possible (if previously impossible) for the goods to be re-purchased/re-sold.

Finally, it is for the parties to continue to bear in mind that if the parties intend to limit or amend the operation of the principle of mitigation, including under a GAFTA Default Clause, then clear express words will need to be included in the contract to that effect.

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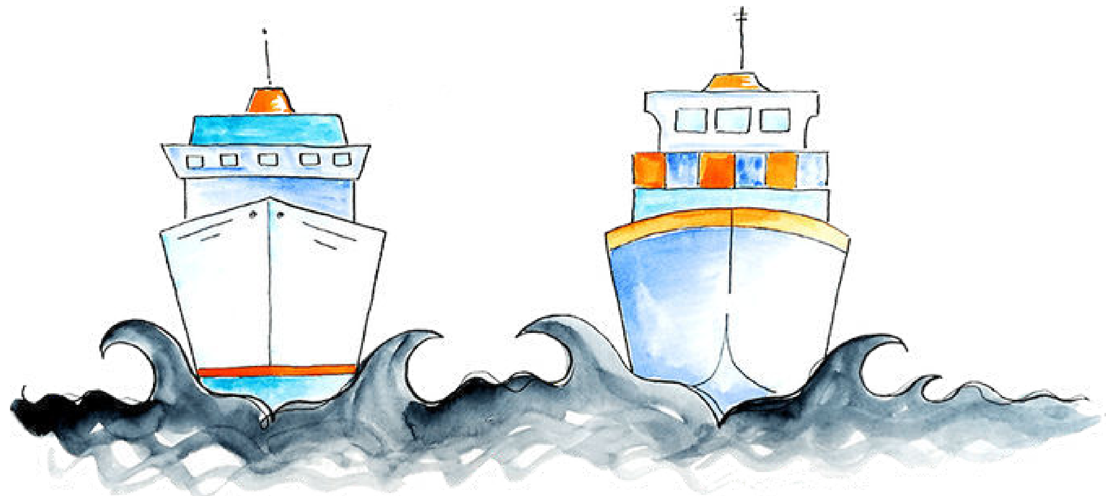

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