



NACMA ARBITRATION AWARD

Claimant – Straw Producer Pty Ltd

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Respondent – Straw Merchant Pty Ltd

JUDGMENTS

1. NACMA Arbitration No. 28/03 - Award dated August 2004

ARBITRATORS

- Clint Munro – Arbitration Committee Chairman nominated by NACMA
- Kim Vater – arbitrator nominated by the Claimant
- Henry Wells – arbitrator nominated by the Respondent

DETAILS

- This dispute involved a number of contracts involving the supply of straw using standard NACMA terms and conditions of sale.
- The delivery period for all contracts was either over a two or three month period. There was no specific tonnage allocated in any one month.
- Payment was to be 30 days end of week of delivery with the buyer to supply a Recipient Created Tax Invoice.

DISPUTE

- The buyer contended that a certain tonnage needed to be delivered per month, implying “even spread”.
- The seller maintained that they only had to deliver the tonnage in the agreed delivery period.
- The buyer called the seller in default and cancelled the contract at Fair Market Value and placed a claim on the seller.
- The seller was not paid for deliveries

CLAIM

- The seller claimed payment for deliveries and damages
- There was a counterclaim from the buyer for damages for product not delivered

MAJOR FINDINGS

The Committee:

- agreed that the seller only had to deliver the tonnage in the delivery period and that there was no obligation to supply according to the NACMA definition of “even spread”.
- found that the buyer was delinquent in payments against both contracts and that the seller was entitled to stop deliveries until the delinquent indebtedness was satisfied.
- Issued an award supporting the sellers claim for payment of product delivered plus interest and reasonable costs.

OUTCOMES FOR MEMBERS

- Delivery of product is at sellers call (NACMA 13.0) unless there is specific terms to the contrary
- All contract amendments must be in writing and immediately confirmed (NACMA 1.3)
- Parties are able to withhold delivery of product if the buyer is delinquent regarding payment (NACMA 13.3)
- Parties are not able to withhold payment for deliveries already effected and not subject to a claim. (Common law)
- Even spread must be a term of the contract and is never implied (NACMA 12.6).

FULL AWARD

Note: The following award has been modified to ensure the anonymity of the parties.

Introduction

The parties entered into the following contracts, incorporating NACMA Trade Rules, for the sale of wheaten straw from Straw Producer Pty Ltd (the Claimant) to Straw Merchant Pty Ltd (the Respondent);

1. The Respondent Purchase Order XXXX (PO XXXX), dated 7/11/02. This purchase order was subsequently amended on consent of both parties on 17/1/03.
2. The Respondent Purchase Order YYYYY (PO YYYYY), dated 23/1/03

Both purchase orders have been referred to as "the Contracts".

The Claimant has referred the dispute arising under the Contracts between itself and the Respondent to NACMA to be the subject of a Full Arbitration process.

The Arbitration Committee consisted of:

- Mr Kim Vater, nominated by The Claimant
- Mr. Henry Wells, nominated by The Respondent
- Mr Clint Munro, Arbitration Committee Chairman, appointed by NACMA

The following submissions were received from both parties, and were considered by the Committee;

1. Claimant's Submission, dated 31 March 2004 from the solicitors for the Claimants.
2. Respondent's Defence Submissions, dated 7 May 2004 from the solicitors for the Respondents
3. Claimant's Rebuttal of Defence, dated 26 May 2004 from the solicitors for the Claimants.
4. Respondent's Surrebuttal, dated 18 June 2004 from the solicitors for the Respondents

There is also dispute on contracts for transportation of wheaten straw and the transport of sorghum stubble, variously described as Contracts 3 and 4 in the Claimant claim. There is no documentary evidence that either of these verbal contracts referred to NACMA Trade Rules and therefore NACMA arbitration. The Arbitration Committee therefore will only consider the disputes for the contracts listed above, PO XXXX and PO YYYYY.

There was considerable comment by both parties regarding telephone calls and other conversations which may have had a material bearing on the arbitration. No statements of evidence were tendered by either party. The Committee has admitted as evidence facts as agreed by both parties.

