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Member Update – Arbitration Award

Date of Issue: **13 March 2008**

Arbitration number: **30 – Final Award issued on 31 January 2008**

Claimant: **Grain Buyer Pty Ltd (Buyers)**
&
Respondent: **Grain Seller Pty Ltd (Sellers)**

ARBITRATORS

- Mr Michael Chaseling, arbitrator nominated by Claimant
- Mr Alick Osborne, arbitrator nominated by Respondent
- Mr Tony Larkman, arbitrator nominated by NACMA and Committee Chairman

CLAIM

The Claimant claimed damages for non-delivery of grain and subsequent wash-out of the contract. The Claimant and Respondent dispute the date on which the washout occurred and thus the amount of damages owed.

AWARD

The Claimant was successful and was awarded costs of the arbitration and legal fees.

DETAILS

- This dispute involved the failure to supply 5000 tonnes of wheat for delivery November/December 2006.
- The Respondent alleges that the contract was washed out on 15 August 2006 at $209.00 per tonnes.
- The Claimant alleges the contract was washed out on 2 February 2007 at $275.00 per tonnes.
- Both parties submitted statements of the persons involved in the telephone conversation on 15 August 2006 but there was little to no documentary evidence that indicated that a contract had been varied or washed out.

MAJOR FINDINGS

- Parties may do orally what they may do in writing. Parties may enter into contracts and vary contracts orally just as they may in writing. It does not matter as a matter of law.
- The parties' recollections of a telephone conversation do not carry as much evidentiary weight as documentary records in terms of proving whether a contract or variation to a contract occurred and what were the terms of that contract or variation.
- The Respondent may have intended to wash out the contract but without written confirmation, it was not possible to conclude that there was any mutual agreement between the parties.

IMPORTANT POINTS

- Whether a new contract is created or the contract is varied, the Trade Rules highlight the importance of exchanging some written confirmation between the parties.
- Whenever entering into, or varying, a contract verbally it is important to subsequently confirming that conversation in writing, both in your personal records, but more importantly by writing to the other side.

AWARD IN DETAIL
This award has been stripped of any detail that may identify the parties to this arbitration.

1. INTRODUCTION

The Claimant in this arbitration is the Grain Buyer Pty Ltd ("Claimant"). The Respondent is Grain Seller Pty Ltd ("Respondent").

The parties have provided us with a contract which incorporates the NACMA Trade Rules and the parties have agreed to a NACMA arbitration pursuant to the NACMA Dispute Resolution Rules. The main issue for determination in this dispute is whether or not a wash-out was agreed between the parties on or around 15 August 2006.

The Arbitration Committee duly comprised:

- Mr Michael Chaseling, nominated by the Claimant.
- Mr Alick Osborne, nominated by the Respondent.
- Mr Tony Larkman, 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 1 May 2007.
2. Respondent's Defence Submissions, dated 12 June 2007.
3. Claimant's Rebuttal, dated 20 July 2007.
4. Respondent's Surrebuttal, dated 10 August 2007.
5. Claimant's Final submissions dated 27 August 2007.
6. Respondent's Final submissions dated 31 August 2007.

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

The Claimant seeks the following relief:

i. An award in favour of the Claimant in the amount of $445,000.00 for damages due to non-delivery of grain.

The Respondent seeks the following relief:

i. Order Contract No. XXXX was washed out on 15 August 2006;
ii. Respondent to pay Claimant $130,000.00;
iii. Legal and arbitration costs.

2. AGREED FACTS

The relevant agreed facts are as follows:

2.1 On 6 March 2006 the Claimant entered into a contract with the Respondent to purchase 5000 tonnes multi-variety grade wheat 2006/2007 season (Contract No. XXXX).

2.2 On 14 August 2006 the Respondent called the Claimant to discuss the washing out the contract.

2.3 On 14 or 15 August 2006 the Claimant contacted the Respondent to discuss the washout value. The content of this conversation is in dispute. (For distinction, this conversation will be referred to as the '15 August 2006 conversation').

2.4 On 24 January 2007 the Claimant emailed the Respondent enquiring why the contract had not been performed.

2.5 On 24 January 2007 the Respondent emailed the Claimant asserting that the contract has been washed out and that the Respondent owed the Claimant $130,000.00.

2.6 On 24 January 2007 the Claimant emailed the Respondent stating that the Claimant had no record of an agreement to wash out the contract.

3. FACTS IN DISPUTE

3.1 The parties dispute the content and effect of the conversation that took place on 15 August 2006.

3.2 The Claimant submits that it offered the Respondent a price of $209.00 or $212.00 to wash out the contract. The Respondent disputed this amount stating that it was too high. The Claimant submits that this conversation was quite heated and animated but at no time did the Respondent accept the offer to wash out the contract.

