[2005] WASC 103

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS
CITATION	**:**	PREMIUM GRAIN HANDLERS PTY LTD -v- ELITE GRAINS PTY LTD [2005] WASC 103
CORAM	**:**	COMMISSIONER MCKERRACHER QC
HEARD	**:**	12 MAY 2005
DELIVERED	**:**	27 MAY 2005
FILE NO/S	**:**	ARB 5 of 2005
BETWEEN	**:**	PREMIUM GRAIN HANDLERS PTY LTD (ACN 009 260 520) Plaintiff AND ELITE GRAINS PTY LTD (ACN 091 599 941) Defendant

Catchwords:

Leave to enforce arbitration award - Whether arbitration agreement - Whether consent to be in writing - Reference to usual terms - Whether arbitration clause imported by course of dealing between the parties - Reference to subsequent conduct - Turns on own facts

Legislation:

Commercial Arbitration Act 1985 (WA), s 4, s 33

Result:

Leave to enforce award granted

Category: B

Representation:

Counsel:

Plaintiff	:	Mr M G Lundberg
Defendant	:	Mr A P Hershowitz

Solicitors:

Plaintiff	:	Mallesons Stephen Jaques
Defendant	:	Holborn Lenhoff Massey

Case(s) referred to in judgment(s):

Anglo-Newfoundland Development Co Ltd v King [1920] 2 KB 214
Barrymores v Harris Scarfe Ltd [2001] WASC 210; (2001) 25 WAR 187
Cockatoo Dockyard Pty Ltd v Commonwealth of Australia (No 3) (1994) 35 NSWLR 689
Daval Aciers D'Usinor et de Sacilor v Armare Srl (The Nerano) [1994] 2 Lloyd's Rep 50
Daval Aciers D'Usinor et de Sacilor v Armare Srl (The Nerano) [1996] 1 Lloyd's Rep 1
Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd (1988) 14 NSWLR 523
Jalun Pool Supplies Pty Ltd v Onga [1999] SASC 20
Re Davis & Brown's Arbitration (No 2) [1957] VR 127
Ridler v Walter [2001] TASSC 98
The Rena K [1979] QB 377

Case(s) also cited:

Australian Foods Co Pty Ltd v Pars Ram Brothers (Australia) Pty Ltd [2002] NSWSC 1180
Brinkibon Ltd v Stahag Stahl and Stahlwarenhandelsgessellschaft mbH [1982] 1 All ER 293
Deeks v Little Moreton Trading Pty Ltd (1995) 14 WAR 58
E Turner & Sons Ltd v Maltind Ltd (1985) 5 Const LJ 273

Excomm Ltd v Ahmed Abdul-Qawi Bamaodah, The St Raphael [1985] 1 Lloyd's Rep 403
Mihaljevic v Eiffel Tower Motors Pty Ltd [1973] VR 545
Skips A/S Nordeim v Syrian Petroleum Co Ltd, The Varemma [1981] QB 599
Warming's Used Cars Ltd v Tucker [1956] SASR 249

1 **COMMISSIONER MCKERRACHER QC**: This is the plaintiff's application for leave to enforce an arbitration award pursuant to the provisions of s 33 of the *Commercial Arbitration Act 1985* (WA) ("*CAA*").

2 That section provides:

> "An award made under an arbitration agreement may, by leave of the Court, be enforced in the same manner as a judgment or order of the Court to the same effect, and where leave is so given, judgment may be entered in terms of the award."

3 Where leave is given under s 33 *CAA*, judgment may be entered in terms of the award. The applicant may seek leave to enforce the award in order to obtain the benefit of the courts' coercive powers of enforcement. Granting leave to enforce under the *CAA* is discretionary and may be refused in cases where the award is considered unsatisfactory; that would be so if I were to conclude the defendant had never agreed to arbitrate.

4 By s 4 of the *CAA* it is provided that unless the contrary intention appears, "arbitration agreement" means an agreement in writing to refer present or future disputes to arbitration. The main matter for determination in this application is whether there was such an agreement.

5 The existence or otherwise of a contract has certainly been addressed by the award itself which accepted there was a contract which referred the dispute to arbitration. The award did not consider the defendant's evidence in support of the argument raised to the contrary for the simple reason that the evidence was not available to the arbitrators. The ground advanced for the defendant in two letters from its solicitors was that no contract came into existence. Consistently with that it was contended both then and now in opposition to the current application that there was no arbitration agreement but the defendant now adduces evidence in support of that position.

