

Arbitration 191

Date of Issue: 22 October 2014

Claimant: Commodity Buyer (Grain Trader)
&
Respondent: Commodity Seller (Grain Producer)

Arbitration Committee (AC)

- Mr Greg Carroll, nominated by the Claimant,
- Mr Guy Allen, nominated by the Respondent, and
- Ms Rebecca Reardon, nominated by GTA to Chair the Tribunal.

Claim

This dispute relates to the existence of a contract between the parties for the supply of 5000MT of F1 Barley ("Contract 1.")

Payment of \$157,476 was subsequently withheld by the Claimant against a further contract (Contract 2) between the parties for the provision of 1500MT of F1 Barley, facilitated by an independent online Broker.

Issues for determination:

1. Whether there was a contract in place between the Claimant and Respondent for the provision of 5000 MT of F1 Barley
2. Whether payment can rightfully be withheld against Contract 2.

Award

1. The Claim was denied and the Claimant instructed to pay the Respondent the \$157,476 outstanding on Contract 2.
2. The Claimant was further instructed to pay interest on the principal sum at a rate of 18% accruing from 1/1/14 to the order of \$19,546.05
3. The Respondent was awarded GTA Arbitration fees paid and legal costs of \$22,688

Details

The Claimant submits that they entered into a contract with the Respondent following phone conversations over several days and by provision of the incomplete Contract document by email, to which the Respondent did not reply. The Respondent claims that they did not accept offer as the contract, and decided to sell a smaller parcel of F1 Barley through an online broker which was purchased by the Claimant.

There was no further mention of the existence of the Contract until the Claimant failed to make payment against the subsequent Contract, facilitated by an online Broker at which time the Claimant determined to withhold payment against.

Award findings

The Tribunal found that:

- The Contract Document was substantially incomplete and there was no evidence that the offer was accepted by the Respondent.
- It was submitted by the Claimant that the Contract Document constituted a Brokers Note. The Tribunal found this to be erroneous and wrong as the Claimant was clearly identified as the Principal and the word Broker appeared nowhere on the document.
- As there was no contract and so no breach, the amount was wrongfully withheld by the Claimant against Contract 2.
- As the Claimant failed to call for delivery of any portion of the grain or provide appropriate notices within the proposed contract period, the Respondent would have been within their rights to call the Claimant in default had it been deemed that a contract was in place.

**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. 191

Grain Buyer (Trader)
(Claimant)

and

Grain Seller (Grain Producer)
(Respondent)

Final Award

1. INTRODUCTION

This is a Final Award in an arbitration conducted pursuant to the Dispute Resolution Rules of Grain Trade Australia Ltd ("**GTA**"). The main issue for us to determine is whether the parties entered into a binding and enforceable contract for the sale of 5000mt of F1 barley (the Contract) evidenced by a document created by the Claimant and sent by email to the Respondent dated 15 October 2013 and numbered 509PM (the Contract Document).

The Respondent denies the existence of the Contract and says (in summary) that it considered the Contract Document to be a draft which it did not accept.

This could have created an issue as to our jurisdiction as we obtain our jurisdiction from the arbitration agreement contained in the agreement between the parties (in this case the Contract Document). In the event neither party has challenged our jurisdiction and both have participated in this arbitration without protest or reservation. In any event, we have jurisdiction to determine our jurisdiction and whether or not a contract has come into existence.

We find therefore that we are a validly constituted Tribunal under the *Commercial Arbitration Act 2010* (NSW) and with jurisdiction to determine all issues in dispute between the parties.

This Tribunal comprises

1. Greg Carroll, nominated by the Claimant,
2. Guy Allen, nominated by the Respondent, and
3. Rebecca Reardon, nominated by GTA to Chair this Tribunal.

The arbitration has proceeded on written submissions and documents alone and neither party has asked for an oral hearing.

The Claimant has relied on Points of Claim which appear to have been received in the GTA office on 31 July 2014. These are supported by an affidavit sworn by Mr H on 28 July 2014 and to which are annexed various supporting documents.

The Respondent relies on Points of Defence dated 27 August 2014 and unsworn statements of Mr W (dated 26 August 2014), Mr R (dated 26 August 2014) and Ms B (dated 26 August 2014). Relevant supporting documents are also annexed to these statements.

Though it had the option to do so the Claimant elected not to lodge any further submissions in response to the Points of Defence.

We have carefully considered these submissions, affidavits, statements and supporting documents and base our decision on the facts and circumstances gleaned from these sources.

2. BACKGROUND TO THE DISPUTE

The Claimant operates a grain trading and logistics enterprise. Mr H is the principal of the Claimant.

The Respondent is a mixed cropping farming operation in Western New South Wales. The day-to-day farming activities are conducted by Mr W.

Mr W and Mr H first met in or around September 2013 when Mr H visited Mr W at his home property. There is some disagreement between the two gentlemen about what precisely was discussed. It was essentially a social encounter but some business was discussed and both gentlemen agreed to speak further.

The next contact occurred on 11 October 2013. There is considerable difference in the two gentlemen's recollection of their conversations on this and following days. While both have

made reference in their statements to their diaries, neither has produced relevant extracts so we must rely solely on their individual conflicting recollections.

