

Duty to mitigate and intentional breaches of contract

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Intentional breaches of contract are not as uncommon as one might imagine. Given the fact that they reflect the non-performing party's wilful disregard of the aggrieved party's rights under the contract, in stark conflict with the fundamental principle of pacta sunt servanda, many legal systems as well as international instruments have set forth special rules and principles that puts the aggrieved party in a more favourable position than what otherwise would be the case. It is considered that a normal application of contract terms or optional legislation would lead to objectionable and morally unfair results in cases of intentional wrongdoings. The particular effects of intentional breaches are often related to, and have their greatest significance for, damages claims.² In the present article, the author examines the interface between intentional misconduct and the duty to mitigate loss.

1 Introduction

Within the field of contractual damages there are several rules and principles that limit the main rule of full compensation.³ This article

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² A few examples are that an intentional breach may extend liability to unforeseen losses (art. 3:703 DCFR) and it is commonly accepted that agreements on the exemption and limitation of liability may be declared void in case of intentional misconduct. It is important to observe that the Supreme Court case NJA 2017 s. 113, in which the Supreme Court clarified that gross negligence does not constitute an independent ground on which a limitation liability clause can be set aside, does not deal with intentional breaches of contract (for a brief review of the case, see my article published in Dagens Juridik at <http://www.dagensjuridik.se/2017/03/hd-klargor-grov-vardsloshet-ingen-sjalvstandig-grund-att-asidosatta-en-ansvarsbegransning>). Furthermore, intentional breaches are by some instruments considered an important factor when establishing whether a breach is fundamental or not (art. 7.3.1 (2)(c) UNIDROIT Principles and art. 3:502 (2)(b) DCFR). Another recent example of the major impact intentional breaches may have when discussing remedies will be discussed *infra* in Section 3.

³ The object of damages is, at least as a starting point, to restore the aggrieved party's financial situation as if the damaging event had never occurred. In general, the most important limitations are the doctrine of causation and the doctrine of adequacy, and, naturally, the limitation of liability by agreement. Contributory negligence and the duty to mitigate loss are two other limitation principles that often apply. There are also a few limitations that are arguably of less practical significance (in the sense that they arise less often), for example the principle of *compensatio lucri cum damno* which is generally recognized under Swedish law. This principle refers to a situation where economic benefits have followed from a breach and provides that the benefits shall be reduced from the amount of compensation so as to avoid overcompensation.

will focus on one of these principles, namely the duty to mitigate loss, and to what extent the duty might be affected by intentional breaches of contract. It is argued, contrary to the result reached by the Supreme Court in a recent judgement, that the conduct of the breaching party should be relevant in deciding whether the aggrieved party has complied with its duty to mitigate.

Virtually all European legal systems recognize, if not the term then at least the concept of, the duty to mitigate loss.⁴ The duty entails that an aggrieved party, being in principle entitled to compensation in damages for the loss resulting from a breach of contract, cannot recover damages to the extent that the aggrieved party could have reduced the loss by taking reasonable measures.⁵ These measures may be positive in the sense that the aggrieved party must take active steps to reduce the loss, for example entering into a substitute transaction. Alternatively, the duty may be negative, in the sense that the aggrieved party may be required to abstain from actions to prevent further loss, for example continuing performance upon the wrongful termination of the contract by the other party.⁶

It bears mentioning that Swedish law, like many other domestic legal systems, adopts the distinction made between contributory negligence and the duty to mitigate loss. There are indeed grounds for distinguishing between these two related concepts, even though there is a clear connection between them. Both concepts involve the aggrieved party's duty to act reasonably. As recently made clear by

⁴ See e.g. Christian von Bar et al, *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference* (DCFR, 2009), p. 953 and H. McGregor, *The role of Mitigation in the Assessment of damages in Contract Damages* (D. Saidov & R Cunningham eds, 2008). Although different legal systems may deal with the subject under various headings and by using different techniques, it is often possible to obtain similar results. In DCFR, the subject is dealt with in III.-3:705 under the heading "Reduction of loss". The duty to mitigate damages has also become a general principle of international treaty law in investment treaty arbitration practice (see for example ICSID Award of October 7, 2003, *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, section 10.6.4 of the award).

