

**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. 63

Commodity Buyer
Claimant

and

Commodity Seller
Respondent

Final Award

1. INTRODUCTION

The Claimant in this arbitration is Commodity Buyer (“Claimant”), a company incorporated under the laws of Australia.

The Respondent is Commodity Seller (“Respondent”) a company incorporated under the laws of Australia.

This dispute relates to performance of a contract between the parties for the supply of 2000 metric tonnes of gritting maize DCT (“the Contract.”)

The issues which fall for determination are:

1. Whether the Respondent’s words and conduct constituted a repudiatory breach of the Contract?
2. In the event that the Respondent did not breach the Contract, did the Claimant’s alteration of the shipping schedule constitute a breach of contract?

The Arbitration Committee comprised:

- Mr. John Orr, grain merchant, nominated by the Claimant;
- Mr. Peter Howard, grain merchant, nominated by the Respondent;
- Mr. Ole Houe, grain merchant, Arbitration Committee Chairman, appointed by NACMA.

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

1. Claimant’s Points of Claim, dated 18 August 2008.
2. Respondent’s Points of Defence, dated 18 September 2008.

3. Claimant's Points of Reply, dated 11 November 2008.
4. Respondent's Points of Reply, dated 30 December 2008.

2. FACTS

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

- 2.1 On 14 November 2007, the parties entered into a Contract, Reference number 123 under which the Claimant agreed to buy, and the Respondent to sell 2000 metric tonnes of Australian Standard Wheat ("Wheat") at \$405.00 per tonne, DCT. Delivery was to be effected 1-31 January 2008, both days inclusive, buyers call.¹
- 2.2 On or about 19 November 2007 the Claimant supplied a pre-advice of the shipping program to the Respondent. The pre-advice stated that the estimated arrival date of the *Maersk Dampier* was 26 January 2008 and the cut off date was 24 January 2007.
- 2.3 On 13 December 2007, the Respondent emailed the Claimant seeking to defer the first shipment of 1000 metric tonnes for 2-3 weeks.²
- 2.4 The Respondent delivered the first 1000 metric tonnes of wheat under the contract.³
- 2.5 On or about 15 January 2008, ABC, the packer of the second 1000 metric tonnes of wheat notified the Claimant that there were some concerns with wheat availability.⁴
- 2.6 On or around 21 January 2008, the Respondent advised the Claimant that it was unlikely to make the 24 January 2008 cut off for delivery.
- 2.7 On 22 January 2008 at approximately 9.49am DJ, an agent for the Claimant, requested that the Respondent provide an alternative plan of action by lunch time that day if it would not be able to provide the wheat by the cut off date.⁵
- 2.8 On 22 January 2008 at approximately 1.21pm DL, an agent for the Respondent, emailed the Claimant that it should be able to organise a late receipt and meet the *Maersk Dampier*.
- 2.9 On 22 January 2008 at approximately 3.17pm Mr. WT, an agent for the Claimant, emailed the Respondent and others that the *Maersk Dampier* had been withdrawn and the wheat would now be carried on the *MSC Mexico*, which would arrive in Melbourne on or around 12 February 2008, outside the agreed delivery period.⁶
- 2.10 On 23 January 2008 the Respondent emailed the Claimant indicating that ABC was fully booked for that time period and it would be unable to meet the new shipping deadline outlined by the Claimant.⁷

¹ Claimant's Points of Claim, Annexure 1.

² Claimant's Points of Claim, Annexure 4.

³ Claimant's Points of Claim, Annexure 5.

⁴ Claimant's Points of Claim, Annexure 6.

⁵ Claimant's Points of Claim, Annexure 7.

⁶ Claimant's Points of Claim, Annexure 8.

⁷ Claimant's Points of Claim, Annexure 9.

