

**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. 299

Grain Buyer (Trader)

Claimant

and

Grain Seller (Trader)

Respondent

Final Award

A. Introduction

1. This is the Final Award in an arbitration conducted pursuant to the Dispute Resolution Rules of Grain Trade Australia Ltd ("GTA").
2. The Tribunal consists of;
 - (a) Andrew Mead, Chair appointed by GTA;
 - (b) Graham Barron, appointed by the Claimant;
 - (c) Ervin Leong, appointed by the Respondent.
3. The dispute concerns a contract between the parties concluded late in November 2018. While the parties agree that a contract came into existence, the Respondent says (in summary) that this Tribunal lacks jurisdiction to determine the matter, and that the Claimant was in breach of a condition of the contract by failing to provide a sample as required by the contract.
4. We have read and considered the;
 - (a) Claimant's Points of Claim (undated);
 - (b) Respondent's document headed 'Points of Order and Formal Objections' (undated) which includes affidavits of Mr A dated August 2019 (Affidavit A1) and Mr B dated August 2019 (Affidavit B1);
 - (c) Claimant's Points of Reply (undated) including witness statement of Mr C dated 4 November 2019 (Affidavit C1); and
 - (d) Respondent's Points of Reply dated 10 December 2019 including witness statements of Mr A dated 10 December 2019 (Affidavit A2) and Mr B dated 10 December 2019 (Affidavit B2).

5. In addition, on 23 January 2020, at our request, GTA wrote to the parties as follows;

The Arbitration Tribunal has deliberated on the Parties' submissions in relation to Arbitration 299 – [REDACTED] and [REDACTED] and has made a request for further information.

The Tribunal asks the Parties to submit evidence of any previous contracts between the Parties performed within the last 5 years (1 January 2015 until 1 January 2020). Please submit your responses to the Tribunal's request to me via email by COB Friday 31 January 2020.

6. In response, the Respondent produced 3 contract forms. The Claimant produced 20 contract forms, which included the 3 produced by the Respondent. Those contracts (Additional Contracts) spanned the period 22 January 2015 to 19 August 2018. Each of the Additional Contracts incorporated the GTA Trade and Dispute Resolution Rules.
7. As the parties have not opted to conduct a hearing, our determination is based solely on these papers and written submissions made by the parties.
8. We have concluded that this Tribunal has jurisdiction, and that the Claimant is entitled to an award of damages as a result of the Respondent's breach of contract.

B. Facts

9. The evidence submitted by the parties is not entirely satisfactory in that statements are not in a complete and admissible form. Nevertheless we have gleaned the following facts from the documents and statements submitted by the parties to the extent that there appears to be agreement between the parties.
10. The Claimant is a grain merchant and the Respondent is a miller/baker. The parties had had a commercial relationship from at least 2010 by which the Claimant sold the Respondent wheat and the Respondent sold the Claimant 'mill-run' which is a by-product of the production of flour.
11. By an exchange of text messages as well as (apparently) verbal communications between Mr C for the Claimant as Seller and Mr B for the Respondent as Buyer between Tuesday 20 November and Thursday 22 November 2018, the Respondent agreed to buy 500mt of APH2 wheat for delivery first half of 2019, for \$510 per tonne, \$3 carry, monthly account, subject to provision of samples.
12. While the parties have provided copies of text messages, there is no proper evidence of the verbal communications so our determination is based largely on the exchange of text messages.
13. On 26 November 2018, the Claimant sent to the Respondent by email, Sale Contract Confirmation document no. [REDACTED] dated 22 November 2018 (Contract Confirmation). There is no evidence that the Respondent either acknowledged receipt of or signed that Contract Confirmation however the Respondent does not suggest that it did not receive the emailed Contract Confirmation at the time the Claimant alleges it was sent.
14. On 18 February 2019, the parties exchanged the following text messages;
Claimant: "Mr B, I would like to start moving on our 500mt H1 wheat contract sooner rather than later. Are you able to give an indication as to when we can start and the rate of draw down."
Respondent: "I can start taking trucks from the first week of March and I'll let you know at the end of February when to send me the trucks thanks Mr B."
Claimant: "Ok, the more notice I have the better."

15. We note that on 30 November 2018 the Claimant offered the Respondent 700mt of H1 wheat to which the Respondent replied;
“Hi Mr C I can take it at the same price and I need samples also from the 500.”
16. It seems to us that the reference in paragraph (14) above to “500mt of H1 wheat” was intended to refer to the 500mt of APH2 the subject of this dispute, and that the Respondent understood as much.
17. On 21 February 2019, Mr A of the Respondent sent the Claimant an email stating;
“Please be advised that we are not interested in taking the 500 ton of wheat.”
It appears to be common ground that this was a reference to the 500mt of APH2 the subject of this dispute.
18. Thereafter Mr C attempted unsuccessfully to engage with the Respondent by text, email and phone through until 3 May 2019, and ultimately accepted the Respondent’s conduct as repudiatory and commenced this arbitration.

