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Peas to See You – Update on Mitigation

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In English law, damages for breach of contract or tort are compensatory in nature. They are intended to put the innocent party in the position it would have been in (i) if the contract had been performed, or (ii) the tort or breach of duty had not occurred. One of the arguments open to the contract breaker or tortfeasor to reduce the damages to be awarded is to say that the innocent party brought the loss, or some of it, on itself – by failing to mitigate. In this article, we review a number of recent cases in which the English Courts considered the role and extent of the duty to mitigate, and in particular, whether the claimant has to give credit for benefits that have fallen into its lap as a result of trying to mitigate the effects of the breach.

Mitigation in Sale of Goods Cases – *Sharp v Viterra*

The Supreme Court looked at the issue most recently in *Sharp Corp Ltd v Viterra BV* [2024] UKSC 14. The case concerned the sale of lentils and peas, to be shipped by the sellers from Vancouver to Mundra in India where the buyers had contracted to take delivery. The contract was on "*C&F FO*" terms. This stands for 'cost and freight - free out' and means that the sellers cover the cost of shipping the goods to the destination port, while the buyers have to bear the cost of unloading the goods upon arrival.

The parties chose a Grain and Feed Trade Association (**GAFTA**) form for their agreement. The contract price was US$ 600 per mt (metric ton) of lentils, and US$ 339 per mt of peas. This contract required the buyers to pay for the cargo five days before it arrived in Mundra. On 10 May 2017, the sellers loaded the cargo onto a vessel in Vancouver and kept the buyers informed as to its expected arrival date in Mundra. On 31 May 2017, the sellers told the buyers and their bank that payment was due by 13 June 2017. The vessel was slightly delayed. On 16 June 2017, the sellers wrote to the buyers to confirm an arrival date of 19 June 2017, noting that payment had already fallen due on 14 June 2017. The vessel duly arrived but the buyers were unable to pay. The sellers agreed to the cargo being discharged at the port in order to avoid the vessel being detained, which would have led to demurrage charges being incurred. By 20 June 2017, the lentils and peas had cleared customs and were stored in a local warehouse, while the parties continued discussions about when payment might finally be made by the buyers. Those discussions went on for some time. By late September 2017, the buyers had agreed to a new arrangement whereby they undertook to pay the full contract price in instalments and also to pay compensation (just under US$ 1 million) to the sellers. The buyers then proved unable to make those payments.

In November 2017, the sellers formally placed the buyers in default of both the original GAFTA contract for sale and the new settlement agreement. The sellers asked the buyers to assist with releasing the peas and lentils from the warehouse, on the basis that the cargo was still the sellers' property since it had not been paid for. The buyers did not cooperate. The sellers commenced proceedings in the Indian courts. Eventually, in February 2018, the sellers were able to take possession of the peas and lentils. They almost immediately resold the cargo locally to an associated company. The lentils went for US$ 431 per mt (compare the contract price of US$ 600), and the peas for US$ 378 per mt (compare the contract price of US$ 339). The sale price achieved by the sellers reflected the fact that in November and December 2017, the Indian government had imposed tariffs on imported peas (50%) and lentils (30.9%) with immediate effect. Since these peas and lentils had already cleared customs in June 2017, no tariffs were due, which made them more valuable on the domestic Indian market.

The Determination of the Default Price

The sellers then commenced arbitration proceedings under the GAFTA contract, claiming damages. Clause 25 of the contract contained an industry-standard 'default' provision which was the starting point for calculating the sellers' damages. It said that if the goods had been resold by the sellers (or if the buyers had bought replacement goods in a case where the sellers had breached), then that sale or purchase price would serve as the default price in calculating the damages. However, if either party was dissatisfied with this default price, they could refer the matter to arbitration for an assessment of damages. The clause concluded:

> "*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 … or upon the actual or estimated value of the goods, on the date of default ...*"