- 2.11 On 24 January 2008, Mr. WT emailed Mr. DL that
- 40 containers for the replacement vessel *MSC Mexico* would be available over the period 25 January 2008-31 January 2008;
 - the consignment was to be packed at and by DEF and;
 - the Respondent was required to respond by midday 25 January 2008.
- 2.12 On or about 25 January 2008 Mr. DL and Mr. WT had a telephone conversation whereby Mr. DL advised that he did not think he could supply grain to the DEF packing plant as the Respondent's supply contracts were with ABC. We note that that Claimant does not admit, nor deny, that this conversation took place.
- 2.13 On 31 January 2008, the Claimant emailed the Respondent to call it in default of the contract.

3. JURISDICTION

The parties agree that Contract 123 was entered into on 14 November 2007. This contract states in 'Other Terms' that "Any terms where not in conflict with the above shall be in accordance with the standard terms and conditions of the current NACMA No.4 DCT contract."⁸

The "NACMA Contract No.4 – Grain/Oilseeds/Birdseeds & Pulses in containers Delivered Container Terminal (DCT)" states at Clause 19, "Any dispute arising out of this contract, including any question of law arising in connection herewith shall be referred to arbitration in accordance with the Dispute Resolution Rules of NACMA in force at the date of this contract and of which both parties hereto shall be deemed to be cognisant."⁹

The above constitutes a NACMA arbitration agreement by the parties. The parties accept NACMA's jurisdiction to arbitrate this dispute.

4. CONTRACT

a) Anticipatory Breach

Renouncement

The Claimant submits that the Respondent committed an anticipatory breach of the contract, whereby "before performance is due, a party renounces the contract."¹⁰ This renunciation need not be express, but can be inferred from conduct where the party in breach has, "acted in such a way as to lead a reasonable man to conclude that [he] did not intend to fulfil [his] part of the contract": *The Hermosa* [1982] 1 *Lloyds Rep* at 580.

The Claimant relies on several pieces of correspondence in support of the submission that the Respondent's conduct constitutes an anticipatory breach. The Respondent's email of 13

⁸ Claimant's Points of Claim, Annexure 1.

⁹ Claimant's Points of Claim, Annexure 2.

¹⁰ Claimant's Points of Claim at 19.

December 2007 requests that the Claimant “please look at deferring at least the first shipment...by 2-3 weeks”. The Claimant submits that this indicates that the Respondent would not have been in a position to comply with the obligations of the delivery period unless delivery was changed from January to February.¹¹ The Claimant submits that this is further evidenced by the Respondent advising the Claimant on or around 22 January 2008, that it was having great difficulty sourcing the further 1,000 tonnes of wheat and that it was “unlikely” to meet the delivery date of 24 January 2008.¹² Finally, the Claimant states that correspondence from ABC raising concerns regarding wheat availability and the Respondent’s correspondence on 23 January 2008 indicating it could not comply with the new shipping date as ABC was fully booked¹³ evidence an anticipatory breach.¹⁴

In response the Respondent submits that its email of 13 December 2007 requesting a 2-3 week deferment was not a repudiation of the contract rather it was a request for an extension¹⁵ and that there was no reference to “issues with farmer deliveries” as alleged by the Claimant, merely concerns about the “timing of the crop”.¹⁶ In relation to the telephone call on or around 21 January 2008, the Respondent admits that it said it was “unlikely” that it would make the cut off for delivery, however that this was merely the “notice of a possibility” rather than a repudiation of the contract.¹⁷ The Respondent further submits that the Claimant’s email at 9.49am on 22 January 2008 indicates that the Respondent interpreted the email as such.¹⁸ The Respondent relies on subsequent emails sent by Mr DL that day to challenge the allegation of anticipatory breach, whereby the Respondent advises, “Looks like we can do a stock swap with another exporter at ABC and commence packing tomorrow subject to logistics at ABC. We should be able to organise a late receipt and meet this vessel” and the Claimant’s response that that was “great news.”¹⁹

While the Claimant claims that the Respondent has failed to properly contextualise the conversations on which it relies,²⁰ on the face of the conversations and correspondence between the parties, the Respondent did not convey an intention to avoid its contractual obligations. The Respondent appeared to be merely canvassing an extension and indicating that it was facing difficulties in fulfilling the contract. The emails of 22 January 2008 indicate that the Respondent was willing to comply with this date.

