GRAIN TRADE AUSTRALIA

Grain Trade Australia Limited Level 11, 56 Pitt Street Sydney NSW 2000
PO Box R1829 Royal Exchange NSW 1225
Phone: +61 2 9247 6408 Fax: +61 2 9247 9153
Email: admin@graintrade.org.au Web: www.graintrade.org.au

Arbitration No. 143

Notice to Members

Date of Issue: **July 2011**

Claimant: **Grain Buyer**
&
Respondent: **Grain Seller**

Arbitration Committee (AC)

- Mr Gerard Langtry, nominated by the Claimant;
- Mr Brett Cooper, nominated GTA in lieu of a nomination from the Respondent;
- Mr Angus McLaren, Chairman appointed by GTA.

1 Dispute

At issue in this dispute is the question of contract formation and default, being non delivery of grain against the contract. Damages equated to the non payment by the grain seller of options purchased as part of the contract.

2 Facts

It must be said from the outset that the Respondent has denied, or does not admit, virtually all of the Claimant's allegations. Leaving that to one side for the moment, it is alleged by the Claimant that the Respondent:

1. signed a Contract Master Agreement;
2. entered into a Contract signed by the Claimant and appears to bear the Respondent's signature
3. nominated an "Authorised Persons"
4. appears to have executed a "Preferred Customer Information Form."

The Claimant annexed these various documents to its Claim. They appear to be signed by the Respondent. That much is not denied by the Respondent, though neither is it admitted.

It is the Claimant's case in summary that the Respondent defaulted in performance of the Contract in failing to deliver any grain.

3 Damages

It is incumbent on Claimants in arbitrations to produce clear and rational calculations of damages claimed with such supporting documents as may be necessary. There is little point going to lengths to establish liability if there is then no evidence to support the damages claim.

In the event the Tribunal was satisfied with the calculation of liquidated damages submitted by the Claimant.

Having considered the Submissions the Tribunal made the following Final Award:

1. The Claim is allowed.
2. The Respondent to pay damages to the Claimant in the sum of $38,126.36.

IN THE MATTER OF THE COMMERCIAL ARBITRATION ACT 1984 (NSW) AND IN THE MATTER OF AN ARBITRATION UNDER THE RULES OF GRAIN TRADE AUSTRALIA LTD

GTA Arbitration No. 143

Grain buyer
(Claimant)

and

Grain seller
(Respondent)

Final Award

1. Introduction

This is an arbitration pursuant to the Dispute Resolution Rules of Grain Trade Australia Ltd ("GTA").

At issue in this dispute is the question of contract formation, and default.

The Arbitration Committee comprises:

- Mr Gerard Langtry, nominated by the Claimant;
- Mr Brett Cooper, nominated GTA in lieu of a nomination from the Respondent;
- Mr Angus McLaren, Chairman appointed by GTA.

The contract the subject if this dispute is an Grain buyer derivative based contract. The "Master Agreement" behind the contracts provided as follows;

"DISPUTES

Either party shall be entitled to refer any dispute arising out of this contract and which cannot be resolved between the parties to NACMA or FICS as appropriate."

We have been provided with copies of an Grain buyer derivative based contract signed by the Respondent. We find therefore that we have jurisdiction in relation to the matters in dispute and that this Tribunal has been properly constituted in accordance with the Grain Trade Australian Ltd Dispute Resolution Rules.

As the Tribunal was constituted prior to 1 October 2010, this proceeding is governed by the *Commercial Arbitration Act* 1984 (NSW).

While the Respondent declined to appoint an arbitrator, both parties have nevertheless participated in the process.

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

1. Claim dated 12 October 2010;
2. Respondent's Defence dated 11 November 2010;
3. Claimant's Points of Reply dated 30 November 2010;
4. Respondent's Surrebuttal dated 22 December 2010.

At the request of the Tribunal, the parties made further submissions principally in relation to the quantification of the Claim. These submissions were made by email received from the Claimant dated 12 April 2011, and the Respondent dated 15 April 2011.

Further submissions and clarification were provided by emails dated 3 May 2011, and 16 May 2011.

2. Facts

It must be said from the outset that the Respondent has denied, or does not admit, virtually all of the Claimant's allegations.

Leaving that to one side for the moment, it is alleged by the Claimant that;

a) On 27 April 2007 the Respondent signed a Grain buyer derivative based contract;

b) That same day, the Respondent entered into Contract No. 3902069 under which he sold to the Claimant 408mt APW2 Multigrade wheat at a price "to be determined" according to the terms of the Contract and Master Agreement which was incorporated into the Contract.

c) The Contract Completion Date under the Contract was 17 November 2008. It was signed by the Claimant on 6 July 2007 and appears to bear the Respondent's signature and the date 16 August 2007.

d) As part of the GOP Master Agreement signed on 27 April 2007, the nominated "Authorised Persons" are the Respondent, and A M.

e) Finally, on 27 April 2007, the Respondent appears to have executed an grain buyer "Preferred Customer Information Form."