Many of the unsubstantiated comments where there is disagreement between parties, have not been admitted by the Committee as there is no documentary evidence in the form of day book notes, confirmation letters/faxes, statutory declarations etc to justify the correctness of the comments.

Agreement on the facts

Contract specifications, terms and conditions

Contract 1 was tabled by both parties, whilst Contract 2 was only tabled by the Respondent in its evidence. Both contracts were only signed by the Respondent and appear to have been faxed to the Claimant as follows:

- PO XXXX faxed 7/11/02 with subsequent amended contract faxed 17 January 2003; and
- PO YYYYY faxed 23/1/2003.

The Claimant has not disputed any of the specifications or terms and conditions of either contract and therefore the Committee concluded that both parties were in agreement as follows:

PO XXXX (Contract 1)

- Commodity: Wheat Straw
- Specification: Moisture – 14% maximum, purity – 95% minimum, no foreign matter such as stones, dirt or sticks, no mould.
- Quantity: 1,000 tonnes
- Packaging: large square bales
- Delivery period: February – March. There was no further qualification on this point.
- Delivery Point: agreed
- Weights: Destination weights
- Price /tonne: \$115, ex. GST
- Price basis: Delivered
- Payment terms : 30 days end of week of delivery.
- Remarks: The contract was subsequently amended on 17/1/03 from a hectare contract with three growers to a firm tonnage contract.
- NACMA Trade Rules to apply.

PO YYYY (Contract 2)

- Commodity: Wheat Straw
- Specification: Moisture – 14% maximum, purity – 95% minimum, no foreign matter such as stones, dirt or sticks, no mould.
- Quantity: 1,000 tonnes
- Packaging: large square bales
- Delivery period: February – April. There was no further qualification on this point.
- Delivery Point: agreed
- Weights: destination weights
- Price /tonne: \$100, ex. GST
- Price basis: delivered
- Payment terms : 30 days end of week of delivery.
- Remarks: The contract was subsequently amended, by verbal agreement, at the end of January 2003 to alter the Delivery Point. The effect of this change was to increase the delivered price by \$100/tonne, excluding GST. Unfortunately, this amendment was not confirmed in writing, however the amendment was recognised in evidence by both parties and therefore the Committee has accepted this change to the contract.
- NACMA Trade Rules to apply.

The Committee particularly notes the Delivery Period and Payment Terms in both contracts as critical elements in this arbitration.

Payment Terms

The Claimant claims that the payment terms were 30 days end of week of delivery for both purchase orders, with the first payment for PO XXXX due 17 March 2003. The Respondent agreed that the first payment for PO XXXX was due on 17 March 2003.

Although not stated by either party, the first payment under these terms for Contract 2 would have been 21 April 2003.

Recipient Created Tax Invoice (RCTI)

The Claimant accepted the offer from the Respondent, dated 20 February 2003 for the Respondent to issue Recipient Created Tax Invoices for deliveries made to the Respondent. The required documentation was executed by the Claimant and forwarded by the Claimant to the Respondent on 20th February 2003.

As Payment Terms were 30 days end of week of delivery, it is reasonable to expect that the Respondent would issue a RCTI at the end of weeks where deliveries from the Claimant were effected as per the numerous Load Receipt Dockets issued by the Respondent and submitted in its Defence.

Tonnages delivered

Both parties agreed to tonnages delivered against both contracts, being:

- PO XXXX – 420.92 tonnes
- PO YYYY – 225.8 tonnes

Disagreement on the facts

There are material matters on which the parties do not agree.

1 Delivery Period and tonnage to be delivered

In the Respondent's defence, the Respondent details the tonnages it claims should have been delivered each month against both contracts. The Respondent describes a situation where the delivery of the straw should have been evenly spread over the contracted months for both contracts. This arrangement is common in the industry and is referred to as "even spread" and defined in the NACMA Trade Rules, Rule 12.0 (f).