“Silence” and “inactivity”

The Claimant also relies on submissions that “silence” and “inactivity” are sufficient to prove an anticipatory breach: *Stocania Gdanska SA v Latvian Shipping Co Latreefer Inc & others* [2002] EWCA Civ 889. The Claimant relies on two specific instances to support this submission.

The first instance is the Claimant’s 9.49am email to the Respondent on 22 January 2008. The Claimant submits that the Respondent “failed to provide the Claimant with any written

¹¹ Claimant’s Points of Claim at 6.

¹² Claimant’s Points of Claim at 10.

¹³ Claimant’s Points of Claim at 19, Annexure 9.

¹⁴ Claimant’s Points of Claim at 9, Annexure 6.

¹⁵ Respondent’s Points of Defence, page 2 at 5.

¹⁶ Respondent’s Points of Defence, page 7 at 6.d.iii.

¹⁷ Respondent’s Points of Defence, page 6 at 6.d.i.

¹⁸ Claimant’s Points of Claim, Annexure 7.

¹⁹ Respondent’s Points of Defence at 6.d.i and Bundle, page 41.

²⁰ Claimant’s Point of Reply, at 8.

response to its request for a “plan of action.”²¹ The Claimant also relies upon its correspondence of 24 January 2008 whereby it notifies the Respondent of the dates of availability of replacement containers and the possibility of having the consignment packed by DEF. The Respondent requested a response by no later than midday on the 25 January 2008.²² The Claimant submits that the Respondent failed to respond to this communication, as requested, by midday 25 January 2008.²³

The Respondent refutes the Claimant’s allegation that it failed to respond to correspondence on either 22 January 2008 or the 24 January 2008. In its Points of Defence, the Respondent provides a copy of the reply email sent by Mr DL to DJ, an agent for the Claimant, at 1.21pm on 22 January 2008.²⁴ As outlined above, the Respondent proposed a “stock swap.”²⁵ The Respondent notes Mr DJ response at 2.09 pm that day, and that the email was sent also to Mr MC, General Manager of the Claimant company.

In reference to the 24 January 2008 correspondence, the Respondent provides telephone records and a statutory declaration by Mr DL to support its submission that Mr DL had a conversation with WT, an agent for the Claimant at approximately 1pm on 25 January 2008.²⁶ During the call Mr DL agreed to try and deliver some wheat to DEF, but this was not a “firm proposal.”²⁷ The Claimant neither expressly denies, nor admits that this call occurred, but denies that it has the effect for which the Respondent contends.

We felt that the Respondent clearly proved that it has been neither silent nor inactive in relation to the contract with the Claimant. On the contrary, it has provided evidence of clearly responding to each communication initiated by the Claimant.

b) Failure to supply/ Breach of contract

In the alternative, the Claimant submitted that its actions in failing to provide 21 calendar days pre-advice as to the vessel cut-off date constituted only a minor breach of the contract whereas the Respondent’s failure to deliver constituted a breach of an “overriding obligation”.²⁸ Further, the Claimant submits that the intention of the “buyer’s call” and “21 calendar days preadvice to vessel cut-off date” is to protect the seller in the event that the buyer leaves execution of the contract too late and then requests delivery under the contract that is “unreasonable or physically or logistically impossible for the seller to meet in the circumstances.”²⁹ In this case however, the Claimant submits that at the time the substitute vessel was offered the Respondent should have been able to fulfil the contract, as it had food grade containers available and the wheat should also have been available for packing.³⁰ The Claimant submits that the Respondent had departed from the contract in failing to supply the wheat, and that this would have had a disastrous impact on the Claimant’s business had the Claimant not taken steps to mitigate its loss: *Federal Commerce and Navigation Co. Ltd v Molean Alpha Inc* [1979] AC 757.

²¹ Claimant’s Points of Claim at 11.

²² Claimant’s Points of Claim at 16, Annexure 10.

²³ Claimant’s Points of Claim at 21.

²⁴ Respondent’s Points of Defence, Bundle page 41.