In the arbitration, the sellers submitted that the damages should be assessed based on the difference between the contract price and the market value of the goods 'C&F FO Mundra' as of February 2018, and that the price that they had actually achieved by selling the peas and lentils out of the warehouse was irrelevant. However, the sellers could not provide any evidence to the GAFTA tribunal of what the 'C&F FO Mundra' price for lentils and peas might have been in February 2018. Instead, they asked the Tribunal to use the free on board (FOB) price ex-Vancouver and added to that the market freight rate for the relevant time for shipping from Vancouver to Mundra. That pricing information was available, and on that basis, the sellers claimed substantial damages. The buyers argued that instead, the value of the goods should be assessed based on the market price at the time on the Indian market. The arbitrators agreed with the sellers. They held:

> "*The contract which is the subject of this arbitration was not a contract for the sale of varying quantities of goods ex warehouse into the domestic market in India over a lengthy period of time but was for the sale of goods in bulk on the international market. Sellers had undertaken to ship the goods in bulk from Vancouver to Mundra and Buyers had undertaken to pay for those goods before arrival … Buyers having failed to perform their obligation to pay, the formula for assessment of damages was that set out in the default clause whereby the market value of the goods was to be assessed by reference to the terms of the contract, ie for* [goods of the contract description] *in Bulk traded C&FFO Mundra on the international market.*"

The tribunal adopted the sellers' analogy for the notional contract pricing in February 2018 (FOB Vancouver plus freight to India). Those prices were substantially lower than the original contract price from May 2017. The tribunal therefore awarded the sellers damages of US$ 4,163,250 (lentils) and US$ 903,750 (peas). In addition, the sellers were awarded US$ 738,000 for the cost of storing the goods in the warehouse.

The GAFTA arbitration clause permits an appeal to the English High Court on a point of law, pursuant to Section 69 of the Arbitration Act 1996. This right of appeal is excluded in the rules of arbitration of other institutions such as the LCIA or the ICC. The buyers appealed on the basis that the decision of the tribunal was wrong in law. In the Commercial Court, Cockerill J dismissed the challenge. She found that since there was no direct evidence of the market value at the time of the breach based on the actual contract pricing (C&F FO Mundra), the tribunal had been entitled to adopt the sellers' best available alternative.

Altering the Deal After the Event and the Impact on Damages

The Court of Appeal came to a different conclusion. It held that damages under Clause 25 of the GAFTA terms had to be assessed on the basis of a notional substitute contract for the goods on the same terms as the parties'

contract, save as to price, at the date of default. However, on the facts, the Court of Appeal concluded that by February 2018, this notional substitute contract was no longer an agreement for the international sale of lentils and peas out of Vancouver. The parties had altered their deal.

The Court of Appeal found that the parties had by their conduct varied the contract after the breach: the sellers had tendered the bills of lading despite not having been paid, had accepted that the goods were discharged and stored in the warehouse, and had agreed to the settlement agreement for payment in instalments while the goods were stored. The Court of Appeal concluded that the correct legal analysis was that title to the goods had passed to the buyers (because the bills of lading were documents of title, and the sellers had given them up). However, the risk for the goods in the warehouse remained with the buyers since they had not paid for them yet. That turned the contract into something entirely different to an international sale on C&F FO or FOB terms and required a different approach to assessing damages. Popplewell LJ found that it was:

> "*… axiomatic to the compensatory principle, that the assessment of damages must reflect the nature of the bargain which the innocent party has lost. That involves an examination of the parties' bargain as it existed at the date of default. If the contract has been varied at that date from the terms originally agreed, it is a notional contract on those varied terms, save as to price, which must be taken as the substitute. Only by doing so is it a true substitute, and only by doing so is the loss calculated as a loss of bargain: the bargain which the innocent party has lost is the contract as varied at the date of default. To the extent that any different loss flows from the terms originally agreed, that is the result of the agreement to the variation, not the default of the defaulting party.*"

The sellers, who had presumably reached all these agreements and made these concessions as part of responding to the breach, found themselves left with a different contract and a reduced entitlement to damages. They appealed.