The Claimant has annexed these various documents to its Claim. They appear to be signed by the Respondent. That much is not denied by the Respondent, though neither is it admitted.

It is the Claimant's case in summary that the Respondent defaulted in performance of the Contract in failing to deliver any grain. The Contract provides on its face, just above what appears to be the Respondent's signature, as follows;

"WASH OUT COST - Refer to Clause 2 DEFAULT of the Master Agreement."

Clause 2 of the Master Agreement relevantly provides;

(c) If the party selling the Commodity defaults, the selling party must pay liquidated damages to the buying party on demand. The liquidated damages will consist of an amount equal to the sum of the Washout Amount, the Cancellation Charge, the Administration Fee and all reasonable legal costs incurred by the buying party as a result of the default".

(e) If all Price Elements have not been fixed in full, or a flat price not agreed, the Washout Amount means an amount equal to any loss or damage suffered by the buying party as a

result of grain buyer closing out (or cash-settling) the Commodity Derivative instruments, basis contracts and Foreign Exchange contracts and Options that have been fixed or entered into.

It is submitted by the Claimant that on 6 July 2007, on instructions from the Respondent's authorised person, T M, the Claimant bought and sold 3 contracts for December 2007 wheat on the Chicago Board of Trade, specifically "put" options with a strike price of US$6.10, and "call" options with a strike price of US$6.90.

The Claimant says it generated two " Order Confirmation" forms reflecting these transactions which it sent to Mr G, and to Mr M.

The Claimant further says that on 17 September 2007, it received instructions from Mr M, on behalf of the Respondent, to close out the derivative position on the contract. It needed therefore to "buy back" the "open puts" which it did at a premium of US$1.85 over the US$6.90 strike price.

The balance on the derivative positions, in Australian dollars at an exchange rate of .89039, was A$35,209.10.

The contract period expired on 17 November 2008. The Respondent did not deliver against the contract and was in default.

According to the terms for the contract, the Claimant sent the Respondent a Contract Completion Statement on 18 November 2008, claiming $38,126.36, comprising an Administration Fee of $1836.00, a Cancellation Fee of $816.00, GST of $265.20, plus the Transaction Cost of $35,209.10.

3. The Evidence

As mentioned above, the Respondent takes issue with all aspect of the claim, either by "not admitting" submissions, or denying submissions.

We will consider the some of those denials.

At paragraph 9 of its Points of Claim, the Claimant asserts that on 17 September 2007, Mr M, an Authorised Person under the terms of the Preferred Customer Information Form, instructed Mr S B of the grain buyer to place an order to close out the derivative position of the Contract. The Claimant annexes a copy of the Order Ticket to its Points of Claim.

At paragraph 9 of the Points of Defence, the Respondent "denies each and every allegation contained in paragraph 9." It goes on to say that it "specifically denies that it gave its approval to "close out" the Contract the subject of the Claimant's claim."

While the Respondent say that it "denies" the content of paragraph 9 of the Points of Claim, it does not produce any evidence in support of the denial. We assume therefore that the Respondent is really saying that it does not admit the allegations, and accordingly puts the Claimant to proof of these and other allegations.

Similarly, in paragraph 10 of the Points of Claim, the Claimant submits that "On 17 September 2008, confirmation of the order referred to in paragraph 9 above was faxed to grain seller and emailed to A M. A print out of the grain buyer’s internal document management software listing communications with grain seller is annexed and marked "E".

According to paragraph 10 of the Defence, "each and every allegation contained in paragraph 10" is denied.

However the Respondent produces no evidence in support of a denial that the order was faxed to it, or emailed to A M. While it could perhaps have produced a statement from the Respondent, or Mr M, to the effect that they did not receive the fax or email (respectively), that in itself would not prove that they were not sent by the Claimant.

Once again, in the absence of any evidence we consider that the denial in paragraph 10 of the Defence is in fact, a non-admission, putting the Claimant to proof.

Apart from denials unsupported by evidence, the only other substantive defence pleaded for the Respondent is that the contract terms are unconscionable within the meaning of the *Fair Trading Act 1999* (NSW) and the *Trade Practices Act 1974* (Cth).

Though this is pleaded in paragraph 3 and again in paragraph 11 of the Defence, once again there is no evidence, or other submission supporting a conclusion that the contract was unconscionable.

One theme of the Defence appears to be that Mr M was not authorised to place the orders he placed, or at least not authorised to place all of those orders; see for example paragraph 9 of the Defence. While the Respondent says that Mr M was not authorised to close out the contract, the Respondent does not seek to argue that Mr M was not an Authorised Person. Mr M's name and signature appear in Section 5 on page 3 of the Master Agreement.

