

**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. 314

Grain Buyer (Trader)
Claimant
and
Grain Seller (Producer)
Respondent

Award

A. Introduction

1. This is the Final Award in an arbitration conducted pursuant to the Fast Track rules of the Dispute Resolution Rules (**Rules**) of Grain Trade Australia Ltd (**GTA**).
2. Pursuant to those Rules, I have been appointed sole arbitrator by GTA.
3. The dispute concerns the existence of a contract between the parties allegedly concluded late in October 2018. The Respondent says (in summary) that no contract was made and this Tribunal lacks jurisdiction to determine the matter.
4. We have read and considered the;
 - (a) Claimant's Points of Claim dated 20 February 2020 (**Claim**)
 - (b) Respondent's Points of Defence dated 6 March (**Defence**).
5. At my request, on 1 April GTA wrote to the parties and asked that they submit evidence of;
 - (a) Any previous contract documents (including terms and conditions) exchanged between the Parties.
 - (b) How the alleged order on the contract referenced at paragraph 5/Appendix 7 of the Points of Claim was initiated and what steps led to the generation of the order.
6. Both parties made further submissions dated 8 April 2020 which I have considered.

B. Facts

7. This arbitration has been conducted under the GTA Fast Track Rules, which support a quick and low cost process. There is no hearing and there are no formal statements of evidence. I establish

the facts on which I make my decision on the balance of probability as appearing to me from the parties' submissions.

8. In August 2017 the parties established a commercial relationship when the Respondents applied for and were granted a Credit Approval by the Claimant dated 14 August 2017. That Credit Approval was subject to Terms of Credit which incorporated the following, under the heading "Definitions";

***Terms of Trade** mean in the case of commodity purchases the Claimant Sales Contract, as amended from time to time, shall apply to all dealings between the Customer and Claimant, in the absence of a duly signed agreement between the Customer and Claimant.*

In its Claim, the Claimant submits that;

The credit application makes it clear that the term of the Claimant's Sales Contract applies to all commodity trades between the two parties. The Sales Contract expressly incorporates the Grain Trade Australia Trade Rules and Dispute Resolution Rules.

The only Claimant' Sales Contract in evidence is the contract document dated 30 October 2018. It incorporates the GTA Trade and Dispute Resolution Rules.

9. Between August 2017 and April 2019 the Claimants supplied products to the Respondents. It appears to be common ground that these orders were "spot" business, placed verbally (whether by phone or face-to-face is not specified) and evidenced only by a Tax Invoice issued at around the time the product was supplied.
10. At the centre of the dispute are the events of 30 October 2018. According to the Claimant, and as set out in paragraph 3 of the Claim, on that day, Mr A of the Claimant visited the Respondent's farm and following a discussion, the Respondent agreed to purchase 168 tonnes of SFW wheat, delivered [REDACTED] at \$470 tonne from January 2019 with \$3 carry to apply from February 2019 onwards.
11. As evidence to support this submission, the Claimant has produced;
 - (a) an extract from Mr A's diary, where under "30" (assume 30 October) is written "Respondent 168T wheat @ \$470 \$3 Feb."
 - (b) an email apparently sent by Mr A to the Claimant at 6.04pm on 30 October 2018 confirming these details, and an email from Mr B to Mr A apparently allocating a contract number [REDACTED].
 - (c) an email from Mr B to [REDACTED] annexing a copy of the Contract of Sale document [REDACTED] (**Contract of Sale**).
12. The Claimant also submits that Mr A personally delivered a copy of the Contract of Sale to the Respondents at their farm "on the week commencing 6 November."
13. For their part, the Respondents in their Defence deny paragraph 3 and deny that a contract was made.
14. They do however concede that they agreed to consider entering into a forward contract "and request that for their consideration in a verbal conversation with Mr A at about 9.30pm on the 30th October 2018."
15. The Respondent's submission at paragraph 3 of the Defence goes on to say

It is impossible that there was an agreement at 6.04pm on 30 October 2018 when Mr A confirmed the order to the Claimant.

The wheat contract, [REDACTED], was not signed by the Respondents and was rejected by them consistent with all previous rejections to lock in grain purchases by forward trades.