The Supreme Court Highlights the Importance of the Mitigation Principle

The Supreme Court allowed the sellers' appeal. It found that the Court of Appeal had gone beyond what Section 69 of the Arbitration Act permits. The provision is limited to appeals on a point of law. However, the Court of Appeal had found that the goods had been discharged against presentation of the original bills of lading (on which the GAFTA tribunal had made no findings at all). In so doing, the Court of Appeal had gone too far:

> "*… any view the finding that discharge was made against the original bills of lading is a finding of fact which it was not open to the Court of Appeal to make and this was critical to the Court's conclusion that the contracts had been varied.*"

It followed that the contract remained as it had been at the time of the breach: It was for the sale of the goods afloat on C&F FO terms. The next question for the Supreme Court was to determine whether the GAFTA tribunal had correctly assessed the measure of damages under that original contract.

Lord Hamblen confirmed there were two fundamental principles in the law of damages: Compensation and mitigation. The principle of compensation is usually stated based on the famous case of *Robinson v Harman* (1848) 1 Exch 850: the innocent party should "*so far as money can do it to be placed in the same situation with respect to damages as if the contract had been performed*". The principle of mitigation means that the injured party has to take all reasonable steps to avoid the consequences of the wrong or breach. While references are often made to a 'duty' to mitigate, this is not a duty that anyone can enforce. The principle has three facets: (i)

No damages are recoverable for loss that should reasonably have been avoided, (ii) damages are recoverable for loss suffered in taking reasonable steps in mitigation, even where that increases the overall loss and (iii) if the loss is reduced through mitigation, or even avoided altogether, then the party in the wrong will get the benefit of that.

Compensation and Mitigation Go Hand in Hand

These two principles work hand in hand, in that the outcome of the innocent party's mitigation efforts crystallises the loss. Where a substitute sale or purchase of goods happens after a breach by the buyer or seller, then the price achieved in that substitute transaction will fix the loss. In a previous Supreme Court decision, *Bunge SA v Nidera BV* [2015] UKSC 43, Lord Sumption noted that:

> "*In a contract of sale where there is an available market,* [awarding damages based on the compensatory principle] *ordinarily achieved by comparing the contract price with the price that would have been agreed under a notional substitute contract assumed to have been entered into in its place at the market rate but otherwise on the same terms.*"

The same principles are enshrined in Sections 50 and 51 of the Sale of Goods Act 1979, dealing with breaches by the buyer or seller. Where the seller is in breach, Section 51(3) says that damages are "… *prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered.*" All this hinges on whether a market is available for the goods. If there is, then the market price will determine the damages, irrespective of what the innocent party actually does – sometimes referred to as "*deemed mitigation*".

Speculation Breaks the Chain of Causation

If there is an available market, the market price will be the default price, even if a decision to delay in entering the market is commercially reasonable. As the Supreme Court put it:

> "*A decision to delay is the injured party's voluntary and independent commercial decision and its consequences are irrelevant to the damages payable, however well or badly it works out … Market prices move, both up and down. If the injured party delays ... in re-entering the market, he does so at his own risk: future speculation is to his account – 'the buyer's decision is (in the vernacular) down to him …*"

This is one instance where a reasonable decision by the innocent party – to wait before entering the market - prevents it from recovering increased damages, where waiting turns out to have been the wrong choice because the market has moved against the innocent party. In *Bunge v Nidera*, Lord Sumption explained this particular point by noting that the breach gives the innocent party an *option* to either enter or stay out of the market, but there is no direct causal connection between the breach and the innocent party's *decision* whether to enter or stay out of the market. The innocent party's freedom of choice breaks the chain of causation. In an earlier Supreme Court decision, *BPE Solicitors v Hughes-Holland* [2017] UKSC 21, Lord Sumption elaborated on how causation and mitigation are linked:

> "*… It is generally a necessary condition for the recovery of a loss that it would not have been suffered but for the breach of duty. But it is not always a sufficient condition. … the law is concerned with assigning responsibility for the consequences of the breach, and a defendant is not necessarily responsible in law for everything that follows from his act, even if it is*