6 In ***Ridler v Walter*** [2001] TASSC 98 the Tasmanian Full Court overturned a discretionary order made under s 33 *CAA* as the award had not quantified costs and was not enforceable in the same sense as a judgment of the court. In dealing with the question of publication of reasons in the award it said at [12]:

> "Although s 29(1)(c) requires that a statement of reasons for the making of an award to be included therein, the Commercial Arbitration Act does not contain any express provision to the

> effect that the failure to include such a statement of reasons will result in an award being a nullity. Since the common law did not require an award to include a statement of reasons, an award that does not include a statement of reasons must not amount to a nullity unless the implied effect of one or more of the provisions of the Commercial Arbitration Act is that such a deficiency results in an award being a nullity. In my view, there is nothing in the provisions of that Act to justify such a conclusion. On the contrary, the provisions that I have referred to which restrict appeals and applications for awards to be set aside or remitted for further consideration suggest that, at least as a general rule, Parliament intended awards that were in some respect defective or deficient to be valid and enforceable."

7 On the information available to the arbitrators, there is no doubt that they gave reasons and although they did not address the arguments which arise on the evidence referred to below, they had no basis for doing so. Other than the fundamental argument about whether the defendant ever agreed to arbitrate, no issue about the award itself has been taken by the defendant, nor do I consider there is any basis for doing so.

8 I am reminded by counsel for the plaintiff that an application of this nature needs to be approached on a summary basis as s 33 *CAA* contemplates. As Rolfe J said in ***Cockatoo Dockyard Pty Ltd v Commonwealth of Australia (No 3)*** (1994) 35 NSWLR 689 at 695 - 696:

> "In my opinion s 33 is not a dispute resolving provision referring a matter the subject of arbitral proceedings to the Court. It provides a summary procedure whereby awards may be enforced 'in the same manner as a judgment or order of the Court to the same effect', and allows judgment to be entered in terms of the award. In the context of the Act that cannot, in my opinion, mean the Court is given power under s 33 to reconsider whether the award should have been made and, if for some reason it concludes it should not, to refuse to enforce the award.
>
> Prima facie, and so much was conceded by Mr Bennett, a party with the benefit of an award can seek to enforce it by resort to s 33. It is necessary for a party resisting an order under s 33 to establish a reason why the award should not be enforced. A reason may be that the Court considers the award is arguably vitiated by appealable error, or by other circumstances making it susceptible of being set aside in accordance with a provision

> of the Act. In other words it may well be an appropriate exercise of the Court's discretion not to grant leave if an application for leave to appeal is on foot or if an application has been made to set aside to award, for example, on the ground of misconduct. However unless an attempt is being made to have the award set aside I have difficulty envisaging other circumstances in which the discretion can be exercised. Certainly I do not regard s 33 as a 'back door' method of appealing against an award in so far as it constitutes a decision by the arbitrator how he should exercise his discretion. The discretion given does not include, in my opinion, an ability to re-visit the way in which the arbitrator exercised his discretion where, otherwise, his discretion is not subject to attack in accordance with the Act. A contrary conclusion would I believe, be totally at odds with the obvious intention and philosophy of the Act."

9 The observations of Rolfe J are, with respect, no doubt correct, in almost every application for leave to enforce an award. This one may be the exception. There is a fundamental factual dispute in this application over whether the defendant at any time agreed to refer any dispute to arbitration. Counsel approached the matter by agreement on the basis that resolution of the factual dispute required a deal of *viva voce* evidence including cross-examination. It seemed to me on hearing the nature of the dispute, that the agreement between counsel was correct and there was little choice other than to deal with the matter on a basis that involved an analysis of credibility.

The award

10 The award to be enforced was delivered by arbitrators appointed by the National Agricultural Commodities Marketing Association ("NACMA"). The award, made on 24 December 2004 by the NACMA arbitrators, relates to a dispute arising in May 2004 between the plaintiff and the defendant concerning an alleged liability of the defendant to take delivery of lupins in bulk pursuant to an alleged contract.

11 By letter dated 24 October 2004 NACMA notified the plaintiff and the defendant that the arbitrators had found in favour of the plaintiff and attached the award signed by the arbitrators.

