



1 July 2015

PRESS SUMMARY

Bunge SA (Appellant) v Nidera BV (formerly known as Nidera Handelscompagnie BV) (Respondent) [2015] UKSC 43
On appeal from [2013] EWCA Civ 1628

JUSTICES: Lord Neuberger (President), Lord Mance, Lord Clarke, Lord Sumption and Lord Toulson

BACKGROUND TO THE APPEAL

GAFTA Form 49 is the standard form of FOB sale contract of the Grain and Feed Trade Association for goods delivered from central or eastern Europe in bulk or bags. (Under an FOB sale contract, the seller agrees to pay to deliver the goods “free on board” the purchaser’s chosen transporter.) This appeal is about the Default Clause in GAFTA 49, which provides in part:

- 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) above 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 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.

Nidera BV, the buyers, entered into a contract with Bunge SA, the sellers, under which they agreed to buy 25,000 tonnes (+/- 10% in buyer’s option) of Russian milling wheat crop 2010, FOB Novorossiysk (a port in Russia). The shipment period was 23-30 August 2010. The contract incorporated GAFTA 49. On 5 August 2010, Russia introduced a legislative embargo on exports of wheat from its territory, which was to run from 15 August to 31 December 2010. The sellers notified the buyers of the embargo on 9 August 2010 and purported to declare the contract cancelled under GAFTA 49’s Prohibition Clause. The buyers maintained that the sellers were not yet entitled to cancel the contract and treated the purported cancellation as a repudiation of the contract, which they accepted on 11 August 2010. The sellers offered to reinstate the contract on the same terms on 12 August 2010, but the buyers refused and began arbitration proceedings under the GAFTA rules.

At the arbitration, the parties agreed that the Default Clause applied to anticipatory repudiation, that the buyers had not bought against the sellers pursuant to sub-clause (a), that the date of default for the purpose of sub-clause (c) was 11 August 2010, and that the difference between the contract and the market price at that date was US\$3,062,500. The sellers no longer dispute that they were in breach of contract and the only issue between the parties concerns damages. The first tier panel held that the buyers were not entitled to a substantial damages award, because the embargo was still in place when the time for delivery arrived and so the contract would have been cancelled in any event. The GAFTA Appeal Board accepted that the contract would have been cancelled in any event, but held that the buyers were entitled under sub-clause (c) of the Default Clause to a damages award of US\$3,062,500, reflecting the difference between the contract price and the market price on the agreed date of default. The sellers’ appeal was dismissed by both Hamblen J and the Court of Appeal.

JUDGMENTS

The Supreme Court unanimously allows the appeal. Lord Sumption gives the leading judgment. Lord Toulson agrees with Lord Sumption but sets out his reasoning in his own words. Lord Neuberger, Lord Mance and Lord Clarke all agree with both Lord Sumption and Lord Toulson.

REASONS FOR THE JUDGMENTS

Lord Sumption first addresses the position at common law. The fundamental principle of the common law of damages is the compensatory principle. The cases have addressed two questions relating to the calculation of damages at common law following an anticipatory breach. First, where there is an available market, the prima facie measure of damages is the difference between the contract price and the market price of the goods at the time when they ought to have been delivered, unless the buyer should have mitigated by going into the market and entering into a substituted contract at some earlier stage, in which case damages will be assessed with reference to the market price at that earlier date. Once the relevant market price has been determined, any subsequent change in the market price is irrelevant. Second, as the House of Lords explained in *The Golden Victory* [2007] 2 AC 353, it will be relevant to take account of contingencies other than a change in the market price if subsequent events known at the time of the judge's or arbitrator's assessment would have reduced the value of performance, perhaps to nothing, even without the defaulter's renunciation. This principle applies to contracts both for the supply of goods or services over a period of time and for one-off sales. [12-23]

Lord Sumption then considers the effect of the GAFTA 49 Default Clause. Damages clauses are not necessarily intended to be complete codes for the assessment of damages. In this case, the clause applies in default of contractual performance, and to anticipatory breach as well as actual breach. The combined effect of sub-clauses (a), (b) and (c) of the Default Clause differs from the common law, first, in that they give the injured party a discretion about whether to go into the market to buy or sell against the defaulter, so that damages are required to be assessed as at the date when the injured party accepted an anticipatory repudiation only if he actually went into the market to fix a price at that date; and, secondly, in that they provide that the relevant comparator is the "actual or estimated value" of the goods rather than their market price. [24-28] The Default Clause provides a complete code for determining the market price or value of the goods that falls to be compared with the contract price. It does not deal at all with the effect of subsequent events which would have resulted in the original contract not being performed in any event, to which the common law still applies. [29-31] Applying *The Golden Victory* to this case, the buyers in fact lost nothing and should receive only nominal damages in the sum of US\$5. [35-36]

Lord Toulson agrees with Lord Sumption and holds that the language of the Default Clause is not sufficiently clear to preclude the application of *The Golden Victory*. The most reasonable interpretation is that the clause is concerned only with placing a mathematical value on the goods, assuming the contract to be capable of performance, and that it is not intended to oust the application of ordinary common law principles where that assumption is inappropriate. He also rejects the argument that the clause precludes the operation of the common law mitigation of loss principle, but the application of this principle was not the subject of argument before this court. [58-62] Where a contract is discharged by reason of one party's breach, and there exists an available market in which the innocent party could obtain a substitute contract, the innocent party's loss will ordinarily be measured by the extent to which his financial position would be worse off under the substitute contract than under the original contract. Whether the innocent party in fact enters into a substitute contract is a separate matter. The assessment should be made on the facts as known at the date of the assessment, as the House of Lords held in *The Golden Victory* and consistently with the fundamental compensatory principle. *The Golden Victory* applies to one-off sales. [63-89]

References in square brackets are to paragraphs in the judgments

NOTE: This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: <http://supremecourt.uk/decided-cases/index.shtml>