⁵ The term "duty" to mitigate loss has, as is known, often been criticised for not being entirely adequate, as a breach of the duty does not give rise to a correlative right of action (J. Herre, *Ersättningar i köprätten*, p. 567 f). Thus, the breaching party may not, in case of failure to comply with the duty to mitigate by the aggrieved party, allege breach of contract and claim remedies. Furthermore, and importantly, a breach of the duty to mitigate can never be invoked by the breaching party to justify the wrongful act it has committed. However, in the author's opinion, it would not be entirely wrong to suggest that a breach of the duty to mitigate loss does give rise to a *right* on the part of the breaching party, namely a right to have the amount of damages reduced by a court or an arbitral tribunal as a means of defence in case of non-compliance with the duty to mitigate. In that sense, it would be accurate to speak in terms of a "duty" to mitigate, although a more suitable term might be to speak in terms of a "burden" to mitigate. As the term "duty" to mitigate is widely accepted under Swedish law, I will continue to describe the requirement of mitigation as a duty.

⁶ J. Herre, *Ersättningar i köprätten*, s. 546. See also Christian von Bar et al, *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference* (DCFR, 2009), p. 953.

the Supreme Court (NJA 2017 s. 9, see further about this case below), the distinction between contributory negligence and the duty to mitigate loss does not prohibit the simultaneous application of both principles in certain situations.⁷

The duty to mitigate loss can be derived from e.g. the Sales of Goods Act (SGA), which stipulates that the aggrieved party must take reasonable steps to mitigate its loss. If the party fails to do so, it must bear “*the corresponding part of the loss itself*” (i.e. the loss that reasonably could have been avoided).⁸ It is generally accepted that the duty to mitigate loss is a general principle of Swedish contract law, also applicable to other types of contracts than sales of goods.⁹

To determine which measures that are reasonable, the reference point is the conduct of a reasonable person. It is often expressed that the aggrieved party should act “*in an economically sensible or rational fashion and in the same manner as the party would have acted if it could not expect to receive compensation for the loss.*”¹⁰ Whereas this basic principle seems to remain undisputed and might provide some guidance, the details have become more and more controversial.

2 NJA 2017 s. 9; a new precedent that sheds some light on the closer meaning of the duty to mitigate

In a recent ruling, the Supreme Court provided a new precedent on the duty to mitigate. The case concerns the duty to mitigate in the field of tort.¹¹ However, the ruling contains important statements of

⁷ Contributory negligence refers to a situation where there has been a contribution to the damage from the side of the aggrieved party. The underlying rationale is that the aggrieved party does not deserve to be compensated to the extent that the loss is caused by the aggrieved party’s own behaviour (however, the principle may also be explained in terms of causality, i.e. by the absence of a direct causal link between the loss and the fault attributed to the damaging party). Under Swedish law the principle has its special significance at the time of the damaging event and especially “*in the assessment of the initial phase of the course of events leading up to the damage, where a position must be taken if and to what extent the aggrieved party has contributed to the occurrence of the damage*” (NJA 2017 s. 9, paragraph 27). The duty to mitigate loss, on the other hand does, not come into play until after the damaging event has occurred. Hence, as a rule, contributory negligence is concerned with the aggrieved party’s negligence before incurring a loss, while the mitigation rule is concerned with a lack of due care after having incurred the loss. However, the aggrieved party’s conduct, although not in any way responsible for the occurrence of the damage itself, may exacerbate the loss following the damaging event. In such a situation, the Supreme Court has stated that both principles can have a bearing on the assessment of damages (NJA 2017 s. 9, paragraph 29). Another point that deserves to be mentioned in this context is that the legal consequences of contributory negligence differ from the legal consequences in cases of failure to comply with the duty to mitigate loss. Failure to prevent avoidable loss leads to the reduction of the claim for damages by the amount of loss that could have been avoided. Conversely, contributory negligence leads to mitigation (Sw. “*jämkning*”) of the damages as is deemed reasonable by a court or arbitral tribunal in view of the degree of negligence on each side.

⁸ Cf. art. 77 of the CISG.

⁹ NJA 2017 s. 9, paragraph 28 (see further about this case in note 11 and *infra*).

¹⁰ See e.g. J. Herre, *Ersättningar inom köprätten*, p. 579.

¹¹ The case concerns a claim of loss of profit due to a preliminary injunction that was later reversed. A company named Hela Pharma, which owned the trademark

general application and is in this capacity equally important in the field of contractual damages. To my knowledge, it is the first case from the Supreme Court that deals with the duty to mitigate on a more general level.