12 The terms of the award which were so annexed were that the respondent (the defendant) was instructed to pay the claimant (the plaintiff) forthwith:

(1) damages of $8,575.73 inclusive to GST;

(2) interest due to late payment of $686.86;

(3) arbitration fees of $6,060 inclusive of GST; and

(4) legal costs of $423.50 inclusive of GST.

This amounted to a total of $15,746.09.

13 The alleged arbitration agreement on which the plaintiff relies is set out in a document entitled Contract No 30819 and dated 22 May 2003 ("the contract") which the plaintiff says was sent by facsimile transmission from the plaintiff to the defendant on that date.

The issue

14 As observed in *Halsbury's Laws of Australia* [25-50] the arbitration agreement is fundamental to the concept and practice of arbitration. It creates and defines the jurisdiction of the arbitrator and, together with the appropriate legislation, defines the procedures for the conduct of the arbitration and establishes the rights of the disputing parties *inter se* and the rights between them and the arbitrator.

15 The defendant asserts no agreement in writing to refer present or future disputes to arbitration within the meaning of s 4 of the *CAA* was ever reached. The defendant accepts that if I conclude there was an arbitration agreement, leave to enforce the award should be granted.

16 The contract contained the following terms amongst others:

> "11. Other ... OTHER TRADE RULES AS PER NACMA
> 12. ARBITRATION: If any dispute arises between the Seller and the Buyer concerning the performance or observation by either party of the provisions of the Contract, the matter and all questions incidental thereto shall be referred to Arbitration under the provisions of the NACMA Arbitration Rules current at the date of the Contract.
> Please sign and return one copy within seven days."

17 The plaintiff says that the contract was faxed on the date it bears and should be assumed to have been received. It supports that assertion with documentary records generated by a telephone company showing a charge being incurred by the plaintiff on the date the contract bears. The plaintiff says that expense was incurred to fax the contract to the defendant. There were no other dealings between the parties at that stage, according to the plaintiff, but the defendant speculates that the telephone expense incurred

on that date may have pertained to other communications between the parties. It can point to no specific need for communication on that day.

18 The plaintiff submits, in the alternative that if a finding cannot be made that the contract was faxed on that date, then the oral contract reached the day before should be taken by reason of the course of dealings between the parties to incorporate the referral of any dispute to NACMA for arbitration pursuant to NACMA's general terms.

The evidence for the plaintiff

19 It was common ground that the parties had entered into a number of contracts prior to the date of this contract. There were at least seven contracts entered into between the parties for delivery of grain prior to the contract in these proceedings. Those contracts were between April 2001 and December 2002. On at least four of those seven occasions the managing director of the defendant, Mr Rodney Culleton, signed and faxed back to the plaintiff the respective contracts. They were similar in terms to the present contract and certainly imported the NACMA arbitration clause but some did spell out in slightly greater detail the purported effect of signing the form. A clause which was subsequently removed by the plaintiff and was not included in the contract (as it considered it to be superfluous), then read:

> "This fax confirms the agreement already formed by phone. Please sign and return one copy within seven days. Failure to do so constitutes acceptance of the above. The seller confirms that he/she is registered for GST with the abovementioned ABN number and hereby agrees to the buyer issuing a recipient created tax invoice for the duration of this contract."

20 Three affidavits of John Bradley Orr for the plaintiff were tendered. Mr Orr was also cross-examined.

21 Mr Orr confirmed he had a telephone conversation with Mr Culleton on 21 May 2003 towards the end of the day in which the parties agreed that the plaintiff would sell to the defendant 200 metric tonnes ("MT") of lupins at a fixed price of $299 per MT for farm dressed lupins and $305 per MT for machine dressed lupins to be delivered over the period from May to October 2003. Those essential terms were recorded in Mr Orr's day book on the date of the discussion.

22 On the day of the telephone conversation, in accordance with his usual practice Mr Orr recorded in his day book what he describes as being

the "variables". The variables were essentially those terms I have referred to above. He did not in the course of the discussion or in his day book record in detail other terms of the agreement as they were, he says, governed by the standard terms and conditions contained in the contract. In the case of this discussion on 21 May 2003 Mr Orr thinks, although he cannot remember the precise words said, it is likely he would have said to Mr Culleton towards the end of the discussion, "I will fax through a standard PGH contract". The usual terms and conditions of course contain the arbitration clause. It was Mr Orr's practice, he said, when agreeing terms with a buyer over the telephone to mark the terms with an asterisk if the parties had reached a "meeting of minds".

