PRESS SUMMARY

8 May 2024

Sharp Corp Ltd (Respondent) v Viterra BV (previously known as Glencore Agriculture BV) (Appellant)

[2024] UKSC 14

On Appeal From: [2023] EWCA Civ 7

JUSTICES: Lord Reed (President), Lord Hodge, Lord Briggs, Lord Hamblen, Lord Leggatt

BACKGROUND TO THE APPEAL

Viterra BV ("**the Sellers**") and Sharp Corporation Limited ("**the Buyers**") entered into two Cost & Freight free out ("C&FFO") Mundra sales contracts dated 20 January 2017 for the sale of lentils ("**the Lentils Contract**") and the sale of peas ("**the Peas Contract**" collectively, "**the contracts**"). The contracts were identical save as to commodity, quantity and price.

The contracts provided that all terms and conditions not conflicting with the express terms of the contracts should be as the Grain and Free Trade Association ("**GAFTA**") Contract No 24.

On 26 April 2017, the Sellers nominated the vessel RB Leah ("**the Vessel**") under both contracts. On 10 May 2017, a total quantity of 21,000 mt of lentils and 47,250 mt of peas was loaded on board the Vessel in Vancouver. The Buyers did not pay for the goods within 5 days prior to the Vessel's arrival at Mundra as required under the contracts.

On 8 November 2017, the Government of India imposed an import tariff on yellow peas of 50% with immediate effect. On 21 December 2017, the Government of India imposed a tariff of 30.9% on lentils with immediate effect.

By a contract dated 7 February 2018, the Sellers re-sold the peas to their associated company Agricore Commodities Ltd ("**Agricore**") for US$378 per mt. By a contract dated 9 February 2018, the Sellers re-sold the lentils to Agricore for US$431 per mt.

The Sellers declared the Buyers in default and commenced arbitration seeking damages. The Appeal Board, in two amended awards dated 1 April 2021 (awards No. 4580A and 4581A, collectively, "the **Awards**") found that the Buyers were in default by their failure to pay for the goods in accordance with the terms and conditions of the contracts, and liable to pay damages based on the estimated value of the goods on the date of default which they assessed by reference to the theoretical cost on the date of default of (i) buying those goods free on board ("FOB") at the original port of shipment plus (ii) the market freight rate for transporting the goods from that port to the discharge port free out. The damages awarded to the Sellers were US$ 4,163,250 under the Lentils Contract and US$ 903,750 under the Peas Contract.

The Buyers appealed the decision on damages pursuant to section 69 of the Arbitration Act 1996 ("**the Act**") and by an order dated 13 May 2021, Jacobs J granted the Buyers permission to appeal.

On appeal, Cockerill J dismissed the Buyers' appeal. The Court of Appeal allowed the appeal but did so in relation to a question of law which it had amended. It also held that damages should be awarded on the basis that the contracts had been varied, as to which there was no finding by the Appeal Board.

The Sellers now appeal to the Supreme Court on the grounds that the Court of Appeal exceeded its jurisdiction.

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

JUDGMENT

The Supreme Court unanimously allows the appeal but allows the cross appeal.
The Awards are remitted to the Appeal Board for reconsideration.
Lord Hamblen gives the judgment with which all the other Justices agree.

REASONS FOR THE JUDGMENT

<u>The appeal:</u>

Issue 1: did the Court of Appeal err in amending the question of law for which permission to appeal had been given?

The question of law for which permission was given asked how "the actual or estimated value of the goods, on the date of default" under sub-clause (c) of the GAFTA Default Clause are to be assessed "where goods sold C&F free out are located at their discharge port on the date of the buyer's default". The Court of Appeal amended the question of law by adding "in the circumstances found by the Appeal Board in the Awards".

Amendments to the question of law are permissible provided that "the substance of the question of law remains the same", as set out in *Cottonex Anstalt v Patriot Spinning Mills Ltd* [2014] 1 Lloyd's Rep 615 [**55**].

In this case, the question was framed in abstract terms and the effect of the amendment is to tie that generally expressed question to the facts found in the Awards. That is a permissible amendment. The amendment was expressly stating what is implicit in any arbitration appeal. It did not change the substance of the question of law [**57**].

Issue 2: did the Court of Appeal err in deciding a question of law which the Appeal Board were not asked to determine and on which it did not make a decision?