In its ruling, the Supreme Court outlined the following key points as regards the scope of the general principle.

- The duty to mitigate arises as soon as the aggrieved party becomes aware of the damaging event (in the context of contract damages, the damaging event is equivalent to the breach).¹² The duty exists until further damage, for which the party causing the damage (for our purposes the breaching party) can be held liable, no longer arises or can arise.
- The aggrieved party is not required to take immediate action when it learns of the breach. On the contrary, there is often reason to allow the aggrieved party some time to consider its options.¹³ The most crucial issues to consider are the options available to the aggrieved party and to what extent the aggrieved party was aware or should have been aware of these options.¹⁴
- In case the breach gives rise to long-term damaging effects, the duty implies that the aggrieved party may need to reevaluate the situation and reconsider its options according to what is known at any given time.¹⁵
- As long as the measures taken by the aggrieved party can be regarded as reasonable, they are taken at the risk of the breaching party. This means that the right to compensation will not be affected if the aggrieved party takes measures that result in greater damage than what other measures (or no measures), with the

“Mivital”, brought an action for trademark infringement against the company Cederroth on the basis that Cederroth had started selling and marketing a product called “Multi total”. Both trademarks were used in relation to food supplements. In 2006, the District Court issued a preliminary injunction prohibiting Cederroth to use and sell food supplement bearing the trademark “Multi total”. The preliminary injunction was in force until 2010 when the Court of Appeal reversed the preliminary injunction and dismissed the action for infringement. Following the Court of Appeal’s ruling, Cederroth brought an action against Hela Pharma for loss of profit due to the preliminary injunction. One of the questions put before the Supreme Court was whether Cederroth had an obligation to limit its loss by continuing to sell its goods under a different trademark during the time when the preliminary injunction was in force, which it had not done. The Supreme Court answered the question in the negative and justified its position by e.g. referring to the functions of trade marks, especially the function to guarantee the origin of the goods and to confirm to the consumer that the goods to which the trade mark in question is affixed really originate from the proprietor of the trade mark. According to the Supreme Court, this function would be countered if a party was forced to use a different trade mark than the one it has registered during a pending infringement dispute, and it would also involve a considerable financial risk.

¹² To reach this conclusion it is necessary to read paragraph 29 of the award in conjunction with paragraph 33 of the award, and to disregard the part of paragraph 29 where the Supreme Court speaks of the starting point as being when the liability for damages arises. This conclusion is convincing, as the aggrieved party cannot take any action until it learns of the breach.

¹³ Paragraph 33 of the award.

¹⁴ Paragraph 33 of the award.

¹⁵ Paragraph 33 of the award.

benefit of hindsight, would have caused, provided that the measures taken by the aggrieved party are deemed reasonable.¹⁶ In the reasonability-assessment, account shall be taken of the expected effect of the measures, how easily they could be taken, what risks and possible inconveniences they would have led to for the aggrieved party, and the extent to which effects and risks could have been anticipated by the aggrieved party.¹⁷

- The burden of proof on the issue of mitigation is always on the breaching party pleading it.
- Since the measures taken to mitigate are taken not only at the risk of the breaching party but also in its interest, it can only be required that the aggrieved party takes relatively limited risks.¹⁸ The examples given by the Supreme Court were that the duty to mitigate does not require the initiation of complicated legal proceedings or measures that would involve considerable risks of impairment to the aggrieved party's commercial reputation. Very costly measures in relation to the loss to be avoided are not required either.
- The scope of the duty to mitigate remains the same regardless of whether the breaching party acted in wilful disregard of the aggrieved party's rights. Accordingly, less far-reaching measures may not be taken only because the breaching party has acted with malicious intent. Similarly, more far-reaching measures are not required only because the breaching party's conduct barely reaches the threshold for simple negligence (assuming that the conduct is still serious enough to give rise to liability).¹⁹

The majority of the results reached conform to the prevailing views presented in the legal literature.²⁰ Even so, the ruling was most welcome as it is difficult to decipher the law on the duty to mitigate in the text of statutory rules, which for long resulted in legal uncertainty.

However, there is one result that stands out and which upon a closer examination is not a matter of course. In my view, there are arguments that can be advanced in favour of reducing the mitigation requirement when the breaching party has engaged in intentional misconduct. In the remainder of this article I intend to elaborate upon this view.

