

## **Notice to Members**

### **Fast Track Arbitration No. 93 (NACMA)**

**Date of Issue of Award: 26<sup>th</sup> February 2009**

**Claimant:** Commodity Buyer

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**Respondent:** Commodity Seller

**Arbitration Committee** – Bob Watters

This arbitration was conducted as a Fast Track arbitration and hence has only one arbitrator nominated by GTA and approved by the parties.

#### **Claim**

This dispute relates to a delay in making a payment under a contract and the Sellers's subsequent repudiation of the contract and non-delivery of the balance of the contract.

#### **Issue for determination**

Was the Claimant's delay in processing payment justified the repudiation of the contract by the Respondent?

#### **Details**

The parties entered into a Multi Grade Barley contract for the sale, by the Respondent to the Claimant, of 300mt of barley.

The signed contract referenced a Delivery Card Number (0000001). The payment term was "Cash 15 days, end week of Delivery/transfer."

The Respondent delivered 125.31mt of barley under the contract against a different delivery card (0000002) than the one referenced in the contract.

The Respondent believed it was the Claimant's responsibility to ensure the correct NGR appeared on the contract. The Respondent claimed it was default by the Claimant in meeting this obligation that resulted in the repudiatory delay in payment and therefore the Respondent was entitled to bring the contract to an end.

#### **Award findings**

The AC found:

- Despite the incorrect NGR appearing on the contract, the Respondent signed the contract. The Claimant was entitled to assume that, in the absence of any corrections, the contract was correct.
- Any breach of the payment term by the Claimant, was caused, or at least significantly contributed to by the act of the Respondent.
- The delay in payment was not repudiatory. It was an error, contributed to by the Respondent, which was remedied when brought to the attention of the Claimant.

#### **Award**

The Claimant was successful and the Respondent was ordered to pay \$21,137.49 for the non-delivery of 174.69 metric tonnes of barley and the Claimant's arbitration and legal fees.

#### **Take out**

**Always check that all details on any contract you sign are correct.**

IN THE MATTER OF THE  
COMMERCIAL ARBITRATION ACT 1984 (NSW)  
AND IN THE MATTER OF AN ARBITRATION  
UNDER THE RULES OF THE NATIONAL  
AGRICULTURAL COMMODITIES  
MARKETING ASSOCIATION LTD

**NACMA Arbitration No. 93**

**Claimant**

And

**Respondent**

Final Award

## 1. INTRODUCTION

The Claimant in this arbitration is a company incorporated under the laws of Australia.

The Respondent is a grain grower.

This dispute relates to a delay in making a payment under contract no. 123 between the Claimant as buyer and the Respondent as seller of barley and the Respondent's subsequent repudiation of the contract and non-delivery of the balance of the contract ("the Contract.")

The issue which falls for determination is whether the Claimant's delay in processing payment justified the repudiation of the contract by the Respondent.

The reference was conducted as a "Fast Track" arbitration. The jurisdiction of NACMA was not in issue and both parties submitted to the process and signed an arbitration contract dated 2 September 2008.

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

1. Claimant's Points of Claim, dated 16 January 2009.
2. Respondent's Points of Defence, dated 2 February 2009.

## 2. FACTS

The following facts appear to be largely agreed, based on the parties' submissions:

- 2.1 The parties entered into Multi Grade Barley contract no. 123 for the sale by the Respondent to the Claimant of 300mt of barley season 2007/2008.
- 2.2 The contract (which was signed) referenced "Delivery Card Number(s): 0000001". The payment term was "Cash 15 days, end week of delivery/transfer." The contract otherwise incorporated terms and conditions on the reverse, none of which are relevant to this dispute. I

note that the contract does not appear to incorporate the NACMA Trade Rules.

2.3 The contract was sent to the Respondent under cover of a letter from the Claimant dated 11 July 2007 which stated:

"To enable us to pay you in a timely manner, it is essential all details on the Confirmation of Contract are accurate. Please ensure that delivery complies with the contract specifications, including; Delivery Card Number".

2.4 From 20-27 November 2007, the Respondent delivered 125.31 mt of barley under the contract. It is asserted by the Claimant and admitted by the Respondent that these deliveries were made "against NGR number 0000002", that is, not the same NGR as referenced in the contract.

2.5 It appears accepted on the papers that the reason for the delay in payment was that the delivery was recorded against an NGR other than the NGR identified in the contract. It is the Respondent's position that it was the responsibility of the Claimant to ensure that the correct NGR appeared on the contract and that it was default by the Claimant in meeting this obligation that resulted in the repudiatory delay in payment, which the Respondent was entitled to accept as bringing the contract to an end.

### **3. DECISION**

#### **Damages**

I do not accept the Respondent's submissions.

While there is no explanation in the documents why the incorrect NGR appeared on the contract, the Respondent has nevertheless signed the contract. The Claimant was therefore entitled to assume that, in the absence of any corrections which it invited in its 11 July letter, the NGR along with all other details in the contract was correct and process the contract accordingly.

If there was a breach of the payment term by the Claimant, it was caused, or at least significantly contributed to by the act of the Respondent. Further, there does not appear to be any provision of this contract rendering time of the essence. Regardless of which version of events I accept, it seems clear that when the Respondent contacted the Claimant to inquire about payment, the Claimant accepted that the payment had not been made, that it needed to be made, and set about arranging at, albeit at snail's pace. The Claimant certainly did not assert that there was no payment due, and even appears to have included a payment of interest.

I find that the delay in payment was not repudiatory. It was an error, contributed to by the Respondent, which was remedied when brought to the attention of the Claimant.

The Claimant is therefore awarded \$21, 137.49 for the non-delivery of 174.69 metric tonnes of barley.

#### **4. AWARD**

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

1. The Claim is allowed.
2. The Respondent shall pay the Claimant damages in the amount of \$21,137.49.
3. The Respondent shall pay the Arbitration fees of \$4000.00 being the arbitration fees paid the Claimant on behalf of both the Claimant and Respondent
4. The Respondent shall pay the Claimant's costs on a party and party basis, and expenses including relevant fees payable to NACMA. The parties are directed to attempt to settle costs between them within the next 14 days, failing which the costs shall be assessed by the Supreme Court of New South Wales in accordance with section 34(1)(c) of the *Commercial Arbitration Act (NSW) 1984*.

**And I so publish my Award.**

..... **Date: ...../...../2009**  
Mr Bob Watters, Arbitrator, appointed by NACMA.