²⁵ Respondent’s Points of Defence, Bundle page 41.

²⁶ Respondent’s Points of Reply, Surrebuttal Annexures.

²⁷ Respondent’s Points of Defence, page 6 at 6.c.ii.

²⁸ Claimant’s Points of Claim at 26.

²⁹ Claimant’s Point of Reply at 13.

³⁰ Respondent’s Point of Reply at 18.

The Respondent submits that the Claimant repudiated the contract by refusing to accept delivery of the wheat in accordance with the Claimant's nomination on 24 January 2008³¹ and failing to give the Respondent 21 days notice as per the Contract.³² While the reasons for this repudiation may have been beyond the Claimant's control, the Respondent persuasively submits that the Claimant bore the risk under the contract with the Respondent³³ and it had no right to make such a variation regarding delivery time or location.³⁴ Rather than repudiating the contract, the Respondent was upholding the terms of the contract as the Claimant had indicated that it could no longer receive the wheat on the agreed date and the Respondent was under no obligation to accept a different delivery date.³⁵ The Respondent further submits that even if its conduct was tantamount to a repudiation, the "innocent party" would have to accept such repudiation for it to be valid, or else the contract remains on foot: *Shevill v Builders Licensing Board* (1982) 149 CLR 620.³⁶ In its Points of Reply, the Respondent also claims that the Claimant has shifted its position from anticipatory breach to failure to supply³⁷.

While there may have been some indications throughout the negotiations that the Respondent was having difficulties fulfilling the contract, the Claimant's failure to accept the containers within the nominated period and the attempts to change the packing company and location were clear breaches of this contract.

5. DECISION

Damages

The Claimant submits that the Respondent's breach resulted in the Claimant having to pay a 'spot price' for the outstanding 1000 metric tonnes of Wheat of \$475.00, therefore the sum owing to the Claimant is \$70,000.00³⁸.

The Respondent submits that the Claimant has not provided evidence of the actual price that it paid for replacement wheat and as such, does not prove quantum.³⁹ As we found that the Claimant was responsible for the breach of contract, evidence of quantum by the Claimant was not an issue.

However, the Respondent submits details that the Claimant has retained \$70,000 from the first shipment between the parties, owing to the Respondent and it seeks an award for that sum with interest and costs.⁴⁰ Accordingly, we find that the Respondent is to be awarded this amount.

³¹ Respondent's Points of Defence, page 1 at 3; Claimant's Points of Reply at 9.

³² Claimant's Points of Claim, Annexure 1.

³³ Respondent's Points of Defence page 8 at 6.d.xi; Respondent's Points of Reply, page 2 at 4.

³⁴ Respondent's Points of Reply, page 4 at 9.d.

³⁵ Respondent's Points of Reply, page 2 at 5; Respondent's Points of Defence, page 7 at 6.b, 6.d.vi.

³⁶ Respondent's Points of Defence, page 8 at 8.

³⁷ Respondent's Points of Reply, page 1 at 1.

³⁸ Claimant's Points of Claim, at 27.

³⁹ Respondent's Points of Defence, page 10 at 14.

⁴⁰ Respondent's Points of Reply, page 6 at 13.

6. 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 shall reimburse the Respondent for the NACMA Arbitration fees paid by it of AUD\$5,700;
3. The Respondent is entitled to payment of AUD\$70,000.00, being the balance of the purchase price of the first 1000 metric tonnes delivered by the Respondent.
4. The Respondent is awarded interest at a rate of 10% p.a. accruing from 31 January 2008 to the day this award is issued. The Respondent shall have 30 days in which to pay the award, beyond which interest shall continue accruing at a rate of 10% p.a.
5. The Claimant shall pay the Respondent'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 we so publish our Award.

.....**Date:**/...../2009

John Orr, Arbitrator nominated by Claimant

.....**Date:**/...../2009

Peter Howard, Arbitrator nominated by Respondent

.....**Date:**/...../2009

Ole Houe, Arbitration Committee Chairman, appointed by NACMA