



NACMA ARBITRATION AWARD

Claimant – Grain Buyer Pty Ltd (Buyers)
&
Respondent – Grain Seller Pty Ltd (Sellers)

JUDGMENTS

1. NACMA Arbitration No. 920 - Award dated March 2004

ARBITRATORS

- Malcolm McMahon, arbitrator nominated by Buyer Pty Ltd
- Henry Wells, arbitrator nominated by Seller Pty Ltd
- George Hammond, arbitrator nominated by NACMA and Committee Chairman

CLAIM

The seller claimed payment against the claim they had received from the importing country buyer as delivered product did not match the commodity specification.

AWARD

The Claimant, Grain Buyer Pty Ltd was unsuccessful and Grain Sellers Pty Ltd were awarded costs including reasonable arbitration and legal fees.

DETAILS

- This dispute involved the quality of faba beans delivered against a broker DCT contract.
- There was no disagreement on quantity supplied and shipped or the delivery points.
- There was also agreement that the bags containing the commodity were incorrectly marked and Sellers were prepared to pay damages on receipt of evidence.
- Buyer received a claim from their buyers in the importing country regarding quality of product delivered.
- Buyers tendered as evidence, quality certificates from the importing country. These certificates contained incorrect information including details of containers not part of the shipment.
- Sellers supplied samples of the product in recognition of their obligations however these were lost by Buyers.
- Sellers was able to demonstrate product quality with the tendering of cleaning inspection records.
- Sellers maintained that there was a time bar associated with this dispute, refer Rule 16 Finality of the NACMA Trade Rules.

MAJOR FINDINGS

The Committee:

- agreed that the seller only had to deliver the product to the nominated delivery point at which time title changed and their responsibilities ceased.
- Noted that it is the buyer's responsibilities to ascertain certificates required to be supplied by the seller, refer DCT Contract Clause 11.
- determined that the product quality should have been determined prior to shipment at the container packing point.
- agreed that the quality certificates supplied from the overseas Q.A Company were inconsistent against container documentation.
- Agreed that there was a time bar and that the buyer should have notified the seller there was an issue within 5 business days off delivery. Refer NACMA Trade Rule 16 Finality.

OUTCOMES FOR MEMBERS

- Ensure product quality is objectively assessed by way of a certified quality certificate prior to or at the container yard.
- Consider retention of samples if you are the seller as a fall back provision. Storage protocols need to apply.
- Ensure all documentation is able to be cross matched to demonstrate accuracy.
- Maintain product quality (inspection) records which are able to be accessed in the case of quality issues.
- Ensure that if there is an issue that the sellers are notified as per Rule 16 Finality.

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 faba beans;

1. Seller Sales Contract No 10477, dated 27 September 20XX, evidenced by DCT Broker Pty Ltd Brokerage Contract 4303/35060 dated 20/9/00 and Buyer Pty Ltd Confirmation of Purchase AC 2001015 dated 21 September 20XX
2. Seller Sales Contract No 10483, dated 27 September 20XX, evidenced by DCT Broker Pty Ltd Brokerage contract 4335/35085 dated 27/9/00 and Buyer Pty Ltd Confirmation of Purchase AC 2001016 dated 21 September 20XX.
3. Seller Sales Contract No 10743, dated 24 January 20XX, being tonnage transferred from Seller Sales Contract 10483.

The Claimant and Respondent are in dispute regarding the quality of the faba beans delivered against 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 consists of :

- Mr Malcolm McMahon, appointed by Buyer Pty Ltd
- Mr. Henry Wells, appointed by Seller Pty Ltd
- Mr George Hammond – Arbitration Committee Chairman, appointed by NACMA

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

1. Claimant's Submission, dated 25 September 20YY
2. Respondent's Defence Submissions, dated 31 October 20YY from solicitors for the Respondents
3. Claimant's Rebuttal of Defence, dated 28 November 20YY.
4. Respondent's Surrebuttal, dated 30 January 2004 solicitors for the Respondents

Agreement on the facts

The Contracts were signed by both parties.

Material terms of all the contracts include:

- Commodity – Faba Beans
- Grade – as per NACMA CSP 18 Minimum Export Standard for Australian Machine Dressed Faba Beans
- Quantities and destination
 - Seller Sales Contract No 10477 – original contract weight 215 tonnes, however by agreement of the parties
 - 43 tonnes or 2 containers was cancelled on Buyer request dated 3/1/01
 - 64.5 tonnes or 3 containers, ex Regional Grain Trading was delivered to Melbourne
 - 107.5 tonnes or 5 Containers, ex Regional Grain Trading was delivered - to overseas port, (but there is no claim against this shipment).
 - Tonnage involved in claim – 64.5 tonnes, destination port
 - Seller Sales Contract No 10483 - original contract weight 215 tonnes, however by agreement of the parties:
 1. 107.5 tonnes or 5 containers, ex Regional Grains Pty Ltd was delivered at Melbourne
 2. 107.5 tonnes was transferred to Seller Contract 10743
 3. Tonnage involved in claim – 107.5 tonnes, destination Destination port

Seller Sales Contract No 10743, dated 24 January 2001, being tonnage transferred from Seller Sales Contract 10483.

- 107.5 tonnes or 5 containers, ex Australian Foods Co Pty Ltd was delivered to Fremantle
- Tonnage involved in claim – 107.5 tonnes, destination port

Total quantity involved in claim is 279.5 mt or 13 containers, average weight of 21.5 mt with destination of Destination port

- Price - \$370 per mt
- Price Basing Point – Container Terminal
- Place of delivery – Container Terminal.