3 Justifying the duty to mitigate loss – underlying policies

In order to successfully apply the duty to mitigate loss, it is necessary to understand the underlying rationale of the principle. In NJA 2017 s. 19, the Supreme Court explained that the duty is based upon two main policies.

¹⁶ Paragraph 35. Corresponds with e.g. UNIDROIT Principles art. 7.4.8 (2); “*The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm.*”

¹⁷ Paragraph 35 of the award.

¹⁸ Paragraph 36 of the award.

¹⁹ Paragraph 32 of the award.

²⁰ See for example J. Herry, *Ersättningar i köprätten*, p. 545 ff.

The first is related to public economy; the law should discourage economic waste. The Supreme Court specifically stated that:

From the point of view of the economy as a whole, it is preferable that the damage is not unnecessarily aggravated by omission or action by the aggrieved party.²¹

The argument of preventing economic waste is well-known and may best be illustrated by an example. Let us assume that the producer P agrees to manufacture and sell machinery to buyer B. It is agreed that the machinery shall be custom-made to suit B's special needs. When the manufacturing is halfway through, B wrongfully terminates the contract. P continues to work after the breach and brings an action against B for the full contract price. Normally, the duty to mitigate loss will preclude the recovery by P of the full contract price, as P knew that B no longer required its performance. P also knew that it had no legitimate interest in continuing performance as P could not sell the machinery to anyone but B. In this example the machinery, in complete condition, does not have an economic value to society. If P continues work after the breach, society at large loses the economic value of P's labour. If P would have used his time to enter into a new contract with another buyer or if it otherwise would have utilized its manpower more effectively, this economic waste, it is usually argued, could be avoided.

The second policy that the duty to mitigate is based upon is "*related to considerations of loyalty*".²² The Supreme Court explained that:

[T]his particularly holds true in the field of contract law.²³

In this context, it needs to be noted that a general duty of loyalty has long been recognised in Swedish contract law. The duty of loyalty is an unwritten legal norm and is generally defined as a duty of the contracting parties to reasonably consider each other's interests and expectations, though without unreasonably risking their own.²⁴ The Supreme Court's reference to loyalty implies that the duty to mitigate loss, at least in part, derives from the general duty of loyalty between contracting parties under Swedish law. This view has previously been supported in the legal literature.²⁵

The Swedish duty of loyalty between contracting parties is closely connected with the legal concept of good faith and fair dealing, which is recognised within international contract law and embraced

²¹ The argument is recognized from the Common law systems and especially McCormick, see McCormick, *Handbook of the law of damages*, p. 127 ff.

²² Paragraph 30 of the award.

²³ Ibid.

²⁴ J. Munukka, *Kontraktuell lojalitetsplikt*, passim.

²⁵ J. Munukka, *Kontraktuell lojalitetsplikt*, p. 168 with extensive references in note 311.

in e.g. DCFR²⁶, CISG²⁷ and UNIDROIT Principles.²⁸ European domestic legal systems also accept the concept of good faith and fair dealing as fundamental, though it is not always recognised as a general rule of direct application. It is also interesting to observe that the rule in DCFR on mitigation – which provides that “*the debtor is not liable for loss suffered by the creditor to the extent that the creditor could have reduced the loss by taking reasonable steps*” – is in fact regarded as a concretisation of the concept of good faith and fair dealing.²⁹ It is clear that the issues are closely connected – the idea common to both is the imposition of certain restraints upon self-interest in deference to the interests of the other party.

To conclude, the answer as to why an aggrieved party must undertake efforts to mitigate the breaching party’s breach lies both in the relationship between the contracting parties and in the society’s general interest to avoid economic waste (and the overall benefits to society when economic waste is avoided).

4 Should the scope of the duty remain the same regardless of whether the breaching party acted in wilful disregard of the aggrieved party’s rights?