Suffice to say that on 15 October 2013, the Claimant prepared the Contract Document which it emailed to the Respondent with the comment “Hi Mr H, please find attached contract, as discussed.”

The Respondent did not reply to that email.

Subsequently on 18 November 2014, the parties contracted, through an online broker, for the sale and purchase of 1500mt F1 Barley produced by the Respondent. This transaction was evidenced by a Brokers Contract Note dated 18 November 2013 and its existence is not disputed by either party.

In situations where the parties have conflicting recollections of what was discussed and what (if anything) was agreed we will give precedence to any objective evidence of the parties’ intentions.

In this case the most relevant objective evidence is the Contract Document.

Based on that document and such uncontested evidence as there is of the surrounding circumstances, our finding is that the parties did not conclude a binding and enforceable contract for 5000mt of F1 barley as alleged by the Claimant for the following reasons;

1. The Contract Document itself is substantially incomplete. We do not accept the Claimant’s assertion that it was normal protocol within the grain trading industry that the Seller would fill in their details and send back a signed copy. That is not our experience. The Contract Document was unsigned even by the Claimant. It was silent as to critical details such as the Seller’s NGR, the entity selling the grain, and the pick-up location. At best it may have constituted an offer by the Claimant. If that is what it was, there is no evidence that the offer was accepted by the Respondent.
2. It was submitted by the Claimant that the Contract Document constituted a Broker’s Note. This submission is erroneous and wrong. A Broker’s Note is generated by a broker and will identify that broker. The submission does not say expressly who the alleged broker was. We assume the Claimant is asserting that it was the broker. As we have observed above the Contract Document was, if anything, an offer by the Claimant to buy grain as a principal. The Claimant (who generated and sent the document) is identified clearly as the Buyer, not broker. The word Broker appears nowhere on the Contract Document. It may be contrasted to the document generated

by the online broker, which is headed Brokers Contract Note and clearly identifies them as the broker. We can only assume that the somewhat desperate attempt to describe the Contract Document as a Brokers' Note was to take advantage of Trade Rule 3.1. It was no more than clutching at straws and served to highlight flaws in the Claimant's case.

3. On or about 18 October 2013 the Claimant entered into a contract to buy 1500 tonnes of barley from the Respondent, through an online broker. However it is Ms B unchallenged evidence that when Mr H (the Claimant) spoke with her on 18 October he did not mention another contract for 5000 tonnes. While he had no obligation to do so, the failure to mention it seems odd to us and is consistent with there being no such contract.
4. If there was a contract as alleged by the Claimant, then the delivery period expressed in the Contract Document was Ex Farm – December to March 2014. One may have expected that some time during the delivery period, the Claimant may have contacted the Respondent to begin making arrangements for delivery. In fact, at no stage did the Claimant call for delivery of any portion of the grain and provide appropriate notices. It was not until the Claimant fell into default of payment under the iGrain contract that the Claimant first asserted that it was withholding payment due to the Respondent's default on the alleged 5000mt contract. If we are incorrect in finding that there was no contract to purchase 5000mt of grain, and that the Contract Document was evidence of a binding and enforceable contract, then the Claimant was in breach of that contract by failing to give notice that it wished to commence taking delivery before wrongly repudiating that contract.

For the reasons given above, we find that the claims advanced by the Claimant must fail.

The Respondent has claimed \$157,476 being the amount withheld by the Claimant under the 1500mt contract owing to the alleged breach by the Respondent of the 5000mt Contract.

As we have found that there was no Contract and so no breach, this amount has been wrongfully withheld and should be paid immediately, along with the interest claimed by the Respondent in the amount of \$19,546.05.

The tribunal believe it is pertinent to point out that the Respondent had the right to call the Claimant in default when it failed to pick up the grain by the end of December on the online broker contract. The Respondent also had the right to halt deliveries on the online broker contract, when the Claimant fell into default by making a late payment. The Respondent exercised none of these rights but for good orders sake, the arbitrators believe it is relevant that parties understand their rights, hence make mention of these facts.

3. COSTS

The Respondent has claimed and is entitled to costs. We have been advised that the Respondent's total legal costs are \$22,688.14 exclusive of GST. By comparison the Claimant's legal costs are \$21,750 exclusive of GST.

In our view \$22,688 (exclusive of GST) represents a fair award of legal costs.

4. AWARD

Having carefully considered the submissions and for the reasons stated above, the Tribunal makes the following Award:

1. The claims advanced by the Claimant must fail.
2. The claims by the Respondent succeed and the Claimant must pay the Respondent \$157,476.
3. The Claimant must pay the Respondent interest of \$19,546.05 on the principal sum.
4. The Claimant shall indemnify for the Respondent for the GTA arbitration fees paid by the Respondent.
5. The Claimant shall pay the Respondent's legal costs fixed at \$22,688.

This award is published the 22nd day of October 2014.

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Ms Rebecca Reardon, Chair Arbitrator appointed by GTA.

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Mr Greg Carroll, Arbitrator appointed by the Claimant.

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Mr Guy Allen, Arbitrator appointed by the Respondent.