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HIGHLIGHTS

- * A Saskatchewan Judge has granted judgment against a farmer who refused to deliver durum wheat pursuant to a deferred delivery contract. The Judge rejected the farmer's argument that the contract was "frustrated" because weather conditions resulted in the durum grading at a substantially lower than anticipated quality, and on the ground that the durum had perished and could therefore not be delivered pursuant to the provisions of the Sale of Goods Act. The decision considers the obligations of buyers and sellers under deferred delivery contracts as well as the application of the law of frustration of contract and s. 9 of the Sale of Goods Act to these contracts. (JGL Commodities Ltd. v. A Puddell Farms Ltd., [CALN/2019-031](#), [\[2018\] S.J. No. 499](#), Saskatchewan Court of Queen's Bench)

NEW CASE LAW

JGL Commodities Ltd. v. A Puddell Farms Ltd.;

Saskatchewan Court of Queen's Bench,

Judicial Centre of Moose Jaw,

December 12, 2018.

[CALN/2019-031](#)

[\[2018\] S.J. No. 499](#) | [2018 SKQB 345](#)

Sale of Grain Deferred Delivery Contracts — Frustration of Contract.

JGL Commodities Ltd. ("JGL") sued A. Puddell Farms Ltd. ("Puddell Farms") for damages allegedly sustained when Puddell Farms failed to deliver 816 metric tonnes of durum wheat to JGL pursuant to a contract entered into between JGL and Puddell Farms in 2014.

Puddell Farms denied liability under the contract and defended the claim on the grounds that the contract was frustrated and unenforceable by virtue of the provisions of the Frustrated

Contracts Act, [SS 1994, c F-22.2](#) and on the grounds that the durum was a specified good that perished before delivery and that the contract was thereby avoided under s. 9 of the Sale of Goods Act, [RSS 1978, c S-1](#) (the "Sale of Goods Act").

The contract required Puddell Farms to sell 816 metric tonnes of milling durum to JGL. The quality was stated to be "1 US Milling Durum". A schedule to the contract provided for a reduced price if the durum did not achieve this grade. Shipment was to be made between September 15, 2014 and October 15, 2014. The contract provided that in default of delivery JGL could cancel the contract and in such case Puddell Farms would be liable to the buyer for any loss or damage sustained as a result of such default. The contract also provided that JGL could cancel the contract and seek damages if the durum did not meet the standards set out in the contract.

Puddell Farms encountered weather problems in harvesting the grain. Samples submitted for testing indicated that the quality of durum was poor. Options which might have been available to Puddell Farms to deliver the durum were explored including extending the delivery date. Ultimately, however, Puddell Farms failed to deliver the durum as agreed and sold the durum to another grain company..

Decision: Tholl, J held Puddell Farms liable for damages in the sum of \$158,852.00 [at para. 73].

Tholl, J had "no hesitation" in concluding that Puddell Farms had breached the contract [at para. 47] by failing to deliver 816 metric tonnes of durum to JGL in spite of JGL's willingness to extend delivery deadlines and take the durum if Puddell Farms could not find another buyer for the grain subject to the discount provisions set out in the agreement, relying on *Can-Oat Milling Limited Partnership v Hagmann*, [2004 SKQB 59](#), [246 Sask R 170](#), aff'd in [2004 SKCA 97](#), [249 Sask R 196](#) and *PS International Canada (Seaboard Speciality Grains and Foods) Corp. v Palimar Farms Inc.*, [2017 SKCA 78](#), [\[2018\] 2 WWR 90](#). Tholl, J held, at para. 49 to 51:

[49] Puddell Farms chose to enter into the Contract with JGL and has to live with the consequences of that decision. The Contract provided certainty to Puddell Farms by guaranteeing a price for its durum and protecting Puddell Farms from downside risk related to price. Mr. Puddell testified he was confident on August 1, 2014 he would have a high quality crop of durum that year. The Contract appeared to be a good deal for Puddell Farms as of August 1, 2014 when the crop was looking good and adverse harvest conditions had not occurred. Mr. Puddell sought advice about the price in advance of signing the Contract and confirmed his own belief that it was a good price. The Contract permitted Puddell Farms to lock in a price that made Mr. Puddell happy based on his view of the circumstances as of August 1, 2014.