3.3 The Respondent submits that at the conclusion of this conversation the Claimant made a final offer of $212.00 to wash out the contract which the Respondent accepted by saying the word "Done".

4. WASHING OUT CONTRACTS

4.1 Where the parties have a binding contract and one party determines that it either will not have the grain to supply under the contract or can no longer afford to purchase the grain it may seek to "wash out" the contract. Focusing on the former situation, when this occurs the party has two options: it can purchase the grain from a third party (presumably at the current market price) to supply to the contract in question or it can cancel the contract and pay a negotiated settlement presumably based on the difference between the contract price and the current market price . This is commonly referred to in the industry as 'washing out' the contract because the contract is finalised without delivery of the grain.

4.2 The NACMA Trade Rules make no express provision for wash-outs. Technically a wash-out can be executed in two ways. The parties may agree to wash out the current contract by creating a new contract which in effect 'cancels' out the original contract. Or the parties agree to accept a cash payment in lieu of delivery of the grain. Whether this equates to an agreed settlement on termination of the contract, or a variation might be an interesting issue but it does not fall for determination in this matter.

4.3 As a wash out normally occurs before the date for delivery falls due, it is not considered to be a default on the contract and thus Trade Rule 17 does not apply.

4.4 The Trade Rules contain the following provisions regarding creating new contracts and varying contracts:

Rule 1.2.1: It shall be the duty of both Buyer and Seller to communicate with each to the other, a Contract Confirmation in writing setting forth the specifications as agreed upon the in the original Terms of Trade, not later than the close of business the day following the date of trade…

Rule 1.3: The specifications of a contract can not be altered or amended without the expressed consent of both Buyer and the Seller. Any alteration mutually agreed upon between Buyer and Seller must be immediately confirmed in writing.

4.5 Neither party disputes that the Trade Rules have been incorporated into the contract in question or that any terms of that contract are in conflict with the Trade Rules.

4.6 Whether the wash-out is deemed to be a new contract or a variation of the original contract is not relevant at this stage. The main issue is that under the Trade Rules either option requires some form of confirmation in writing to be exchanged between the parties.

4.7 The reason for this should be obvious to the parties and is manifest in this case. The parties may do orally what they may do in writing. Parties may enter into contracts and vary contracts orally just as they may in writing. It matters not as a matter of law.

4.8 However it matters greatly as a matter of evidence and to that end, Trade Rules 1.2.1 and 1.3 are not so much statements of the law, as statements of good contract practice which, if followed, will avoid conflicts such as this one.

4.9 The content of the telephone conversation in question cannot carry as much evidentiary weight as the documents the parties have annexed to their submissions. Those documents are objectively clear. Given the quantity and nature of the witness statements it is difficult to assess the credibility and veracity of such evidence. The Committee will now examine the documentation supporting the parties' submissions to evaluate whether a wash-out was concluded on 15 August 2006.

5. SUBMISSIONS

Claimant

5.1 The Claimant submits that its practice for the washout of contracts is that a grower may 'buy back' a contract by having it 'washed out' by way of financial settlement. The Claimant considers this to be a resale of the grain back to the grower and the wash-out price is the difference between the contract price and the market price the day the grain is sold back to the seller. The Claimant submits that when the terms of a washout are agreed the trader records it as 'Booked' in their daybook and then fills out a contract note and enters the deal into the contract trading system. The Claimant submits that the new contract is then sent to the grower and this contract offsets the original contract with the effect of cancelling it. The Claimant submits that an invoice is then sent to the grower.

5.2 The Claimant submits that at no point in the conversation on 15 August 2006 did the Respondent accept the offer to wash out. The Respondent submits that this is supported by the fact that no wash-out deal was recorded in the trader's day book or in the trading system. The Claimant submits that there was no written confirmation in its system that a wash-out had been agreed.

5.3 The Claimant submits that it conducted itself as if the contract was still on foot and if the contract had been washed out and removed from the trading system the Claimant would not have been alerted to the Respondent's failure to deliver the grain.

5.4 The Claimant submits that the internal emails of the Respondent demonstrate that the Respondent had no intention of following up the paperwork regarding the washout that it thought it had concluded. The Claimant submits that Trade Rule 1.3 places an equal obligation on all parties to ensure that any alteration is confirmed in writing.

Respondent

5.5 The Respondent submits the Claimant's general practice for washing out contracts is irrelevant. It submits that the only relevant matter in this instance is what the Claimant did in relation to this wash-out. The Respondent submits that there are substantial inconsistencies in the Claimant's evidence. The Respondent submits that during the conversation between the Claimant and the Respondent, the Respondent said the word 'Done' to accept the wash-out price of $212.00. The Respondent submits that this is supported by its day book entries.

