GRAIN TRADE AUSTRALIA

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GTA Arbitration 159

Notice to Members

Date of Issue: **August 2011**

Claimant: **Producer seller**
&
Respondent: **Trader buyer**

Arbitration Committee (AC)

- Mr Guy Allen, nominated by the Claimant;
- Mr Gerard McMullen, nominated by the Respondent;
- Mr Peter Flottmann, Chairman appointed by GTA.

Claim

- At issue in this dispute is:
  - the question of the performance of a contract and consequence of breach.
  - relying on assessment of quality after delivery to discount the contract price.
- The claim was for $$186,001.

Award extract

"It is incumbent on both parties, the Buyer in particular, to assess the quality and condition of delivered grain promptly and so advise the Seller. It puts the Seller at a massive disadvantage if the Buyer only notifies the Seller well after delivery of any concerns as to quality or condition."

Award

Final Award:

- The Claim is allowed in the sum of $97,616.66 payable by the Respondent to the Claimant immediately.
- The Respondent shall pay interest on the damages at the rate of 8.75% per annum from 21 June 2010, being the date on which it made the payment of $96,626.25.
- The Respondent shall indemnify the Claimant in respect of any fees paid by the Claimant to GTA in relation to this arbitration.
- The Respondent shall pay the Claimant's legal costs on a party and party basis. The parties are directed to attempt to settle costs between them within the next 14 days, failing which the costs shall be assessed by the Supreme Court of New South Wales in accordance with section 33B(5) of the Commercial Arbitration Act (NSW) 2010.

IN THE MATTER OF THE COMMERCIAL ARBITRATION ACT 2010 (NSW) AND IN THE MATTER OF AN ARBITRATION UNDER THE RULES OF GRAIN TRADE AUSTRALIA LTD

GTA Arbitration No. 159

Producer seller
(Claimant)

and

Trader buyer
(Respondent)

Final Award

1. Introduction

This is an arbitration pursuant to the Dispute Resolution Rules of Grain Trade Australia Ltd (“GTA”), formerly the National Agricultural Commodities Marketing Association Ltd ("NACMA").

At issue in this dispute is the question of the performance of a contract and consequence of breach.

The Arbitration Committee comprises:

- Mr Guy Allen, nominated by the Claimant;
- Mr Gerard McMullen, nominated by the Respondent;
- Mr Peter Flottmann, Chairman appointed by GTA.

As the Arbitration Committee was constituted after 1 October 2010, this award is governed by the *Commercial Arbitration Act* 2010 (NSW).

The following submissions were received from the parties and have been considered by the Committee:

1. Claimant's Points of Claim dated 18 March 2011 ("Points of Claim");
2. Respondent's Points of Response dated 29 April 2011 ("Points of Response");
3. Claimant's Points of Reply dated 19 May 2011 ("Claimant's Reply");
4. Respondent's Points of Reply served under cover of a letter dated 9 June 2011 ("Respondent's Reply").
5. Claimant's *Reply to the new material filed by the Respondent in its reply dated 9 June 2011,* dated 30 June 2011 ("Claimant's Further Reply");

6. Respondent's *Reply to Claimant's Reply to New Material Filed by the Respondent, undated* served under cover of an email dated 7 July 2011 ("Respondent's Further Reply").

The parties have elected to have the matter dealt with on documents alone. There has been no hearing and we have not had the opportunity to examine witnesses, or see witnesses examined.

With the exception of a Statutory Declaration from Mr KT, neither party has submitted witness statements as part of its evidence.

2. Jurisdiction

The contract the subject of this dispute is on the Respondent's notepaper.

It specifies that "NACMA Trade Rules apply - November 2004."

There is not specifically an edition of the NACMA Trade Rules dated November 2004. This is accepted by the parties who have agreed between themselves that the 1 October 2004 form of the Trade Rules apply to this matter.

In any event it seems to be common ground that the contract is subject to the usual NACMA (now GTA) arbitration agreement and both parties have participated willingly in this arbitration.

As neither party has put in issue our jurisdiction to deal with the matters referred to us, we find that we are a validly constituted tribunal with jurisdiction to determine the matters in dispute.

3. The Background to the Dispute

As mentioned above, the disputes arise under a contract between the parties on Trader buyer notepaper. The contract document itself appears to be undated but there does not appear to be any doubt as to its terms.

Materially, the contract identifies the Claimant as Seller, and the Respondent as Buyer of Aldinga Lentils - 2009/2010 season. Other terms are as follows;

Quantity - 400ha (Approx 1000 acres). Total production up to 4 bags/ac (0.83t/ha). Purchaser would like first option to purchase any tonnage over and above 0.83t/ha.

