

**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. 318

Grain Buyer (Trader)
(Claimant)

and

Grain Seller (Producer)
(Respondent)

Final Award

INTRODUCTION

This is a Final Award in an arbitration conducted pursuant to the Dispute Resolution Rules of Grain Trade Australia Ltd (**GTA**). The dispute concerns an alleged default under a contract for the sale and purchase of faba beans.

There is no dispute as to jurisdiction. The contract documents clearly provide for the referral of disputes to arbitration to be administered by Grain Trade Australia Ltd (GTA) pursuant to GTA's Dispute Resolution Rules.

We find therefore that we are a validly constituted Tribunal under the *Commercial Arbitration Act 2010* (NSW) and with jurisdiction to determine all issues in dispute between the parties.

This Tribunal is comprised of:

1. Mr Chris Heinjus, nominated by the Claimant;
2. Mr Anthony Furse, nominated by GTA on behalf of the Respondents; and
3. Mr Jack Fahy, Chair nominated by GTA.

The parties have exchanged;

- (a) Points of Claim dated 26 May 2020;
- (b) Points of Defence dated 17 June 2020;
- (c) Points of Reply dated 2 July 2020; and
- (d) Respondent's Points of Reply (dated 17 June 2020 but received by GTA on 17 July 2020).

These submissions were supplemented by supporting documentation and correspondence to which we shall refer as required.

We have carefully considered these submissions, statements and supporting documents and base our decision on the facts and circumstances thereby adduced.

BACKGROUND TO THE DISPUTE

1. The Claimant is a grain trader.
2. The Respondents operate a farming enterprise based in [REDACTED].
3. Much of the background leading up to the dispute is agreed.
4. On 12 December 2019, the Respondents contracted to sell the Claimant 300 metric tonnes of faba beans (**Beans**). That contract was arranged through an intermediary, (**Broker**).
5. As is common in the grain trade, two contract documents were generated; one by Broker dated 12 December 2019 (**Broker Document**), and one by the Claimant with the same date (**Claimant Document**).
6. Both documents evidenced the sale of 300 metric tonnes of 19-20 season faba beans, \$550 metric tonne, multigrade spread. Both provided for delivery at SITE A, 12 December to 31 January 2020 inclusive.
7. There were however two significant differences between the two documents.
8. The Broker Document included under the heading 'Additional Terms', "Delivery as it comes, Dec/Jan". While this term was not expressly included in the Claimant Document it was referenced in the covering email sent by the Claimant to the Respondents on 12 December 2019 and the Claimant accepts that it formed a term of the contract.
9. The Claimant Document included the words, under Special Terms and Conditions, "Minimal Grub Damage." (**MGD Clause**)
10. Both parties agree that on 28 December 2019, **Mr A** presented at SITE A with the first load of 43.48mt of beans (**Load**) for delivery under the contract.
11. Both parties also agree that discussion ensued, but there is disagreement as to the tenor of those discussions, to which we will return.
12. It is agreed that subsequent to those discussions, later that same day **Mr A** took the Load to another site at SITE A operated by GRAIN BUYER B, and delivered the Load to GRAIN BUYER B. No further deliveries were made against the contract.

13. On 12 February 2020, the Claimant’s solicitors served a notice of default on the Respondents.

The Claimant’s Case

14. The dispute turns in large part on what transpired at the site at SITE A on 28 December 2019.
15. It is the Claimant’s case that the beans in the Load were affected by more than minimal grub damage.
16. A series of communications ensued by phone calls between Mr B, Mr C (of Broker) and Mr D (of SITE A) and Mr A.
17. The Claimant says that it was prepared to receive them as Grade 3, possibly with a further discount to reflect the grub damage.
18. Mr B then became aware that Mr A had left the SITE A site and delivered the beans to GRAIN BUYER B.
19. Thereafter the Respondents delivered the balance of the crop into store at SITE C, which was not a delivery site permitted under the contract.
20. The Claimant’s case is perhaps summarized at paragraph 10 of the Points of Claim as follows; *Despite the issues surrounding the first Load, that first load was not delivered for the purpose of and in accordance with the Agreement, and the Respondent made no attempt to make any subsequent delivery of the remaining Beans.*
21. So far as damages are concerned, the Claimant has produced evidence from two brokers, Tim Teague and Sam Sloane of IKON. IKON estimated \$710/mt DCT Adelaide as at 14 February 2020. Tim Teague gave a price of \$725/mt DCT Melbourne. Allowing \$35 DCT costs brings that to a delivered Site A price of \$690/mt or \$140/mt x 300mt or \$42,000.

The Respondents’ Case

22. The Respondents say that;
- (a) The Load was not delivered because it was erroneously rejected by the Claimant in reliance on the MGD Clause, which did not form part of the contract;
 - (b) Further, **Mr D** advised **Mr A** that SITE A would not be able to receive beans for the Claimant for 2 weeks which amounted to a breach of the “as it comes” term of the contract.
23. It says in effect that the Claimant by its words and acts on and around 28 December 2019, repudiated the entire contract.

Determination

24. The only evidence we have of the events of 28 December 2019 is a brief affidavit of Mr D made on 2 July 2020 (**Mr D's Affidavit**). Mr D deposes that he is a director of SITE A. He states at paragraph 3 of his affidavit that;
"I do not recall stating to Mr A that SITE A 'can not accept beans from Andrew for 2 weeks' in or around December 2019."
25. Mr D's Affidavit was produced with the Claimant's Points of Reply. The Respondent therefore had an opportunity to tender a statement of evidence from Mr A at the latest as part of the Respondent's Points of Reply received by GTA on 17 July 2020 but elected not to. We are entitled to infer that any evidence tendered by Mr Y would not have improved the Respondent's case.
26. We do not accept therefore that on 28 December 2019 Mr D advised Mr A that SITE A would not be able to receive beans for the Claimant.
27. We accept the Respondent's submission that the Broker Document was a broker's contract for the purposes of the GTA Trade Rules. We also therefore accept that the MGD Clause did not form part of the contract.
28. In relation to the alleged rejection of the Load due to grub damage, even if the MGD Clause was not a valid contractual term, there is no contemporaneous or any notice from the Respondents holding the Claimant in default for wrongly rejecting the Load. In fact there is no evidence that the Claimant unambiguously rejected the Load. In any event, such an erroneous rejection could not amount to a repudiation of the entire balance of the contract.
29. Having found that the Claimant did not repudiate the contract as alleged, and that the Respondent failed to deliver any beans in accordance with the contract, we accordingly find that the claim is made out.
30. We accept the Claimant's quantification of its loss, which other than a denial of liability was not challenged by the Respondents.
31. The Claimant is also entitled to its costs. We have invited both parties to indicate their costs and having reviewed the Claimant's total legal costs, we believe that \$[REDACTED] is a fair award of costs, plus an indemnity in respect of arbitration fees paid by the Claimant to GTA.

AWARD

32. For the reasons stated above, we make the following award;

- (a) The Claimant’s claim is allowed, with costs;
- (b) The Respondent shall pay the Claimant \$ [REDACTED] (ex GST);
- (c) Fix the costs payable by the Respondent to the Claimant at \$ [REDACTED] (ex GST); and
- (d) The Respondent shall indemnify the Claimant for arbitration fees paid by the Claimant to GTA.

This award is published at Sydney, the 5th day of August 2020.

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Mr Jack Fahy

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Mr Chris Heinjus

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Mr Anthony Furse