5.6 The Respondent submits that on the Claimant's evidence he may only make a 'note in the day book' if he deals with a party on a regular basis. The Respondent submits that this means the Claimant does not always send a further written contract.

5.7 The Respondent submits that given the Claimant's practices, if the contract had not been washed out and thus was due for delivery in December 2007, why was the contract not actioned as normal where the Claimant would have sought to confirm delivery sites and

so on? As this was not actioned, the Respondent submits that the original contract can only have been washed out.

5.8 The Respondent submits that there was no legal requirement nor a requirement under the NACMA Trade Rules nor a requirement under the sale of goods legislation to pursue the necessary paperwork from the Claimant in respect of the washed out contract or reduce that contract into writing.

Documentary Evidence

5.9 Given the facts in dispute in this matter it is essential to closely examine what written documentation the parties have submitted to the Arbitration Committee to support their positions. The relevant documentation to evaluate this dispute relates to what each party did at the time the conversation took place and shortly thereafter, but before the contract fell due to delivery when this dispute arose.

5.10 The Claimant has provided a photocopy of the daybook entries of its trader between 10 August 2006 and 18 August 2006. The entries are very difficult to read but there does not appear to be an entry regarding the Respondent's washout, nor that any conversation between the parties took place.

5.11 The Respondent has provided a photocopy of its trader's daybook entry which is also quite difficult to read. The page is not clearly a daybook entry and there appears to be a lack of consistent dated daybook recordings. Indeed the same daybook entries are submitted with the Surrebuttal and show that the entries are dated inconsistently or not at all without the use of external tags.

5.12 The Respondent has provided copies of internal emails between its trader and other employees. An email dated 15 August 2006 seeks to confirms a conversation that the contract had been washed out at $212.00. An email dated 28 August 2006 asks whether the contract has been washed out. The Respondent's trader replies that it had been washed at $210.00 on 14 August 2006. On 24 October 2006 an internal email states that no paperwork has been received, and could the Respondent's trader follow up. The Respondent's trader replies that they don't need any paperwork until delivery and they will simply invoice the difference. The Respondent's trader states that they shouldn't look for the paperwork as they currently have no income.

6. DECISION

6.1 Whilst the parties have submitted evidence as to the content of the telephone conversations, and the respective employees who were in the office on the day the conversation took place, as it was not possible to test the validity of that evidence we have given greater evidentiary weight to the documentation exchanged between the parties on or after 15 August 2006.

6.2 We have to form an objective assessment of the parties intentions, based on the documents provided, including the evidence of telephone conversations.

6.3 As the parties incorporated the Trade Rules into the contract, and neither party has disputed this, we consider that the Trade Rules apply and govern the contractual relationship between the parties.

6.4 Whether a new contract is created or the contract is varied, the Trade Rules specifically require some written confirmation to be exchanged between the parties. Whilst each party has made various submissions regarding how we should interpret the contemporaneous events surrounding the conversation and the delivery of the contract, given the requirements of the Trade Rules the Arbitration Committee must first examine and be persuaded by the documentation exchanged between the parties.

6.5 The parties have provided some day books entries which, irrelevant of what they do or do not state, there is no evidence that these were exchanged between the parties. The internal email string of the Respondent is evidence that the Respondent believed that it

had agreed to a washout but without any written confirmation between the parties to the dispute we cannot conclude that there was any mutual agreement between the parties to wash out the contract. The Respondent's inconsistent evidence as to the amount at which the contract was washed out indicates that the Respondent had not properly recorded the washout for its own purposes.

6.6 Following 15 August 2006, the Claimant sent notices to the Respondent on 7 September and 22 December 2006 in relation to the open position. While the 22 December letter appears to be in the nature of a "circular" to all growers, the letter of 7 September 2006 makes specific reference to the contract in dispute.

6.7 On 24 January 2007 the Claimant enquired why the Respondent had not fulfilled the contract.

6.8 We accept that the Respondent's trader believes that he washed this contract out. His subsequent conduct within the offices of the Respondent may well bear this out. However his subjective belief is not relevant to our inquiry. The fact remains that there is no evidence that the Claimant agreed to wash the contract out. The parties have not supplied any persuasive documentation that there was a mutual agreement between the parties to wash out the contract as required by the Trade Rules for creating a new contract or varying a current contract.

7. AWARD

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

1. The Claim is allowed;

2. The Respondent shall pay the Claimant $445,000.00 for default of the contract;

3. The Respondent shall indemnify the Claimant in respect of all NACMA arbitration fees paid expenses paid by the Claimant to NACMA in this arbitration;

4. The Respondent shall pay the Claimant's costs on a party and party basis as agreed or assessed in accordance with *Commercial Arbitration Act (NSW) 1984*.