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

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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.

Read the full article here.

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