The Claimant contends that for Contract 1 that "...the Claimants do not regard the February – March date as an essential term of the contract." as there had been subsequent verbal alterations. These alterations were not confirmed in writing as per Rule 1.3 – Alteration of Contract.

The Arbitration Committee finds that the delivery period was February – March and that this term is an essential term of the agreement. The Arbitration Committee further adds that the Claimant was required to deliver the 1,000 tonnes by the end of the delivery period, being the end of March.

The Claimant argues that for Contract 2 that ".....delivery would take place as and when required rather than a specific volume tonnage in one month or week." Also...."The contract stipulates that one thousand tonnes would be delivered through the period February to April 2003."

In the absence of a specific reference to "even spread" the Arbitration Committee finds that the Claimant is required to deliver the tonnage at sellers call, NACMA Trade Rules, Rule 13.0, with the Claimant responsibility to deliver the total tonnage delivered by the end of the delivery period for both contracts being:

- Contract 1 - 1,000 tonnes delivered by the end of March; and
- Contract 2 - 1,000 tonnes delivered by the end of April.

2 Payment, cessation of deliveries and breach of contract.

There is disagreement as to whether the non payment of the first payment constituted a breach of contract. The following table details the situation.

PO	First Delivery	EOW of delivery	Payment Due (30 days EOW of delivery)	Payment effected on time	First payment
XXXX	10/2/03	14/2/03	17/3/03	No	2/6/03
YYYY	19/3/03	21/3/03	21/4/03	No	2/6/03

Both parties agree that the first payment against PO XXXX was due on 17th March 2003. The Respondent admits in its defence, that it failed to pay invoices due on 17 March 2003. In the Respondent Defence the Respondent "Denies that it is a breach of contract" but does not offer any explanation to the Arbitration Committee as to why it is not a breach.

The Arbitration Committee finds that the Respondent was delinquent in its payments against both contracts and hence in breach of contract and that The Claimant was entitled to stop deliveries of further product until the delinquent indebtedness was satisfied as per Rule 13.3 – Delinquent Payments at Time of Conveyance.

RCTI and giving of notice by the Claimant

The Claimant claims that the rescission of the authority to issue RCTI's by the Respondent issued by a representative of the Claimant on 21st May 2003 also had the intention of giving Notice pursuant to Rule 21.1.

The Respondent in their defence claim this notification did not constitute giving of notice.

The Arbitration Committee finds in favour of the Respondent, in that the withdrawal of authority to issue RCTI's did not constitute giving of notice of contract default as per Rule 21.1.

Date of Contract Cancellation

The Respondent wrote to The Claimant on 29 May 2003 announcing that the Claimant was in Default against both contracts and notifying that they would "cancel the defaulted portion of the delivery or shipment at fair market value."

The Arbitration Committee finds that the Respondent was not entitled to issue this notice as the Claimant was entitled to withhold deliveries until delinquent payments had been effected. The Respondent itself was in breach for wrongfully repudiating its contractual obligations.

The Arbitration Committee finds that the giving of this notice effectively identified 29 May 2003 as the day of breach and contract cancellation.

The Claimant Trading Losses

The Claimant claims that it suffered loss due to the default of the Respondent, Claim. The Committee takes 29th May 2003 as the last day of the contract and hence the cancelled portion of the contract needs to be valued at fair market value, as per Trade Rule 21.1 (f).

The Respondent defence details offer prices for the Straw on various dates from 30th May to 5th June 2003 with the offer values from \$148.50 (advertisement, The Land 5th June 2003) to \$160.00/tonne. As these values are well above the contract value, the Arbitration Committee finds that The Claimant is not entitled to claim for damages.

Interim Final Award

Having considered the Submissions, and for the reasons stated above, the Arbitration Committee made the following Final Award:

That the Claim made by the Claimant is successful; and that the Respondent was instructed to pay the Claimant for:

1. all deliveries made to the Respondent and as detailed in the award; and
2. costs, such costs to be fair and reasonable. This includes the Claimant's Arbitration and solicitors fees;
3. Interest pursuant to the Section 83A of the District Court Act (currently 9% per annum).