> *wrongful. A variety of legal concepts serves to limit the matters for which a wrongdoer is legally responsible. Thus the law distinguishes between a mere precondition or occasion for a loss and an act which gives rise to a liability to make it good by way of damages: … Effective or substantial causation is a familiar example of a legal filter which serves to eliminate certain losses from the scope of a defendant's responsibility. It is an aspect of legal causation. So too is the rule that the defendant cannot be held liable for losses that the claimant could reasonably have been expected to avoid … Ultimately, all of them depend on a developed judicial instinct about the nature or extent of the duty which the wrongdoer has broken.*"

The Supreme Court's Conclusion and the Importance of 'Actual Mitigation'

What did that mean for the sale of the peas and lentils stuck in the warehouse in Mundra? The Supreme Court noted that the default provision in the GAFTA form of contract reflected the mitigation principle, and so one had to consider first the market in which it would be reasonable for the sellers to have resold the goods. Since in February 2018, the Sellers had been left with goods that had gone through customs and were stored in a warehouse, the obvious market to look at was the domestic one. That was even more so because the imposition of tariffs made these particular goods more valuable on that market. It was no longer reasonable to fix the default price by reference to the international market, because the sellers would have had to re-export the goods, thus losing the benefit of the customs clearance and making a much more complicated attempt to re-sell the goods afloat. Both the principles of compensation and mitigation, the Supreme Court found, required the benefit of the uplift in value to be taken into account when assessing damages.

It was also relevant that until the Sellers had reacquired possession of the goods in February 2018, they could not resell them. As the arbitrators had found, that was the date of default or breach, because until then it was impossible for the seller to resell the goods. This logic applied to time but also to place: When sellers became able to resell the goods, they were in the warehouse in Mundra. If there had been some disastrous fall in the local market price of peas and lentils in India, then the sellers' damages would have been greatly increased. However, as it happened, the sellers benefited and had to account for it.

The Supreme Court plainly considered it relevant to look at what the sellers had actually done. However, that was not quite the end of the matter. The Supreme Court remitted the case to the GAFTA tribunal to re-assess damages on the basis of the market value of the goods in a notional re-sale of the goods ex-warehouse in Mundra as of February 2018. This was because the actual re-sale had been made to an affiliated company of the sellers. The Supreme Court instructed the tribunal to determine whether there was an actual arm's length market price for the goods as they were at the time.

Accounting for Benefits – A Result of the Breach?

Another recent decision in the Technology and Construction Court (**TCC**), in *Darcliffe Homes Ltd v Glanville Consultants* [2024] EWHC 3184 (TCC) illustrates the relevance of benefits obtained by the innocent party in a context other than the sale of goods. In that case, developers commissioned a desk top study into the prevailing ground conditions at a site they contemplated purchasing. The consultants gave the site a clean bill of health from a geotechnical perspective but had apparently only collated publicly available information without checking the ground conditions or carrying out any kind of analysis of the information that they had found. Hence, they could not have been in a position to reach any sensible conclusion.

This was held to have been negligent. However, the judge found that this being a desk-top study, a non-negligent report would not have included much more in the way of a warning that there might be ground

dissolution (the problem eventually encountered). The judge also found that the claimants might not even have noticed such a warning, since they admitted they had only skimmed the report. The claimants would have gone on to instruct the same more intrusive on-the-ground investigations that they actually commissioned and would have bought the site anyway in light of the results of those investigations. The judge concluded that the claimants' corporate mind would not have been affected by a report that met the standard of reasonable skill and care.

Since the breach did not cause the loss, the judge did not have to assess damages, but he made some (obiter) comments which are of interest. The claimants argued that had they been properly advised, they would not have bought the site. In the event, they did purchase it and had to undertake substantial remediation costs. They claimed those costs as damages. Alternatively, the developers argued that they were entitled to damages based on the difference in value, pursuant to the principle set out in *Perry v Sidney Phillips & Son* [1982] 1 W.L.R. 1297:

> "*… you have to take the difference in valuation. You have to take the difference between what a man would pay for the house in the condition in which it was reported to be and what he would pay if the report had been properly made showing the defects as they were. In other words, how much more did he pay for the house by reason of the negligent report than he would have paid had it been a good report?*"

The judge found that if there had been a breach, damages on this basis would have been recoverable. The defendants submitted that, in any event, the claimants would have had to give credit for the profit that they made in selling the homes for more than originally forecast.