Turning back to one of the two main policies upon which the duty to mitigate is based, it may be recollected that the duty of loyalty is central in justifying the requirement that the aggrieved party must undertake efforts to mitigate the consequences of the other party’s breach (especially within the field of contractual damages). A first reflection is whether there is really much left of the aggrieved party’s duty of loyalty when the breaching party has acted in wilful disregard of the aggrieved party’s rights. Should not an intentional breach, to a certain extent, dissolve the aggrieved party’s duty to act loyal? The reason for this would mainly be that the breaching party has no legitimate interest to expect the aggrieved party to consider its interests and to act loyal when the breaching party itself has acted disloyal by intentionally breaching the contract. In other words, it could be argued that there should be little room for the breaching party to criticise the measures taken by the aggrieved party when the breaching party not only created the problem in the first place but also did so deliberately.

It is important to emphasize, however, that it is not contended that the aggrieved party should be completely relieved of the duty to mitigate in cases of intentional wrongdoings. Rather, it is argued that the breaching party’s intentional conduct should factor in the reasonability-assessment of the aggrieved party’s conduct, effectively

²⁶ Art. 1:103.

²⁷ Art. 7.

²⁸ Art. 1.1.7.

²⁹ von Bahr et al, *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)*, p. 68.

lowering the standard by which the reasonableness of the aggrieved party's efforts is to be measured. A fairly sensible approach seems to be that a breaching party may not assert simple negligence on the part of the aggrieved party to comply with the duty to mitigate when harm has been intentionally inflicted.

In this context it might be interesting to observe that the consequences of disloyal conduct was subject to the Supreme Court's assessment just a few months after its ruling in NJA 2017 s. 19, this time in relation to the requirement to give notice to the breaching party upon becoming aware of the breach.³⁰ The requirement of notification is enshrined in e.g. the SGA, which provides that the buyer loses the right to rely on a lack of conformity of the goods if it does not give notice to the seller within a reasonable time after it discovers or should have discovered the lack of conformity. The general perception is that the requirement of notice is applicable also to other contract types than sales of goods.³¹ Importantly, both the principle of loyalty and that of damage limitation are considered to justify and rationalize the notice requirement.³²

The question put before the Supreme Court in the case at hand was whether a real estate buyer had lost his right to claim remedies because he had given notice to the seller approximately *four and a half years* after learning of the breach. The assessment was made on the premise that the seller was guilty of conduct incompatible with honour and good faith and/or had acted with gross negligence. The SGA provides that the buyer in such a case may rely on the defect notwithstanding the provision on the requirement to give notice. However, the preparatory works explain that the buyer may not wait for an unlimited time; such passivity may, in accordance with general principles, result in a loss to resort to remedies.³³ The Supreme Court concluded that the duration of four and a half years did not *ipso facto* debar the buyer's right to resort to remedies, irrespective of the circumstances.³⁴ The outcome clearly demonstrates a judicial willingness to express moral reprobation towards the breaching party in cases of intentional wrongdoings. After all, giving notice is a simple task that does not involve any sacrifices, expenses or inconveniences.

³⁰ Case no. T-1451-17, pronounced on 29 December 2017.

³¹ However, the legal effect of not notifying the breaching party may differ. It is not within the ambit of this article to elaborate on this issue further, but it might be interesting for the reader to note that there is a pending case in the Supreme Court on e.g. this subject, case no. T 12/17 (see also the passage in paragraph 20 in case no. T-1451-17).

³² See e.g. preparatory works 1989/90:77 p. 45, C. Hultmark, *Reklamation vid kontraktsbrott*, p. 27, J. Munukka, *Kontraktuell lojalitetsplikt*, p. 167 and Ramberg & Ramberg, *Allmän avtalsrätt*, p. 39.

³³ Preparatory works 1989/90:77 s. 64.

³⁴ Paragraph 21 of the award.

An example of when the conduct of the breaching party had an impact on the assessment of the aggrieved party's compliance with the duty to mitigate can be found in NJA 1953 s. 14. The case concerns the question of whether the aggrieved party, upon a wrongful termination, is under a duty to enter into a new agreement with the party in breach on the same terms as originally agreed in order to reduce its loss.

