

Arbitration 36 (NACMA)**Notice to Members****Date of Issue:** 8th May 2009**Claimant:** Hay Buyer**&****Respondent:** Hay Seller**Arbitration Committee (AC)**

- Allan Wallace - nominated by the Claimant
- David Dossor - nominated by Claimant in lieu of Respondent nomination
- Malcolm McMahon - nominated by NACMA & Chairman

Claim

That the Respondent did not deliver the contracted quantity of hay within the contracted delivery period. Claimant sought damages of \$52,228 plus interest and costs (legal & arbitration).

Award

The Claimant was unsuccessful and the AC directed the Claimant to pay the Respondent's legal fees and NACMA Arbitration fees.

Details

The Claimant (not a GTA member) contracted to purchase 600 bales of hay, each weighing approx. 720 kgs, ex farm over a delivery period at "regular intervals". The Claimant picked up 57 bales by the end of the delivery period.

The Respondent disputed NACMA jurisdiction as they claimed the contract had not been signed and appeared under protest and did not sign the NACMA Arbitration Contract or pay the fees due to NACMA. They did not nominate an arbitrator.

The Claimant was late on payment of hay which they had picked up and, although the Respondent did not appreciate it, they were entitled, under the NACMA Trade Rules (Delinquent Payments at Time of Conveyance – Trade Rule 13.3) to withhold further deliveries which they did as a matter of course.

Further, the AC considers the term in the contract "regular intervals" means the contract was in effect an "even spread" contract (Trade Rule 12.6) and accordingly the Claimant came nowhere close to fulfilling their obligations by the end of the delivery period.

Award findings

The AC found that:

- a contract did exist and therefore NACMA did have jurisdiction. Claimant successful on this issue.
- the failure to take delivery of the hay in accordance with the requirements of the contract by the Claimant was sufficient to amount to a breach of contract by the Claimant.

Take out for Members

- Ensure your legal advisors read and understand the "GTA Guidelines to Arbitration" published on the GTA website.
- Do not use ambiguous terms such as "regular intervals".
- Claimants should not automatically expect a favourable outcome. GTA Awards carry as much weight as an Award of the Court, therefore they must be legally "bullet proof". GTA Awards are open to challenge in a state Supreme Court.
- Arbitrators do not take their responsibilities lightly and will question evidence and disregard it where it is found wanting or unsubstantiated.

- **Claimants must prove their case and document their damages in their submissions. Arbitrators can not draw their own inferences or conclusions based on prior knowledge or hearsay. Repeat – Claimants must prove their case and document their damages.**

**IN THE MATTER OF THE
COMMERCIAL ARBITRATION AND INDUSTRIAL
REFERRAL AGREEMENTS ACT 1986 (SA)
AND IN THE MATTER OF AN ARBITRATION
UNDER THE RULES OF THE NATIONAL
AGRICULTURAL COMMODITIES
MARKETING ASSOCIATION LTD**

NACMA Arbitration No. 36

Hay Buyer

Claimant

and

Hay Seller

Respondent

Final Award

1. INTRODUCTION

The Claimants in this arbitration are Hay Buyers (“the Claimant”), a business registered in Victoria.

The Respondent is a Hay Seller (“the Respondent”), a company incorporated under the laws of Australia registered in South Australia.

The Claimant contracted to purchase 600 bales of hay from the Respondent at \$250 per tonne.

The issues in contention are whether the contract incorporated NACMA Trade Rules and whether the Respondent was entitled to withhold delivery.

The Arbitration Committee comprised of:

- Mr Allan Wallace, nominated by the Claimant;
- Mr David Dossor, nominated by the Claimant in lieu of nomination by the Respondent;
- Mr Malcolm McMahon, 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 15 January 2008;
2. Respondent’s Defence Submissions, dated 20 February 2008;
3. Claimant’s Rebuttal, dated 14 March 2008;
4. Respondent’s Surrebuttal, dated 4 April 2008.

The Respondent appeared under protest and did not sign the NACMA arbitration contract or pay the fees due to NACMA.

The parties waived their right to make oral submissions and the Committee has deliberated solely upon the information provided in the above submissions and annexures.

The Claimant seeks the following relief:

- i. An award in favour of the Claimant in the amount of \$52,228.80;
- ii. Interest;
- iii. Costs.