16. The Respondents do not explain why they say it was impossible, nor is there evidence of “all previous” rejections.
17. As I understand the Respondents’ case, they accept that Mr A visited their farm on 30 October 2018 and that a ‘forward’ wheat contract was discussed. Neither party says precisely when Mr A arrived at and left the farm, but the Respondents submit that at 9.30pm they asked the Claimant to provide a draft contract for their consideration, but this was never signed and was in fact rejected by them.
18. The Respondents also appear to challenge the existence of an agreement to arbitrate this dispute.
19. To that end, they refer to the “Terms of Credit” and submit that;
 - (a) The “Claimant Sales Contract” referred to in the definition of “Terms of Trade” was not annexed; and
 - (b) Within “Other Conditions” it provides that the parties submit to the “non-exclusive jurisdiction of the courts of Victoria in respect of any proceedings relating to” the Terms of Trade.
20. The Respondents also refer to the exclusive jurisdiction clause within the Deed of Guarantee and Indemnity incorporated in the Terms of Trade.

C. Determination

21. In summary, I have to decide whether there was an agreement to refer disputes to GTA arbitration, and also decide whether the parties entered into a contract for the sale of grain.
22. For the avoidance of doubt, both the Article 25.1 of the GTA Dispute Resolution Rules, and section 16(1) the *Commercial Arbitration Act 2010 (NSW) (CAA)* authorize me to determine my own jurisdiction.
23. As I understand the Claimant’s case, it says that the contract was concluded some time on 30 October 2018. The Contract of Sale sent by email subsequently on 31 October 2018 was intended to record the terms of the agreement reached the day before.
24. As I have mentioned above, the events of 30 October 2018 are central to this claim. If there was a contract, that is when it was concluded. Neither party however has produced a witness statement nor other evidence of what was actually said or agreed during Mr A’s visit.
25. Similarly, though the Claimant submits that a copy of the Contract of Sale was hand-delivered to the Respondents sometime in the week commencing 6 November 2018, there is no evidence to support that the visit took place or what was said or otherwise took place during the alleged visit. And it is denied by the Respondents in any event.
26. So far as the jurisdiction of GTA is concerned, there is no evidence that GTA terms were mentioned during the 30 October negotiations. Similarly, there is no mention in the Diary entry that the contract was subject to GTA terms. The fact that the GTA Dispute Resolution Rules were referenced in Contract of Sale is not determinative as there is no evidence that these terms were accepted by the Respondent.

27. The Claimant submits that on 9 January 2019 the Respondent placed an order under contract [REDACTED]. If it had, this may have amounted to evidence of performance of the contract and acceptance of its terms. But again there is no objective evidence, and no evidence coming from the Respondent, that the Respondent placed that order, and the Respondent expressly denies placing the order.
28. If any contract is subject to GTA terms, it must be by virtue of the reference in the Terms of Trade to the pro-forma 'Claimant Sales Contract' "as amended from time to time". The fact that the contract was not annexed to the Terms of Trade is not conclusive. The Respondents signed the Application for Commercial Credit.
29. Pursuant to section 7(8) of the CAA;
- The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.*
30. I am not satisfied that I can conclude that the pro-forma 'Claimant Sales Contract' referenced in the Terms of Trade was such a document. The pro-forma has not been produced in evidence and there is no evidence that the Contract of Sale No. [REDACTED] is in the same form as the pro-forma 'Claimant Sales Contract'. It is not self-evident from its description in the Terms of Trade that as at 14 August 2017 when the Credit Application was signed, the pro-forma 'Claimant Sales Contract' incorporated GTA terms.
31. I find therefore that the GTA Dispute Resolution Rules were not incorporated into any contract the subject of this reference.
32. In relation to the contract itself, I do not have sufficient objective evidence to conclude that a contract was concluded verbally on 30 October 2018, nor do I have any evidence that the Contract of Sale sent the next day was consistent with the terms agreed, nor that the Respondents agreed to be bound by those terms.

D. Award

33. For the reasons above, my Award is;
- (a) The claim must be dismissed;
 - (b) The Claimant shall pay the Respondent's costs which I fix at \$ [REDACTED] GST exclusive.
 - (c) The Claimant shall indemnify the Respondent in relation to any fees paid by the Respondent to GTA in respect of this application.

This amended award is dated at Sydney, the [REDACTED] day of May 2020.

Mr Simon Clancy