The judge considered the leading decision on the issue of whether a benefit obtained by the claimant will reduce damages, *British Westinghouse Co v Underground Electric Railways Co of London Ltd* [1912] AC 673. In that case, the claimant sought damages for the defendant's breach in supplying defective turbines for the generation of electricity to power the London Underground. After three years of using the defective turbines, the claimant replaced them and sued the supplier. At the time, the original turbines had become obsolete, so the claimant replaced them with a newer model. Those newer models were more efficient. The claimant's operations became more profitable as a result. The House of Lords held that this was a benefit which arose as a consequence of the breach, because the turbines were replaced in the ordinary course of business, based on the standard model in use at the time. The increased profits thus reduced the damages awarded. Viscount Haldane held that:

> "*… the principle which applies here is that which makes it right … to look at what actually happened, and to balance loss and gain. The transaction was … one in which the person whose contract was broken took a reasonable and prudent course quite naturally arising out of the circumstances in which he was placed by the breach. Apart from the breach of contract, the lapse of time had rendered the appellants' machines obsolete, and men of business would be doing the only thing they could properly do in replacing them with new and up-to-date machines.*"

The losses caused by the claimant's mitigation included the cost of replacing the turbines, and the benefits included the increased profits that the claimant company was able to obtain from using the replacement machines in its business. Damages were the net result of the two. However, in *Darcliffe,* the TCC did not agree that any additional or unexpected profit from the sale of houses to be developed on the land would be a

consequence of the breach – negligent advice about the prevailing ground conditions. Instead, the developer had sold the houses as it had always planned to do.

Old for New?

Cases about accounting for benefits will ultimately turn on the facts. One well-known decision where the claimant did not have to account for what some might initially see as an advantage obtained as a result of the breach is *Harbutt's Plasticine v Wayne Tank and Pump* [1970] 1 QB 447. Plasticine was a non-drying alternative to modelling clay invented by the artist William Harbutt in 1897. Harbutt was enthused by his invention and worked hard to promote it – too hard, perhaps, since in 1921 he died from pneumonia while on a promotional tour to New York. After his death, the popularity of Harbutt's Plasticine continued to grow. The company built a factory near Bath. In the mid-1960s, the defendants installed some new equipment at the factory. The design of the equipment proved defective and led to a fire in which the factory burned down. The claimant rebuilt the factory and ended up with a new facility in place of the old. Predictably, the matter ended up in court. The Court of Appeal held that the claimant could claim the entire cost of replacing the factory from the contractor who had supplied the equipment that caused the fire, and did not have to give credit for any betterment. Lord Denning MR said that:

> "*The destruction of a building is different from the destruction of a chattel. If a second-hand car is destroyed, the owner only gets its value; because he can go into the market and get another second-hand car to replace it. He cannot charge the other party with the cost of replacing it with a new car. But when this mill was destroyed, the plasticine company had no choice. They were bound to replace it as soon as they could, not only to keep their business going, but also to mitigate the loss of profit (for which they would be able to charge the defendants). They replaced it in the only possible way, without adding any extras. I think they should be allowed the cost of replacement. True it is that they got new for old; but I do not think the wrongdoer can diminish the claim on that account. If they had added extra accommodation or made extra improvements, they would have to give credit. But that is not this case.*"

What then is the distinction between the claimants in *British Westinghouse* having to give credit for the new and improved turbines, even though it was a reasonable decision to replace obsolete models with new ones, and *Harbutt's Plasticine*, where the claimants might be seen to have ended up in a better position than they were in before the breach?

A distinction between these apparently similar cases can be drawn. The Harbutt's Plasticine company did not want a new factory, just some new equipment for the old one. In order to carry on with their business after the fire, they had to rebuild the factory, and that they could not do in a manner equivalent to the condition it was in before the breach. It was either a new factory, or no more plasticine business. The Underground Electric Railway Company, it seems, could have continued with the existing, underperforming turbines: The trains were still running, albeit the company had not received what it had bargained for and perhaps suffered greater electricity bills.