2. FACTS

Based on the submissions provided by the parties we consider that the following facts are not in dispute and accordingly we find that:

1. On or about 15 February 2007 Mr R B, employed by the Claimant, met with Mr J V at his property in (country location). Mr B inspected two types of hay.
2. On or about 16 February 2007 the Claimant faxed a one-page contract confirmation (number 122) to the Respondent. The transmission did not include any terms and conditions other than those appearing on the face of the transmission.
3. On or about 19 February 2007 the Respondent wrote into the contract the delivery period and special conditions and placed his signature on the document and faxed the document to the Claimant.
4. On or about 3 March 2007 the Claimant collected 27 bales of hay from the Respondent.
5. On or about 5 March 2007 the Claimant collected 30 bales of hay from the Respondent.
6. On or about 8 March 2007 the Respondent issued Invoice 31 for the 57 bales to the Claimant.
7. On or about 30 March 2007 the Respondent telephoned the Claimant concerning the non-payment of Invoice 31 and that hay had not been collected. We note that the Claimant submits that during this conversation it advised the Respondent that it had not received a copy of Invoice 31.
8. On or about 4 April 2007 the Claimant collected 42 bales.
9. On or about 4 April 2007 the Respondent faxed Invoice 33 for 42 bales to the Claimant. The Respondent also faxed Invoice 31 to the Claimant.
10. The Claimant asserts that on or about 16 April 2007 it posted a cheque for Invoice 31 and 33 to the Respondent.
11. On or about 23 April 2007 the Claimant sought to collect more bales of hay. The Respondent denied the Claimant access to the property on the basis that Invoice 31 and 33 had not been paid. The Claimant stated that the cheque must have been lost in the mail.
12. On or about 24 April 2007 the Claimant cancelled the unpresented cheques. The Claimant issued two cheques and sent them by registered post to the Respondent.
13. On or about 30 April 2007 the Respondent received the cheques.
14. On or about 1 May 2007 the Respondent posted the cheques to his bank in Sydney.
15. On or about 5 May 2007 the cheques cleared into the Respondent's bank account.

The parties were in dispute regarding details and occurrences of phone calls between the parties, however the Committee is satisfied that the above is a clear reflection of the material facts.

We note that the Respondent submits that an oral contract was concluded on 15 February 2007 for 600 bales to be taken at regular intervals until 1 May 2007. We further note that the Respondent denies that he signed the contract confirmation generally, but only signed the authorisation for tax invoices to be raised. We consider these issues below.

3. JURISDICTION

The Respondent disputes that the contract was reduced to writing and that only an oral contract was entered into. The Respondent denies that it entered into an arbitration agreement with the Claimant for a number of reasons. Firstly because there were no terms and conditions attached to the contract confirmation, secondly that the Respondent has no prior knowledge of NACMA and finally because the Respondent only signed the tax invoice authorisation and not the full terms and conditions of the contract confirmation.

Pursuant to the *competence-competence* rule, we are satisfied that this Committee has power to determine its own jurisdiction. The Respondent alleges that the Committee lacks jurisdiction to arbitrate as the NACMA Trade Rule were not incorporated into the contract and therefore there is no agreement to arbitrate between the parties.

To determine whether this Committee has jurisdiction to determine the dispute before it, we must review the submissions provided by the parties and evaluate whether the contract incorporated the NACMA Trade Rules which include an agreement to arbitrate and/or whether the agreement expressly incorporated the NACMA dispute resolution rules.

It is undisputed that the Claimant sent the Respondent a contract confirmation, the Respondent placed his signature on the document and faxed it back to the Claimant. The Contract confirmation states at the bottom of the page:

“This contract has been executed and this form serves as a confirmation and should be signed and a copy returned to the buyer/seller immediately. Failure to do so within 24 hours of the contract date will signify agreement to and acceptance of the Contract terms and Conditions. NACMA Trade Rules and Arbitration Rules to Apply.”

The Claimant’s signature appears next to the word “Buyer”, with name and date underneath. The Respondent’s signature appears above the Claimant’s and underneath two sentences which state:

“All Contract Terms and Conditions as set out above and on the reverse of this page form part of this Contract. Terms and Conditions written on the face of this Contract Confirmation shall overrule all printed Terms and Conditions on the reverse with which they conflict to the extent of the inconsistency. This contract comprises the entire agreement between Buyer and Seller with respect to the subject matter of this Contract.

To assist with the processing of the Goods and Services Tax compliance, the buyer may prepare, for the grower, a Recipient Created Tax Invoice – RCH. If the grower requires this service he is required to sign this authorisation.”