The following words appear below the signature;

"Each Authorised Person is individually authorised on behalf of the Customer to give any notices and requests whatsoever to grain buyer, its related bodies corporate principal, and authorised representatives under or in relation to any contracts between the Customer and gran buyer from time to time (including without limitation any requests to fix an Commodity Derivative, Foreign Exchange, or Basis price elements, Flat price, Options, or instrument approved under the Contracts."

This is certainly a broad enough authority to allow Mr M to give the instructions he gave in respect of the contract. Whether or not Mr M was actually authorised may be an issue between the Respondent and Mr M, but in any event the Claimant was entitled to act on those instructions.

The Claimant's evidence consists of;

a. The Contract, apparently signed by the Respondent. We note that in its Points of Defence the Respondent does not deny signing the contract, but does not admit it, either.

b. Various documents it says evidence orders placed by T M on behalf of the Respondent. These consist of Position Statements, Order Confirmations, and Order Tickets. It says that the Position Statements and Order Confirmations were faxed and emailed to the Respondent and to Mr M, and produces evidence in the form of extracts from a "Document Manager". This records that the documents were emailed to Mr M, and faxed to "03 53900244" which is the Respondent's fax number entered on the Preferred Customer Information Form.

c. Default documents, in the form of a Washout Approval Form, Contract Completion Statement and Debit Memo.

These appear to be genuine business records. There is no evidence or suggestion that they are concocted or fabricated. Such a suggestion would amount to an allegation of fraud.

The Claimant has not produced a witness statement linking these various documents together. We are conscious however that this is an arbitration over a relatively small claim. While the Respondent has a right to clearly understand the case put against him, and be given every

opportunity to meet that case, we are not bound by the strict rules of evidence and it would be a failing of commercial arbitration if we required the Claimant to produce evidence in support of its case to the standard that might be expected in a Superior Court.

When the Claimant produces a document such as an Order Confirmation, it is not unreasonable for us to infer, in the absence of any evidence to the contrary, that such a document was created following the receipt of such an instruction even if there is no evidence of how that order was placed and by whom.

Further it appears that those Order Confirmations were sent to the Respondent and Mr M and in the absence of some evidence from the Respondent that it protested to the Claimant about an order being unauthorised, we can conclude that such an order was placed, and it was authorised.

4. DAMAGES

It is incumbent on Claimants in arbitrations to produce clear and rational calculations of damages claimed with such supporting documents as may be necessary. There is little point going to lengths to establish liability if there is then no evidence to support the damages claim.

It is not for the Tribunal to have to extract relevant material from a party, and we have had to do so twice in these proceedings. It is a fine line we are required to walk (as well as being time consuming) and it is not fair that we are required to walk it, particularly by sophisticated commercial parties. It may be prejudicial to a Respondent's case if we appear to be assisting the Claimant to make its case. This needs to be balanced by the injustice that a Claimant may suffer if having established a default, and a genuine entitlement to compensation, it is denied compensation by what may be described as a technicality.

In the event we are satisfied with the calculation of liquidated damages submitted by the Claimant in its correspondence dated 3 May 2011.

5. FINDINGS

There is sufficient evidence for us to make the following findings, on the balance of probability.

a. On or about 27 April 2007 the Respondent signed the Master Agreement in the formed annexed to the Points of Claim marked "A".

b. In executing the Master Agreement, the Respondent nominated A M as an Authorised Person.

c. On or about 6 July 2007 the Respondent entered into GOP Contract 3902069 with the Claimant, in the formed annexed to the Points of Claim, marked "C".

d. On or about 6 July 2007 the Respondent by Mr M gave instructions to the Claimant to buy December "puts" at US$6.10 and sell December "calls" at US$6.90.

e. On or about 17 September 2007, the Respondent by Mr M gave instructions to the Claimant to close out of any open derivative positions.

f. That by virtue of the Master Agreement, Mr M was authorised on behalf of the Respondent to give the instructions referred to in (d) and (e) above.

g. That the Respondent failed to deliver against the contract and as at 18 November 2008 was in default.

h. That in complying with the directions of the Respondent in (d) and (e) above the Claimant has incurred loss and is entitled under the terms of the Contract and Master Agreement to liquidated damages as claimed.

6. FINAL AWARD

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

1. The Claim is allowed.

2. The Respondent to pay damages to the Claimant in the sum of $38,126.36.

3. The Respondent shall pay interest on the damages at the rate of 8.75% per annum from 18 November 2008.

4. The Respondent shall indemnify the Claimant in respect of any fees paid by the Claimant to GTA in relation to this arbitration.

5. The Respondent shall pay the Claimant's legal costs on a party and party basis. 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 we so publish our Final Award.

……...**Date: …...../…...../2011**

Gerard Langtry, Arbitrator nominated by the Claimant.

……...**Date: ……../…...../2011**

Brett Cooper, Arbitrator nominated for the Respondent.

……...**Date: ..……../…...../2011**

Angus McLaren, Arbitration Committee Chair, appointed by GTA.