Delivery was originally Sydney/Melbourne. This was subsequently amended to Melbourne for 8 containers and Fremantle for 5 containers.

- Delivery period - December 20XX. The delivery period was extended with the agreement of both parties
- Weight, quality and condition of the commodity were “final at loadport as per standard Buyer Pty Ltd” contract. Refer Buyer Confirmation of Purchase AC2001016 and AC2001015.
- NACMA Trade Rules to apply
- The marking terms on the bags sourced from Australian Foods was not as instructed leading to penalties incurred by Buyer. Refer Jo Flo from Seller to Jimbo Smith 16 May 2001. Buyer has advised that the penalty is AUD 4716. However, this amount is not backed up by documentary evidence.
- There was no requirement in the Contracts for samples to be drawn at either the container packing yard or container terminal, hence there was no quality certificates issued.
- Buyer tendered the Regional Grain Company Pty Ltd, Cleaning Inspection Record log sheets which indicated frequency of sampling and quality parameters for CSP 18. The quality parameters as detailed in these records was within CSP 18 requirements.

Incorrect bag marking. There is agreement by both parties that the bags were marked incorrectly. This is conceded by Seller in fax dated 16 May 2001 (page 95 arbitration proceedings), from Jo Flo to Jimbo Smith at Buyer and more specifically in letter dated 23 October 2001 (page 134 arbitration proceedings) from Respondent’s Solicitors for Seller to Buyer which states, *“We are instructed that our client agrees to pay Buyer for the incorrect bag marking claim on receipt of evidence from Buyer of the amount paid to its buyer.”*

Disagreement on the facts

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

1 Provision of samples

Buyer requested samples to be provided by Seller– refer fax dated 16 May 2001 from Jimbo Smith Buyer to Jo Flo at Sellers. Seller in their Defence, tendered evidence in the form of Ward Consignment Notes and Load Delivery Dockets indicating that samples from Regional Grains and Australian Foods were dispatched to and received by Buyer.

This evidence was not challenged by Buyer in their Rebuttal.

Based on the documentation provided, the Committee were satisfied that the samples were dispatched by Seller in a timely manner and that they were delivered to Buyer.

2 Validity of QA Company Sampling and Analysis Report, dated 28/3/01

Seller questioned the validity of this report and whether the report could be used to quantify the Buyer damages. The Committee has the following comments.

- The containers were unloaded and the bags moved to a warehouse. Photos supplied by Buyer detail a warehouse where it would be impossible for any mechanical movement of

product, hence all bags would have been moved and stacked manually and in a random fashion. The bags were stacked wall to wall and to the roof. This leads to the following issues.

1. Damage to the product. As the bags were manually handled there is the possibility of the product being damaged in transit between the point where the containers were unloaded (undetermined) and the warehouse where it was stacked. Also, the photos supplied by Buyer show the bags being walked over presumably during the sampling process and also during the loading and unloading of transport vehicles and during stacking.
 2. Ability to draw a representative sample. The method of stacking would not enable access to any bag for the sampling process. There is no description as to how the sampling was conducted and no comment verifying that the sample was representative of the rejected product.
- The Sampling was over the entire consignment and also included lots that were not the subject of the claim. The sample may therefore have been commingled and hence it would be difficult to differentiate quality differences between the consignments that made up the entire Seller consignment.
 - The QA Company Report details that the sample was drawn from 18 containers, whereas the claim on quality is only for 13 containers. Thus the sampling process may have drawn samples from bags that were not the basis of this dispute. The Committee believes that as the bags were mixed with bags from another consignment that it was impossible to track the product in question and hence the sample used for analysis was compromised.

Cognisant of the above points, the Committee does not admit the QA Company Report as evidence regarding product quality. The Committee makes the point that product quality should have been determined prior to shipment at the container packing point or container terminal.

3 Evidence of Product Quality

Seller was able to demonstrate that there was reasonable indications that product quality was satisfactory at shipment by provision of Wards Consignment Notes for samples and the Regional Company, Cleaning Inspection Records log sheets.

However, the evidence given by Buyer gives no indication that the sample collected by QA Company Ltd was not free of contamination from other sources as previously discussed. Therefore, it is unclear as to product quality at the warehouse in.

4 Time Bars

Seller asserts that Buyer is in breach of the period in which they were entitled to lodge a claim. Buyer assert that their claim is timely.

The Committee believes that Rule 16 Finality, of the NACMA Trade Rules applies, *"All adjustments or compensation claimed based on defect of quality or condition or weights which shall be apparent upon reasonable inspection must be advised within five (5) business days after unloading or presentation of appropriate documents and must be formally confirmed by written notice, letter or facsimile within thirty (30) consecutive days of delivery of the consignment."*

The contracts were DCT contracts and the Committee finds that DCT is the point at which delivery took place. The deliveries took place in January. The first advice from Buyer to Seller of a quality dispute was made late in April, which is beyond the period in which Seller should have received advice of the claim.

Accordingly the Committee rules that Buyer failed to notify Seller within the time requirements as detailed in Rule 16 of the NACMA Trade Rules.

5 Supporting Buyer documentation

The Committee did not admit as evidence much of the Buyer claim as it was tendered in Arabic without translation.

Award

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

That the claim made by the Claimant is unsuccessful; and that;

1. Buyer is instructed to pay Seller costs, such costs to be fair and reasonable. This includes the Respondent's Arbitration Fees and solicitors fees. Seller is to submit their detailed schedule of costs to NACMA.
2. Seller to reimburse Buyer for misbranding of the bags as per the Buyer Surrebuttal, upon provision by Buyer of documentation supporting the penalty imposed by the Importing Country Government and paid by Buyer. Supporting documentation must be provided in English.