[50] Under the Contract, Puddell Farms agreed to undertake the risk the quality of durum might be lower than anticipated by Mr. Puddell. Unfortunately, that risk materialized. This risk was contemplated by the Contract, as evidenced by the discount schedule, and was a risk that was assigned to Puddell Farms under the Contract. In taking the potential benefits of the Contract, Puddell Farms also has to take the potential negative consequences of the contract.

[51] After the durum was harvested, Puddell Farms could have chosen to deliver the durum, and accepted the significantly discounted price, but it chose to not fulfil its contractual obligations. Puddell Farms failed to deliver 816 metric tonnes of durum to JGL despite its obligation to do so. As a result, Puddell Farms breached the Contract and is

liable to JGL for the damages that flow from that breach, unless the provisions of FC Act or SOG Act dictate a different result.

Tholl, J rejected Puddell Farms' argument that the contract was frustrated and unenforceable by virtue of the provisions of the Frustrated Contracts Act stating, at para. 53 that ".adverse weather and poor harvest conditions with the subsequent decline in quality do not constitute a frustrating event in the circumstances of this matter."

In this regard, Tholl, J relied on the Can-Oat Milling case cited above in which the Saskatchewan Court of Appeal stated, in part, at para. 21 of the Court of Appeal decision:

"First, as the trial judge pointed out, the contracts contemplated the possibility that Mr. Hagemann would not be able to fulfill his obligations and placed the risk of such loss on him. Second, Mr. Hagemann sold all his oats to another company for more than he would have received from Can-Oat. In such circumstances, it would be unjust to find the contracts to be frustrated."

Tholl, J also relied on the following principles of frustration summarized in *Kreway v Kreway*, 2016 SKWQB 115:

- (a) A contract becomes frustrated if it is incapable of being performed because the performance is radically different from the obligations that were undertaken in the contract;
- (b) The frustrating event must have occurred after the formation of the contract and not have been foreseen;
- (c) The frustrating event cannot be self-induced;
- (d) There is a distinction between complete fruitlessness and mere inconvenience;
- (e) The disruption must be permanent or protracted, not temporary or transient;
- (f) The change must totally affect the nature, meaning, purpose, effect and consequences of the contract;
- (g) If there was a mistaken assumption about a current or future event the unexpected event must be so far outside of the range of the risks allocated by the contract that it undermines its very substances; and
- (h) From a policy perspective, the values favouring non-enforcement must outweigh those favouring enforcement of the contract.

Tholl, J concluded at para. 58 and 59:

[58] The agreement in this matter is a deferred delivery contract not a production contract. This is a distinction that must be kept in mind in the analysis of the application of the doctrine of frustration to the matter at hand. The contract is the typical type of contract used in transactions in this industry and forms the "backbone" of JGL's business. From a policy perspective, such contracts should not be easily found to have been frustrated.

[59] The court finds the Contract was capable of being performed by Puddell Farms. Although there were unexpected adverse harvest conditions, this did not frustrate the Contract. The parties made a provision for poorer quality durum caused by conditions such as weather by including a discount schedule in the Contract. The delivery to Viterra of over

1,000 metric tonnes of durum by Puddell Farms of a quality that fit into the discount schedule demonstrates Puddell Farms had sufficient durum to satisfy its obligations under the Contract. It could have delivered 816 metric tonnes of that durum to JGL and the contract would have been fulfilled. Puddell Farms chose to deliver the durum to Viterra rather than accept a lower price under the Contract. This performance is not radically different than expected under the Contract. This type of performance was contemplated as evidenced by the discount schedule that formed part of the Contract.

Section 9 of the Sale of Goods Act provides that:

"Where there is an agreement to sell specific goods and subsequently the goods without any fault on the part of the seller or the buyer perish before the risk passes to the buyer the agreement is thereby voided."

Tholl, J observed, at para. 65 that the contract did not specify the product. It was a deferred delivery contract under which Puddell Farms could have provided the durum from any source and that, in any event, [at para. 67] the durum did not perish. It existed, and could have been used to satisfy Puddell Farms' obligations under the contract but that Puddell Farms instead chose to sell it to Viterra for a higher price than would have been payable under the discounted provisions under the contract.

CREDITS

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