In determining whether a contract came into existence and if so, its terms, we are required to examine the parties conduct objectively. As the High Court said in *Toll (FGT) P/L v Alphapharm P/L*:

“It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe.”¹

We turn to the Respondent’s submissions regarding an arbitration agreement, firstly that the terms and conditions were not attached to the confirmation. As the contract stated *“Terms and Conditions written on the face of this Contract Confirmation shall overrule all printed Terms and Conditions on the reverse...”* we consider that the terms that were presented to the Respondent were primary. The confirmation clearly stated that the terms incorporated into that contract were contained in a separate document which included an arbitration agreement.

Secondly the Respondent submitted that it had no knowledge of NACMA Trade Rules. As we have mentioned above, the Respondent’s subjective belief is not relevant. By signing a document containing an express reference to and incorporation of NACMA Trade and Arbitration Rules, the Respondent represented to the Claimant that it accepted those Rules. Nothing in its words or conduct gave any indication that it demurred from those Rules.

The Committee finds that the contract incorporated the NACMA Trade Rules which included an arbitration agreement. Thus the Committee concludes that it has jurisdiction to determine this dispute.

4. DECISION

Based on our findings above the Committee has determined that the contract incorporated the NACMA Trade Rules and Dispute Resolution Rules. We now turn to the effect of the Respondent withholding delivery of the remaining bales of hay.

The terms of the agreement between the parties were as follows:

- Respondent agreed to deliver 600 bales of oaten hay at \$250 per tonne;
- Size: “8x4x4”;
- Price basis: Ex-Farm;
- Delivery Period: February to May 1;
- Payment Terms: 14 days from receipt of invoice in office;
- Other: Hay to be taken at regular intervals until May 1. Any remaining hay or additional hay to be renegotiated.

The Committee considers that “regular intervals” means that the contract was in effect an “even spread” contract (as per Trade Rule 12.6) and on that basis the Claimant was obliged to collect the hay at an approximate rate of 70 bales per week. On this basis approximately 105 bales should have been moved by the end of February and a further 315 bales by the end of March 2007 for a total of 420 bales.

By the end of March 2007 the Claimant had only collected 57 bales. We note that weather may have been a factor for a few days during this period, but it is apparent that regardless, the drawdown requirement was not close to being adhered to.

¹ 2004 219 CLR 165 at 179.

The Committee considers that the failure to take delivery of the hay in accordance with the requirements of the contract was sufficient to amount to a breach of contract by the Claimant.

The Respondent had issued an invoice to the Claimant on 8 March 2007. Whilst the Respondent had not received payment by the end of March, the Respondent must still have been committed to the contract on 4 April 2007 when further bales were taken. Payment had still not been received by mid April when the Claimant sought to take delivery of further bales. It appears that the Respondent did not receive a cheque until 30 April 2007 only one day prior to the conclusion of the agreed contract period and that payment would have been due on 20 April 2007.

We consider that the Claimant was in breach of contract for failure to pay for the hay it had taken delivery of. In accordance with Trade Rule 13.3 the Respondent was entitled to withhold delivery in these circumstances.

The Committee concludes that:

- i. The majority of the hay had not been moved as per the contract terms; and
- ii. That the Claimant had at not time made any real effort to bring the overdue account into line.

We conclude that the Claimant failed to meet its contractual obligations in two key areas, timely pickup of the tonnage and time for payment. The Claimant by its conduct had repudiated its obligations under the contract, therefore the Respondent was entitled to accept that conduct as repudiatory and to withhold delivery in effect bringing the contract to an end.

It was not unreasonable for the Respondent to consider that the Claimant was in default of the contract and when the contract fell due for renegotiation the Respondent legitimately advised the Claimant that it had cancelled the contract at the agreed renegotiation time.

5. FINAL AWARD

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

1. The Claim is denied;
2. The Claimant to pay to NACMA the outstanding arbitration fees of \$5,700.00;
3. The Claimant to pay the Respondent's legal costs on a party-party basis as agreed or assessed by the Court.

And we so publish our Final Award.

..... **Date:**

Mr Allan Wallace, Arbitrator nominated by Claimant

..... **Date:**

Mr David Dossor, Arbitrator nominated by NACMA in lieu of nomination by Respondent

..... **Date:**

Mr Malcolm McMahon, Arbitration Committee Chairman, appointed by NACMA