C. Jurisdiction

19. Despite the Respondent’s objections, we have decided that we do have jurisdiction in relation to this dispute. While it is true that the main terms were agreed by exchange of text messages between 20-22 November 2018, and that exchange did not expressly reference the GTA Trade or Dispute Resolution Rules, the Claimant sought to reaffirm his trading terms by sending the Contract Confirmation by email on 26 November 2018, which did expressly incorporate the GTA Trade and Dispute Resolution Rules.
20. The Respondent had every opportunity to reject that variation. This is not just a case of acquiescence by silence. Nor does the Respondent assert that no contract exists. In our view, by continuing to perform the contract after receipt of the Contract Confirmation, most tellingly by the exchange of text messages on 18 February 2019, the Respondent affirmed the contract and implicitly accepted the terms contained in the Contract Confirmation.
21. Moreover, or perhaps alternatively, it is apparent to us on production of the Additional Contracts, that a course of dealings existed between the parties from at least 22 July 2015 by which the Claimant made it clear to the Respondent that it contracted on GTA terms, including the GTA Dispute Resolution Rules.
22. We find therefore that the contract between the parties was on the terms of the Contract Confirmation, including incorporation of the GTA Trade and Dispute Resolution Rules.

D. Breach of Contract

23. There is no doubt that Mr A’s email on 21 February 2019 was repudiatory. The Respondent does not submit otherwise. In fact, it is clear from Mr A’s statement dated 10 December 2019 that he intended the email to cancel the contract.
24. The Respondent says that it was entitled to repudiate the contract because the Claimant was in breach of its obligation to provide a sample.
25. We agree that there was a contractual obligation to provide a sample. We note that the Contract Confirmation states;
“SUBJECT TO SAMPLE APPROVAL’.

26. The justification for the repudiation appears from the dialogue recorded in Affidavit A2 and Affidavit B2 where both gentlemen record, in identical terms, the following conversation occurring between 19 February 2019;

Grenler: "Mr C wants to deliver the wheat".

Dahari: "Did he send us the samples?"

Grenler: "No. I didn't even think he was still wanting to sell the wheat."

Dahari: "That's it. We don't want his wheat if he can't just do what he said he would. I'll cancel the contract."

On the basis of this exchange, and the available evidence, there is no evidence that the Claimant was in breach of its obligation to provide a sample and no justification for cancelling the contract. It should go without saying that the 500mt was to be delivered in installments over 6 months. To the extent that the Claimant had an obligation to provide samples, it would have provided a sample at the commencement of deliveries. It could not make a delivery until the Respondent confirmed the date and time for delivery.

27. By a text message sent on 18 February, the Respondent stated;
"I can start taking trucks from the first week of March *I'll let you know at the end of February when to send the trucks thanks Mr B.*"(emphasis added)
28. As a result of the Respondent's termination on 21 February, the Claimant was not given an opportunity to provide a sample.
29. For the reasons above we find that Respondent's repudiation was wrongful and that the Claimant was entitled to accept that conduct as repudiatory, which it did by email on 3 May 2018.

E. Damages

30. In the Claimant's Points of Claim, it assess its loss as \$[REDACTED]. This consists of \$[REDACTED] as the loss on the contract tonnage, plus \$[REDACTED] by way of 7-month's carry (February-August).
31. For damages, the market values given align with independent broker confirmations provided by IKON. Along with freight differentials provided by BFB (using delivered Bathurst as the price reference point), the market price as at 3rd May was established.
32. Having found however that the date of the acceptance of the repudiatory conduct was 3 May 2018, we will allow 4-month's carry, being \$[REDACTED], for a total award on damages of \$[REDACTED].

F. Award

33. For the reasons above, our Award is;
- (a) As a result of a course of dealings together with its conduct, affirming the contract following receipt of the Contract Confirmation from the Claimant, which incorporated the GTA Trade and Dispute Resolution Rules, this Tribunal has jurisdiction;
 - (b) The Claimant's claim is allowed;
 - (c) The Respondent shall pay the Claimant \$[REDACTED].
 - (d) The Respondent shall pay the Claimants' costs of this arbitration which we fix at \$[REDACTED].

- (e) The Respondent shall pay the Claimant interest at 7% per annum from 3 May 2018 to the date of this Award.
- (f) The Respondent shall indemnify the Claimant in relation to any fees paid by the Claimant to GTA in respect of this application.

This award is dated at Sydney, the 13th day of February 2020.

Mr Andrew Mead

Mr Graham Barron

Mr Ervin Leong