Packing: In Bulk

Quality: Farmers Dressed as per NACMA CSP - 7.2.2 Edition 2004/05

Price: A$1000/mt Delivered Mills Cleaning Plant Dooen Vic.

Rules: NACMA Trade Rules apply - November 2004

Delivery: At buyers call during January 2010.

Payment: Full invoice value due no later than 30 days from end of week of delivery.

Special Conditions: A fee of $15 pmt for scalping/cleaning fee will apply for those deliveries outside specs. Offal will be credited back to seller.

The contract was signed by both parties.

It appears to be common ground that the "NACMA CSP - 7.2.2 Edition 2004/05" is "No 1 Grade Export Standard."

It is the Claimant's case in summary that due to "heatwave" conditions during the growing period it became concerned about its crop and contacted the Respondent who attended the Claimant's farm and examined the crop, expressing satisfaction with progress and not raising any concerns about price.

It appears to be accepted by both parties, and as specifically stated in the contract, that the Respondent was entitled to clean/scalp any "defective" lentils at a price of $15/mt.

In other words, the Respondent was likely to process the lentils delivered; charge the Claimant $15/mt, and then pay the contract price for that quantity of lentils of No 1 Export grade which resulted from the processing, which would most likely be less than the tonnage actually delivered.

The Claimant delivered some 257.18 mt of lentils to the delivery location between 22 January 2010 and 18 February 2010 ("the First Consignment").

According to the Claimant, it was contacted by the Respondent on or about 18 February 2010 and advised due to market conditions any further deliveries the Claimant might make would be priced at $720 per tonne. The Claimant accepted the new price for all further deliveries.

In the event, it delivered a further 113.9 tonnes between 4 and 11 March 2010 ("the Second Consignment").

On rough figures, the Claimant was expecting payment of 257.18mt x A$1000 = A$257,180.00 for the First Consignment, and 113.9 x A$720 = A$82,008 for the Second Consignment. In total. A$339,188.00 (ex GST), less levies and cleaning.

On 19 March 2010 the Claimant received a cheque from the Respondent in the sum of A$100,000. On or about 21 June 2010 the Respondent paid a further $96,626.25.

The Respondent contacted the Claimant on or about 7 April 2010 to;

(a) Complain that the quality of the lentils in the First Consignment was below specification and that there would need to be a discount to the contract price; and

(b) Reject the Second Consignment entirely as being out of specification.

4. The First Consignment

Subject to the relevant Trade Rules, the Claimant was obliged to deliver to the Respondent Aldinga Lentils -2009/2010 season, Farmers Dressed as per NACMA CSP - 7.2.2 Edition.

The Claimant and Respondent make various submissions in relation to the alleged application of Rule 17 of the Trade Rules, however in the absence of any real probative evidence about what was discussed and said by whom and when, we can make no finding in relation to Rule 17.

Rule 16 does appear to us to have application to the First Consignment. It is common ground that the First Consignment was delivered between 22 January and 18 February 2010.

According to Rule 16 (Finality);

(1) All adjustments or compensation claimed based on defect of quality or condition or weights which shall be apparent upon reasonable inspection must be advised within five [5] business days after unloading or presentation of appropriate documents and must be formally confirmed by written notice, letter or facsimile within thirty [30] consecutive days of delivery of the consignment.

(2) However, should a party fail to comply with these time limits and claim justification thereon which is disputed by the other party, that claim and its dispute shall be deemed to be a dispute to which the provisions of Rule 24 [Disputes], and Rule 25 [Mediation] and/or Rule 26 [Arbitration] shall apply.

(3) In the event of failure to comply with this condition, all claims in regard to quality shall be void unless a NACMA Arbitration Committee shall be of the opinion that the delay in making the claim was justified.

The Claimant submits that the first significant complaint or dispute occurred on 7 April 2010, approximately 1.5 months after completion of delivery of the first consignment.

According to the Respondent, it notified the Claimant of its concerns as to quality and conditions on 21 and 22 January 2010[1], albeit not in writing.

This is denied by the Claimant.[2]

This sadly appears to be the crux of the dispute. We say "sadly" because neither party has provided us with any adequate evidence in the form of a written or sworn statement of evidence attesting to the conversations that (allegedly) took place on 21 or 22 January 2010.

The only evidence of this nature appears at Attachment "AA" to the Respondent's Further Reply. It is a Statutory Declaration of KT declared at Sydney on 7 July 2011. We do not find this statement, which is incomplete in parts, and conjectural in others, to be helpful.