Section 69(1) of the Act sets out that a party may appeal on a "question of law arising out of an award" and that the question must be one which the "tribunal was asked to determine" (section 69(3)(b)) [**51**].

This requires that the point of law be fairly and squarely before the tribunal for determination – see *Safeway Stores v Legal and General Assurance Society Ltd* [2004] EWHC 415 (Ch), [2005] 1 P&CR 9.

In determining the appeal, the Court of Appeal decided that the value of the goods was to be measured by reference to a notional sale of the goods in bulk ex warehouse Mundra on 2 February 2018, on instalment payment terms. This decision was founded on the conclusion that the contracts had been varied [**64**].

The question of whether and, if so, how the contracts had been varied was neither argued before nor addressed by the Appeal Board [**68**]. It follows that this is not a question of law for which permission to appeal could be given under section 69 of the Act and, if so, it is not open to the Court of Appeal to introduce such a question on an appeal [**69**].

Issue 3: did the Court of Appeal err in making findings of fact on matters on which the Appeal Board had made no finding?

The Sellers contend that the Court of Appeal impermissibly made findings of fact, in particular a finding that the cargo had been discharged from the Vessel against presentation of the original bills of lading to the Vessel's agent [**76**].

The court's jurisdiction under the Act is limited to appeals on a question of law. It has no jurisdiction to make its own findings of fact. [**71**]. Whilst there may be circumstances where it is possible to infer that the tribunal has made a finding of fact even though it is

not expressly set out in the award [**72**], these circumstances are limited. It is necessary to show that the inferred finding is one which inevitably follows from the findings which have been made [**74**].

The finding that discharge was made against presentation of the original bills of lading is a finding of fact. It was not relevant to any issue addressed by the Appeal Board and it by no means inevitably follows from the findings which were made **[77]**. This finding was central to the Court of Appeal's conclusion that the contracts had been varied. It follows that Court of Appeal erred in making that finding [**79**].

The cross-appeal:

Damages fall to be assessed under clause 25 of the GAFTA Contract ("**the Default Clause**"). This clause reflects both the compensatory principle and the principle of mitigation of damages [**83-87**].

In accordance with the principle of mitigation, if a substitute sale or purchase is reasonably made then that is likely to be the default price. If, however, there is no such substitute transaction, or none that it is appropriate to rely upon (as in this case where it was with an affiliated company), then damages are assessed under cl 25(c) on the basis of "the actual or estimated value of the goods, on the date of default". Sub-clause (c) "covers the same territory" as sections 50(3) and 51(3), of the Sale of Goods Act and the common law, which means that where there is an available market the normal or prima facie means of establishing the "actual or estimated value of the goods" under sub-clause (c) is by reference to the price of a substitute sale or purchase in that market. **[97].**

In the present case, there was no evidence before the Appeal Board of an available market for a substitute transaction on C&FFO Mundra terms and the issue which then arises is by reference to what market is the estimated value of the goods to be established. The Sellers contend that it should be the FOB Vancouver market with appropriate adjustments being made to arrive at a C&FFO Mundra price, as the Appeal Board accepted. The Buyers contend that it should be the ex warehouse Mundra market [**99**].

The proper approach is to be guided by the principle of mitigation and to consider the market in which it would be reasonable for the Sellers to sell the goods. On the date of default the Sellers were left with goods, which were landed, customs cleared and stored in a warehouse. The goods had also significantly increased in value because of the imposition of customs tariffs. In such circumstances, the obvious market in which to sell the goods, and in which it would clearly be reasonable to do so was the ex warehouse Mundra market **[100]**.

This approach is supported by the following considerations: (i) the common law approach to damages for non-acceptance in CIF contracts: (ii) where goods are left in the seller's hands the question is what reasonable steps should be taken to sell those

goods; (iii) it means that sub-clauses (a) and (c) are interpreted and applied in a consistent manner; (iv) it is consistent with the compensatory principle and brings the benefit of the increased value of the goods in the Sellers' hands as a result of the imposition of import tariffs into account, and (v) it is consistent with the findings made by the Appeal Board relating to other aspects of damages **[102-115]**.

It follows that the Appeal Board erred in law in its assessment of damages. The answer to the question of law is that the value of the goods under paragraph (c) of the Default Clause falls to be measured by reference to a notional sale of the goods in bulk ex warehouse Mundra on 2 February 2018 **[121]**.

References in square brackets are to paragraphs in the judgment

NOTE