The facts of the case were the following. A Swedish company (B) agreed to buy a batch of nylon textile from an English company (S), to be delivered within 6–8 weeks. At the time of the conclusion of the contract, B had also placed several orders with other sellers in the UK. B applied for an import licence a few weeks after the conclusion of the contract with S, which was later granted. The sought import licence did not cover all of B's orders, something of which B was aware. Subsequently, B informed S that B could not fulfil the contract as B's licence did not cover the order placed with S. B added that B would contact S again should B apply for a new license in the future. S objected to B's refusal to deliver. B then replied that a binding contract had not been entered into as it had been an implied condition that B's import licence would cover the transaction with S. S did not agree and terminated the contract. After S's termination, B offered to apply for a new import licence specifically intended for the contract with S. B was thus willing to receive delivery on the same terms as originally agreed, and applied for a new license, which was granted, and sent the licence no. to S. S responded that it could only accept B's offer under the condition that B provided an irrevocable letter of credit. B refused to issue the requested guarantee, whereby S brought a claim for damages against B for the recovery of the difference between the agreed price and S's buying-in price. S claimed that it was virtually impossible to find a market for the batch of nylon textile elsewhere.

The Court of Appeal ruled that S, being in principle entitled to compensation in damages, could not recover for loss of profit because S had refused B's offer to conclude a new contract on the same terms as originally agreed. The court paid particular attention to the fact that S had not contended that B was unable to deliver once B had been granted the new license. The Supreme Court reversed the Court of Appeal's judgement and allowed S's claim for damages. According to the Supreme Court, the fact that S made its acceptance to the proposed settlement subject to an irrevocable letter of credit did not affect S's right to compensation.

It is clear from the facts of the case that B intentionally breached the contract with S – B knew beforehand that it could not fulfil all of its contracts using the import licence it had applied for and that it therefore would be forced to elect to disregard its obligations towards one of the English sellers (which came to be S). What is also

clear is that B's conduct had a determining effect on the outcome of the case. S had good reason to decide that, after its experience, it should not enter into a new contract with B unless there was an assurance from B in the form of an irrevocable letter of credit.

Accepting B's offer to conclude a new contract on the same terms as originally agreed once S had received the second import licence B had applied for would without doubt have been the most preferred choice from an economic point of view; it was difficult, if not impossible, for S to dispose of the batch of nylon textile elsewhere and only in the hands of someone like B would the batch have an economic value to society at large. However, it is harder to justify a dismissal of S's claim for damages based on considerations of loyalty. The Supreme Court probably found it difficult to ignore that B deliberately breached the contract when determining S's relative accountability regarding the avoidable loss of profit. Another observation is that an imposition on the aggrieved party to accept a new offer would encourage the other party to violate entered agreements.

Another example of when the conduct of the breaching party arguably should be highly relevant when determining what measures are reasonable to comply with the duty to mitigate is provided in the following illustration³⁵:

B contracts to buy certain goods to be manufactured by S. A date of delivery is agreed. S is aware that it will probably not be able to deliver on time but enters the contract nevertheless, knowing that many manufacturers are interested in providing the goods and that there is big money involved. On the date on which the goods ought to have been delivered, S breaches the contract and declines to supply them. However, S promise B that the contract will be performed at a later date than agreed upon. B refuses to give S a second chance since S knew all along that the goods would not be delivered in time and instead enters into a contract with another manufacturer, even though this will mean that it will take longer for the goods to be supplied compared to the date S is now willing to deliver (thereby, to a certain extent, exacerbating the loss B will incur).

It would be hard for S to discharge the onus of showing that B acted "unreasonably" in refusing to accept its new offer. It can be assumed that S got elected to manufacture the goods because it promised to deliver them before anyone else was able to do so, completely disregarding the performance interest of B in having the goods delivered in time. It is argued that, in order to fairly and efficiently deter unethical conduct, the non-breaching party should be ensured full compensation, including the additional loss related in this case to electing another company to manufacture the goods. It appears wrong in principle to concentrate on the aggrieved party's conduct

³⁵ The author has been involved in a dispute where the circumstances were similar to those of the illustration.

and disregard the role of the breaching party, who caused the problem the aggrieved party might ultimately mishandle when reacting to the breach.

5 Concluding remarks

The conclusion suggested by this brief article is that the Supreme Court's sweeping statement in NJA 2017 s. 9 – i.e. that the scope of the duty to mitigate remains the same regardless of whether the breaching party acted in wilful disregard of the aggrieved party's rights – might have been too categorical. Examples are conceivable in which the conduct of the breaching party arguably is relevant in deciding whether the aggrieved party has complied with its duty to mitigate. Whether or not the standard of reasonableness that must be attained for the duty to mitigate to be discharged will be affected and lowered in cases of intentional breaches remains to be seen. It seems likely that NJA 2017 s. 9 will not be the last word on this subject.