GRAIN TRADE AUSTRALIA
Grain Trade Australia Limited Level 11, 56 Pitt Street Sydney NSW 2000
PO Box R1829 Royal Exchange NSW 1225
Phone: +61 2 9247 6408 Fax: +61 2 9247 9153
Email: admin@graintrade.org.au Web: www.graintrade.org.au

Arbitration 181

Notice to Members

Date of Issue: **July 2013**

Claimant: **Grain Buyer**
&
Respondent: **Grain Seller**

Arbitration Committee (AC)

- Mr. Steve Burt, nominated by the Claimant;
- Mr. Harry Notaras, nominated by the Respondent;
- Mr. Mark Lewis, Chairman appointed by GTA.

Claim

At issue in this dispute is the performance and alleged breach of a contract and to unilaterally amend the contract for the sale of cereal rye between the Claimant as Buyer, and the Respondent as Seller.
The total amount of damages being claimed $36,970.70

Award

- The Claim was allowed in the amount of A$36,970.70.
- 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 interest at 7.5% from 1 October 2012.

Details

The Claimant says that of the contracted 500mt, the Respondent failed to deliver 284.39 mt. The Claimant had to buy in grain at a higher price of $360 per tonne, therefore claims the difference.

The Defence is effectively a mitigation argument. The Respondent says that there was fault on both sides. It admits default. It says that this was an even-spread contract under which the Claimant was required to take deliveries of 55mt per month. Given the Respondent failed to make deliveries in January and February, the Claimant should at that stage have terminated the contract for default, but did not.

According to the Respondent this was a default under the terms of the contract and the Respondent should not be required to compensate the Claimant for the higher prices paid at a later point in the year.

The Tribunal did not agree with the Respondent's submission in this regard. This was a 9-month contract for monthly deliveries. Even if there was default in the early months, the Claimant was entitled to keep the contract on foot if they wished to do so. Even when the Respondent attempted to terminate or renounce the contract, the Claimant refused to accept that renunciation, and the Respondent continued to perform.

In so far as the quantum of the claim is concerned and the price at which the Claimant bought in product against the Respondent, given the contract remained on foot, the Claimant was under an obligation to act reasonably to mitigate its losses.

There is no evidence that the Claimant failed to do so. Simply pointing to the fact that prices may have been lower earlier in the year does not establish that it was unreasonable for the Claimant not to have made larger purchases at that time.

There could be any number of reasons why it didn't do so; it may not have needed the additional stocks at that time; it may not have had storage facilities. The question for the Tribunal is not whether the quantum of the claim could in hindsight have been reduced; it is whether the Claimant's conduct at the time it was taken was unreasonable. There is no evidence that it was.

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.181

Grain Buyer
(Claimant)

and

Grain Seller
(Respondent)

Final Award

1. Introduction

This is a Final Award in an arbitration pursuant to the Dispute Resolution Rules of Grain Trade Australia Ltd (ñGTAò).

At issue in this dispute is the performance and alleged breach of a contract for the sale of cereal rye between the Claimant as Buyer, and the Respondent as Seller.

The Tribunal comprises:

- Mr Steve Burt, nominated by the Claimant;
- Mr Harry Notaras, nominated by the Respondent;
- Mr Mark Lewis, Chairman appointed by GTA.

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

1. Claimantôs Points of Claim dated 21 March 2013 (ñPoints of Claim");
2. Respondent's Defence received by GTA on 16 May 2013 (though dated 16 March 2013) ("Defence");
3. Claimantôs Points of Reply dated 5 June 2013 ("Claimantôs Reply");
4. Respondent's Points of Reply dated 24 June 2013 ("Respondent's Reply").

2. Jurisdiction

This dispute is concerned with the terms of and performance of a contract between the Claimant and Respondent. It appears to be common ground that the contract incorporated the GTA Trade Rules including the referral of disputes to arbitration administered by GTA under the GTA Dispute Resolution Rules.

As neither party has put in issue our jurisdiction to deal with the matters referred to us, and by virtue of the incorporation of the GTA Trade and Dispute Resolution

Rules into the contract, we find that we are a validly constituted Tribunal with jurisdiction to determine the matters in dispute.

