Sharp v Viterra: Supreme Court elevates mitigation to a fundamental principle of damages and confirms limits on s. 69 appeals

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In its judgment in ***Sharp Corp Ltd v Viterra BV*** [2024] UKSC 14, handed down on Wednesday 8 May 2024, the Supreme Court declared the 'principle of mitigation' to be as fundamental as the compensatory principle in the law of damages. Applying those two principles, the Supreme Court reversed the approach to damages assessment adopted by both the Commercial Court and the Court of Appeal, ruling that damages for non-acceptance of goods should be quantified by valuing the actual goods left in the seller's hands 'as is where is', and not by seeking to replicate the terms of the original sale contract.

The judgment also provides authoritative guidance on the limits within which the English Court can act on an appeal under s. 69 of the Arbitration Act 1996 ("the Act"). The Supreme Court held that the Court of Appeal impermissibly breached those limits by (i) asking itself a question which the tribunal had not been asked to determine and (ii) making factual findings when answering that question.

The background to the Court's judgment

The appeals related to the sale of lentils and peas C&F Mundra. The Buyer was obliged to pay for them before they arrived at Mundra, the discharge port, but failed to do so. The Seller gave the Buyer more time to pay and allowed the goods to be landed, customs cleared and stored in a warehouse at Mundra in the meantime. Upon the Buyer's continued failure to pay, the Seller declared the Buyer to be in default and terminated the contracts. However, by that time, the Indian government had imposed import tariffs which had the effect of substantially increasing the value of the customs cleared goods left on the Seller's hands at Mundra.

The Seller commenced arbitration, claiming damages for repudiatory breach under the standard GAFTA default clause, which provides in sub-clause (c) for damages to be based on the difference between the contract price and *"the actual or estimated value of the goods on the date of default"*. The Seller argued that the value of the goods should be calculated by reference to the terms of the original C&F contract between the parties and that the best evidence of that value was the hypothetical cost of buying in new goods and selling them afloat. That approach ignored the benefit of the substantial increase in the value of the goods on the domestic market resulting from the imposition of tariffs after those goods had been customs cleared.

The GAFTA Appeal Board awarded damages on that basis. The Buyer secured permission to appeal to the Court under s. 69, contending that damages under the GAFTA default clause should be based on the difference between the contract price and the value of the actual goods left on the Seller's hands on an 'as is, where is' basis (i.e., customs cleared in Mundra) on the date of default.

Cockerill J upheld the Appeal Board's decision, holding that ***Bunge v Nidera*** required any damages under the standard GAFTA default clause to be based on a hypothetical substitute sale on the same terms (other than price) as the original contract.

The Court of Appeal allowed the appeal by an unusual route. The Court approved Cockerill J's analysis of ***Bunge v Nidera***, but found that the parties had varied the contracts from C&F Mundra to ex warehouse Mundra before the date of default. This appeared to square the circle by allowing damages to be assessed by reference to both the 'substitute contract' analysis said to be mandated by Bunge v Nidera and the obvious merits of an 'as is, where is' valuation reflecting the true economic position of the Seller post-termination.

Limits on the Court's review under s. 69 of the Act

The Supreme Court, with Lord Hamblen delivering the Court's judgment, held that the Court of Appeal had exceeded the bounds of s. 69 in finding that damages should be assessed by reference to the sale contracts as amended.

The Supreme Court first summarised the requirements ("safeguards") of s. 69:

» The limits on judicial review set out in s. 69 must be respected and applied consistently with the general principle in s. 1(c) that *"the court should not intervene except as provided"* in Part 1 of the Act.

- The Court may amend the question of law for which permission has been granted under s. 69 provided that the substance of the question remains the same.
- Although the question of law appealed need not have been raised with the precision of a construction summons, the point must have been *"fairly and squarely before the arbitration tribunal* ***for determination****"* (emphasis in original).
- Since the Court's jurisdiction under s. 69 of the Act is limited to appeals on questions of law, it has no jurisdiction in relation to errors of fact and no power to make its own findings of fact. It must accept the facts found by the tribunal.
- The court can infer that the tribunal has implicitly made a finding of fact only if that inference *"inevitably follows"* from the tribunal's express findings. This involves the court identifying a finding of fact which the tribunal has made, and not making its own finding.