The Court of Appeal in *Harbutt's Plasticine* also noted that the defendant had led no evidence that there had in fact been any particular betterment. There was no suggestion that the claimants had, to use Lord Denning's expression, added any extras to the new factory. Had they done that, and had the defendants been able to prove it, then the outcome might have been different. Just like the defendant has the burden of proving that there was a failure to mitigate, the defendant also has the burden of showing that there was a benefit, or betterment, for which the claimant should give credit.

The Defendant Must Prove Betterment, Just Like a Failure to Mitigate

In *Lagden v O'Connor* [2003] UKHL 64, Lord Hope expanded on this point. Not only did the defendant have to identify an element of betterment, but they also had to show that the claimant had a choice, and could have mitigated the loss at a lesser cost, before a deduction for an alleged benefit will be made:

> "*The wrongdoer is not entitled to demand of the injured party that he incur a loss, bear a burden or make unreasonable sacrifices in the mitigation of his damages. He is entitled to demand that, where there are choices to be made, the least expensive route which will achieve mitigation must be selected. So if the evidence shows that the claimant had a choice, and that the route to mitigation which he chose was more costly than an alternative that was open to him, then a case will have been made out for a deduction. But if it shows that the claimant had no other choice available to him, the betterment must be seen as incidental to the step which he was entitled to take in the mitigation of his loss and there will be no ground for it to be deducted.*"

In *Barrowfen Properties Ltd v Patel* [2025] EWCA Civ 39, a similar issue had to be addressed by the Court of Appeal. At the heart of the case was a fight for control over a family-owned property development company, Barrowfen. It owned commercial property in Tooting, Southwest London. The intention was to develop it by constructing a hotel, a supermarket, shops and student accommodation.

In 2014, Barrowfen had obtained planning permission from Wandsworth Borough Council to proceed with the scheme. A dispute between the family members arose. One individual, "G", who was already a director of the company then engaged in a course of conduct designed to keep others who disagreed with his aims for the company off the board of directors. The opposing camps instructed solicitors. The dispute meant the development scheme did not go ahead. "G" procured that a particular firm of solicitors act for Barrowfen, but he purported to give them instructions on behalf of the company. Because "G" was being accused of breach of fiduciary duty and breaches of his obligations as company director, it was subsequently argued that the solicitors should have advised the company to take legal advice independently of "G". This did not happen. The advice that was actually given as to who could control the company played into "G"'s hands. In 2016, "G" then implemented a scheme whereby he set up a new company, Barrowfen II. He assigned a loan that the original Barrowfen company had taken out for the development to the new company and then demanded that the original company pay it back. This led Barrowfen being put into administration. It seems "G"'s plan was to do what he wanted with the land in Tooting by using the second company.

Eventually, "G"'s scheme unraveled. The other family members regained control of Barrowfen. In May 2016, the other family members were able to secure a refinancing for the company, in the amount of £4 million, which was sufficient to take it out of administration. By then, however, the original development scheme was in difficulties. Waitrose had pulled out as tenant for the supermarket. The new directors of Barrowfen (excluding "G") reviewed the scheme and what to do now. It was decided that the student accommodation was no longer sufficiently profitable, and that the company could do better. They revised the scheme and brought Lidl on board for the supermarket. In 2017 and 2018, Barrowfen secured new planning permission from Wandsworth Borough Council. The work started and was completed in 2021. The original scheme would have cost a total of £14 million. The new scheme proved considerably more expensive. Barrowfen had to obtain an additional loan of £8 million and secure equity investment of another £2.4 million.

Barrowfen commenced proceedings against "G", the solicitors who had failed to advise the company of "G"'s conflict of interest and the Barrowfen II company for breach of fiduciary duties (or as accomplices in such breaches). At trial, the judge found that the solicitors had not been dishonest, but that they should have advised

the company differently. If that had happened, the judge found, "G" would not have remained in control of Barrowfen, and the other family members would have caused the company to pursue the original scheme by early 2015. Because this was a counterfactual scenario, the judge assessed the chance of that happening at 60 percent. He awarded Barrowfen damages for the loss of a chance of obtaining rental income under the original scheme for the period during which "G" had stopped the company from going ahead with the development. The damages calculations were complex but led the judge to award a maximum of £4 million for lost rental income.