Even if we had such evidence, the effect and intent of Rule 16 is quite clear.

It is incumbent on both parties, the Buyer in particular, to assess the quality and condition of delivered grain promptly and so advise the Seller. It puts the Seller at a massive disadvantage if the Buyer only notifies the Seller well after delivery of any concerns as to quality or condition.

[1] Points of Response, para 6
[2] Claimant's Points of Reply, paras 2-3

Rule 16 requires that the Buyer must provide notice of any alleged defect in quality or condition within 5 days of delivery, and written notice within 30 days. Both were possible but neither occurred in this case and no satisfactory reason has been advanced for the purposes of Rule 16(2).

5. Second Consignment

According to the Respondent, while it was able to "scalp and clean" the First Consignment to produce 185mt of "number 1 grade lentils" for which it says it has paid, the Second Consignment of 113.9mt delivered between 4-11 March 2010 was (with a small exception) entirely unsaleable and has been rejected by the Respondent.

However, once again, the Respondent failed to discharge its obligations under Rule 16.

6. Quantum

It is common ground that the Claimant has been paid $196,626.25 by the Respondent. That is in respect of First Consignment only, the Respondent alleging that the Second Consignment is entirely unsaleable.

The Claimant claims it was due $275,768.97 in respect of the First Consignment, and a further $87,409.32 in respect of the Second Consignment, leaving a balance payable of A$186,001.21 following allowance for the amount actually paid.

This does not however seem to us to reflect the true operation of the contract.

The contract anticipates that out-of-specification tonnage may be "scalped/cleaned" at a fee of $15pmt. The effect of "scalping/cleaning" will be to reduce the gross-tonnage delivered and produce a net-tonnage of clean lentils which are within the contractual specification.

Allowing for "scalping/cleaning", we find that the Claimant is entitled to damages of $97,616.66, as set out in the Schedule to this Award.

7. Other Issues

While this disposes of the matter, other issues were raised by the parties which we can deal with briefly.

7.1 Second Contract

The Respondent alleges that it entered into a second contract with the Claimant for 300mt of lentils at $720/mt. It puts in evidence[3] a document which it says evidences the agreement. The document is however unsigned and there is no evidence that it was sent to or received by the Claimant.

[3] Attachment N to the Points of Response

The Contract signed by the parties expressed that the Respondent "would like" the first option to purchase any tonnage over and above 0.83t/ha. It seems to us that the Second Consignment represented the exercise of that option, at $720mt, but with no min/max quantity specified.

7.2 Estoppel

The Respondent has argued that by banking the cheques presented by it the Claimant has become estopped from any further claim.[4]

This is denied by the Claimant.

The Respondent refers to and relies on a letter dated 20 June 2010.[5] That letter apparently enclosed a Recipient Created Tax Invoice and cheque for $96,626.25. It said that "we (the Respondent) hope that you accept this as full and final settlement". This expression of hope does not appear to us to be sufficient to create the estoppel on which the Respondent now seeks to rely and we find that the Claimant is not estopped from bringing this claim.

7.3 Further Amount

We note that at paragraph 21 of the Points of Response the Respondent concedes that a further amount of $10,208.00 was payable by the Respondent to the Claimant. Given that we have found (as per the Schedule) that the Claimant is entitled to compensation of $66,530.81 in respect of the Second Consignment we do not need to deal further with the further amount of $10,208.00, which is not separately payable to the Claimant.

8. AWARD

Having considered the Submissions and for the reasons stated above, we make the following Final Award:

1. The Claim is allowed in the sum of $97,616.66 payable by the Respondent to the Claimant immediately.

2. The Respondent shall pay interest on the damages at the rate of 8.75% per annum from 21 June 2010, being the date on which it made the payment of $96,626.25.

3. The Respondent shall indemnify the Claimant in respect of any fees paid by the Claimant to GTA in relation to this arbitration.

4. The Respondent shall pay the Claimant’s legal costs on a party and party basis. The parties are directed to attempt to settle costs between them within the next 14 days, failing which the costs shall be assessed by the Supreme Court of New South Wales in accordance with section 33B(5) of the *Commercial Arbitration Act (NSW) 2010*.

[4] Para 86 of the Points of Response
[5] Tab F to the Points of Claim

And we so publish our Final Award.

……..**Date: ……../……../2011**

Guy Allen, Arbitrator nominated for the Claimant.

……..**Date: ……../……../2011**

Gerard McMullen, Arbitrator nominated for the Respondent.

……..**Date: ……../……../2011**

Peter Flottmann, Arbitration Committee Chair, appointed by GTA.