Applying those principles, the Supreme Court held that the Court of Appeal erred in assessing damages on the basis that the sale contracts had been varied to become ex warehouse Mundra contracts because the tribunal had not been asked to determine whether such a variation had taken place. The Supreme Court also held that, in reaching its decision, the Court of Appeal had impermissibly made factual findings about tender of bills of lading at Mundra which the tribunal had not made and which did not *"inevitably follow"* from its express findings.

The fundamental mitigation and compensatory principles

On the question of damages, the Supreme Court first declared the compensatory principle and the principle of mitigation to be the two *"fundamental principles of the law of damages"*. This marks a departure from ***Bunge v Nidera*** and ***The Golden Victory***, where the focus was almost exclusively the compensatory principle.

Lord Hamblen explained that in many cases these two fundamental principles work together, with reasonable steps taken in mitigation fixing the measure of compensatory damages. He ruled that the GAFTA Default Clause, like the common law measure of damages for non-delivery and non-acceptance in the *Sale of Goods Act 1979*, reflects these two fundamental principles. The innocent party is deemed to have mitigated by going into the market to buy or sell goods and so its loss attributable to the breach is the difference between the contract price and the market price on the date of default.

Lord Hamblen explained that, in the case of a buyer's default, the appropriate market to determine the value of the unaccepted goods was the market where *"it is reasonable for the seller to dispose of the goods"*. On the facts, the Seller was left on the date of default with goods which had been landed, customs cleared and stored in a warehouse in Mundra, where their value had significantly increased because of the imposition of the import tariffs. Accordingly, *"the obvious market in which to sell the goods, and in which it would clearly be reasonable to do so, is the ex warehouse Mundra market"*. It is clear from Lord Hamblen's judgment that exactly the same analysis would apply in a common law Sale of Goods Act case rather than a GAFTA default clause case.

This decision provides welcome clarification of the dicta in ***Bunge v Nidera*** that had been interpreted in the Courts below as requiring damages to be assessed on the basis of a substitute contract on the same terms as the original contract, save for the price. That will often be the market on which a buyer or seller would conclude a substitute contract, but the decision in Sharp v Viterra makes clear that this is not an invariable rule. The touchstone will be what the innocent party could reasonably have done in the face of the breaching party's default.

The Supreme Court has thus elevated mitigation to a fundamental principle of the law of damages and brought much needed clarity and consistency of principle to the quantification of damages not only in sale of goods cases but in the law more generally.

Chirag Karia KC and Ben Gardner acted for the successful buyers, instructed by Leigh Crestohl, Saurabh Bhagotra & Daniel Powell of Zaiwalla & Co.

Chirag Karia KC

'Chirag is an astute judge of the mood of the court, knowing when to push harder for the client's interest, and his advice is practical." (Legal 500, 2024)

Chirag Karia KC is a leading commercial silk with a broad commercial, international arbitration, energy, shipping and international trade practice. He appears in the Commercial Court, the Court of Appeal, the Supreme Court and international arbitrations. He is listed as a 'Leading Silk' for Shipping and Commodities disputes by Chambers UK, Chambers Global, The Legal 500 UK, The Legal 500 Asia Pacific and Who's Who Legal and for Commercial disputes by Legal 500 EMEA.

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'A brilliant all-rounder and one of the best juniors, he is responsive, methodical and incisive, providing clarity of thought." (Legal 500, 2024)

Ben has a busy commercial practice, focusing on international arbitration, energy, shipping and commodities. He is the only barrister recognised by both Chambers & Partners and Legal 500 as a leading junior across each of these fields. Ben often appears in Court at all levels, both as sole counsel and as part of a team.

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