Neither party has provided us with witness statements. As neither party has requested that a hearing be conducted we have proceeded on the basis of documents alone.

3. The Background to the Dispute

The Claimant is a flour miller.

The Respondent is an experienced trader in and supplier of agricultural commodities including cereal rye.

On or about 19 December 2011 the Claimant as Buyer purchased from the Respondent as Seller 500mt (+/- 15 tonnes) Cereal Rye No.1 and No.2 11/12 Season, in bulk, at A$210 per tonne delivered to the Claimantôs premises.

The delivery period was Sunday 1 January 2012 to Sunday 30 September 2012 approximately even spread.

The contract further provided that Rye No.1 up to 5% screenings (max), with a $3 per ton discount to apply for every 1% over 5% screenings up to a maximum of 10%, and that ñall grain prior to purchasing is to be tested at the Claimantôs premises for approval. ñ

This indicates to us that the Claimant was particularly concerned about the quality of the grain to be delivered.

4. Performance of the Contract

According to the Claimant there were significant quality issues with the contract from the start.

It appears from the correspondence that the practice was that the Respondent would send bagged samples to the Claimant for testing. If the results were acceptable, the Claimant would notify the Respondent and grain would be delivered.

A significant number of samples supplied between December 2011 and April 2012 failed due to high screenings and at times the presence of live insects.

In May, the Claimant sought to have the monthly contract deliveries increased to 120mt every second week until the contract tonnage was satisfied.

Ultimately the Respondent delivered 215.61mt under the contract. Each party held the other in default, though only the Claimant is now claiming against the Respondent, no cross-claim having been filed.

5. The Claim

The claim itself is relatively straightforward. The Claimant says that of the contracted 500mt, the Respondent failed to deliver 284.39 mt. The Claimant had to buy in grain at a higher price of $360 per tonne, therefore claims the difference.

The Defence is effectively a mitigation argument. The Respondent says that there was fault on both sides. It admits default. It says that this was an even-spread contract under which the Claimant was required to take deliveries of 55mt per month. Given the Respondent failed to make deliveries in January and February, the Claimant should at that stage have terminated the contract for default, but did not. According to the Respondent this was a default under the terms of the contract and the Respondent should not be required to compensate the Claimant for the higher prices paid at a later point in the year.

We do not agree with the Respondentôs submission in this regard. This was a 9-month contract for monthly deliveries. Even if there was default in the early months, the Claimant was entitled to keep the contract on foot if they wished to do so. Even when the Respondent attempted to terminate or renounce the contract, the Claimant refused to accept that renunciation, and the Respondent continued to perform.

In so far as the quantum of the claim is concerned and the price at which the Claimant bought in product against the Respondent, given the contract remained on foot, the Claimant was under an obligation to act reasonably to mitigate its losses. There is no evidence that the Claimant failed to do so. Simply pointing to the fact that prices may have been lower earlier in the year does not establish that it was unreasonable for the Claimant not to have made larger purchases at that time. There could be any number of reasons why it didnôt do so; it may not have needed the additional stocks at that time; it may not have had storage facilities. The question for us is not whether the quantum of the claim could in hindsight have been reduced; it is whether the Claimantôs conduct at the time it was taken was unreasonable. There is no evidence that it was.

6. COSTS

Both parties have made submissions in relation to costs. The Claimant has claimed indemnity costs; the Respondent has submitted that we should make no order as to costs.

In view of our findings above we see no reason why the Respondent should not pay the Claimantôs costs on the ordinary basis.

Both parties also used their submissions to address the timing of the Respondentôs payment of GTAôs fees. We note those submissions but do not intend to comment further.

7. FINAL AWARD

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

1. The Claim is allowed in the amount of A$36,970.70.

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

3. The Respondent shall pay interest at 7.5% from 1 October 2012.

4. The Respondent shall pay the Claimantôs 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 2010* (NSW) .

And we so publish our Final Award, at Sydney, 18 July 2013.

Steve Burt, Arbitrator nominated by the Claimant.

Harry Notaras, Arbitrator nominated by the Respondent.

Mark Lewis, Arbitration Committee Chair, appointed by GTA.