The judge also assessed the developer's profit that Barrowfen would have made on the original scheme, and the developer's profit, or capital value, that it in fact earned on the revised scheme. That additional capital value was calculated, based on expert evidence, by taking the difference between the gross development value (GDV) of the property and the construction and finance costs. The GDV of the original scheme was found to be £27 million, and it would have cost £17 million to finance and build. The revised scheme's GDV was more, £40 million, and it cost Barrowfen a total of £27.5 million. This meant that the revised scheme, which Barrowfen now owned, had generated £2.5 million more in developer's profit or capital value than the original scheme would have, but for "G"'s breaches. The judge at first instance held that, while the directors had reasonably taken the view that the original scheme was no longer viable, and it had been reasonable to embark on the more expensive scheme to mitigate the loss of rental income it was suffering (by not having a development at all), Barrowfen had to give credit for the additional capital value obtained as a result of that decision. The judge reached that conclusion by applying the principle in *British Westinghouse*.

Barrowfen appealed on this point. It argued that since Barrowfen did not intend to sell the development, the additional capital value ought not to be brought into the equation. It argued that it wanted to retain the property as an income-producing asset. Barrowfen also pointed to additional financing costs that it would continue to incur because it was not planning a sale. The Court of Appeal dismissed the appeal. Snowden LJ found that the judge had correctly applied the overriding principle, that benefits are to be taken into account if they are caused by the breaches for which compensation is sought, or which are caused by the actions reasonably taken to mitigate the losses caused by those breaches. Barrowfen had lost the opportunity to earn rental income for the period by which completion of the development was delayed. Incurring the additional costs of completing the revised development was "… *a continuous dealing by Barrowfen with the situation in which it found itself and was not an independent or disconnected transaction.*"

Upon completion of the work, Barrowfen had, through mitigation, received a benefit – the property was worth more, and it could also generate more rental income in the future. The Court of Appeal found that the judge had been right to value that benefit on the basis of the price that a putative (reasonable) purchaser would pay for the development. Snowden LJ distinguished *Harbutt's Plasticine*, since the breaches had not damaged the property, and it was clear that the revised scheme was altogether more valuable. The defendant had succeeded in proving betterment as a result of mitigation.

Once the revised development had been built, Barrowfen was free to sell it, as a witness for the company admitted. The company's independent commercial decision to retain the property as a rental asset and continue to incur the costs of repaying the construction loans with interest broke the chain of causation:

> "*Although Barrowfen has chosen to continue to own the Property, this is no longer part of a continuous course of conduct to deal with the situation in which it found itself as a result of the breaches of duty or negligence for which compensation is payable. That situation has been dealt with, and there is no reason why Barrowfen should be entitled to visit the adverse consequences of its further commercial decisions as regards the Property upon the defendants*."

Conclusion

References to the duty to mitigate may bring to mind the question of whether damages fall to be reduced because the claimant somehow failed to deal with the consequences of the breach in the manner that the law expects. However, it should always be recalled that all that is required is for the claimant to have acted reasonably, and the standard is not particularly high. In *Banco de Portugal v Waterlow* [1932] AC 452, the House of Lords famously explained that:

> "*Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those that have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken.*"

At the other end of the spectrum are the cases where the claimant seeks to recover damages for the loss suffered but does not wish to give credit for a benefit it has received as a result of dealing with the breach. English law does not easily allow the claimant to retain the fruits of its good fortune, since the principle in *British Westinghouse* requires that losses and benefits are to be netted off. If that is done, then damages will be deemed to be fair. As cases such as *Sharp v Viterra* and *Barrowfen v Patel* show, the increased value of the asset that the claimant is left with may end up being assessed objectively, on the basis of what a reasonable purchaser would pay for it. It is also worth recalling that independent commercial decisions by the innocent party will break the chain of causation. As soon as the innocent party is able to decide how to proceed, the wrongdoer is likely to be off the hook. The consequences of further harm will not be visited upon them, and the innocent party is entitled to retain the benefits that may accrue as a result of such an independent decision.