23 His further practice was to personally fax to the buyer the contract produced from his computer. It would contain the terms agreed in the telephone conversation and recorded in the day book, as well as the standard terms and conditions. When the fax machine at his office gave a single tone indicating that the facsimile had been dispatched satisfactorily, at that stage and not before, he would tick the entry appearing in his day book. On this occasion the entry pertaining to the contract has both an asterisk and a tick next to it. Mr Orr says that this, in accordance with his standard practice, indicates to him that agreement was fully reached on the telephone and that the fax was successfully sent to Mr Culleton.

24 Although it was his usual practice to immediately forward the confirmatory fax which seeks the signature of the buyer, he did not pursue that course until the following morning shortly after 10 am as the telephone conversation was late in the day.

25 It was common ground that there was not in existence any version of the contract signed by the defendant. The defendant says that is because he never received the contract by facsimile or otherwise. The plaintiff says that as they entered into a large number of similar contracts they did not chase up buyers every time, requesting them to sign and return contracts. In fact Mr Orr regarded the process of the buyer returning the signed contract as being administrative in effect rather than binding because he contended that the contract had been completed by the telephone conversation.

Subsequent conduct

26 Between May and September 2003 the defendant took delivery of four deliveries from lupins from the plaintiff at a constant price of $295 per MT for farm dressed lupins and $305 per MT for machine dressed lupins. The plaintiff says this is significant because prices did in

fact fluctuate through that period but the price at which the defendants took delivery on each occasion was consistent with the terms in the contract. I agree that it is significant.

27 By October 2003 the defendant took a delivery of a fifth load of lupins from the plaintiff and paid at the same price of $295 per MT for the farm dressed lupins.

28 Mr Culleton emphatically denies that he, on behalf of the defendant, at any time agreed to purchase 200 MT of lupins from the plaintiff and says that there were five separate "spot" or individual contracts which governed the purchase of the lupins in that period. There is no additional documentation however to support contracts of this nature at this time other than the plaintiff's own record of delivery of the lupins. This record is also consistent with the terms of the contract.

29 After the defendant took delivery of 48.28 MT of lupins (invoiced on 17 October 2003) the plaintiff pointed out to it that it still had 149.66 MT of lupins in storage being the balance to be delivered under the contract. On 20 May 2004 the plaintiff sent by facsimile to the defendant a memorandum informing it that it was in default on the delivery period on the contract and advising that a penalty would be charged associated with the costs of the late payments on some of the deliveries which had been made against the contract. The plaintiff said in the memorandum:

> "We have elected to cancel the default portion of the contract at the current market value and have attached an invoice to include both the contract default and the late payment costs."

The method of the calculation was spelt out and an invoice forwarded to the defendant for the sum of $9,262.59.

30 The defendant refused to pay this amount or any amount.

The Arbitration Process

31 On 3 June 2004 the plaintiff wrote to NACMA outlining the dispute between the parties and requesting that NACMA provide the parties with a "NACMA fast track arbitration service".

32 NACMA wrote to the defendant in relation to that request. On 14 July 2004 Mr Culleton for the defendant informed NACMA that he was seeking legal advice and would contact NACMA forthwith. On 30 July 2004 NACMA advised the plaintiffs that it had not received any further correspondence from the defendant regarding the arbitration.

33 The defendant received a letter from NACMA of 2 September 2004 requiring it to sign the contract for the full arbitration, to nominate an arbitrator and to forward the appropriate fee, some $8,800. The defendant's solicitors on 16 September informed NACMA that no contract was ever made or ever came into existence with the plaintiff and the defendant was not bound to resolve the dispute under s 6 of the NACMA full arbitration rules. The defendant declined to consent to any process of arbitration. The defendant's solicitors informed NACMA that if the plaintiff was to proceed with a claim against the defendant it should do so in the ordinary courts and not by reference to NACMA's arbitration rules.

34 NACMA took its own legal advice from solicitors in Sydney who wrote to the defendant's solicitors saying that because the plaintiff took a contrary view as to the existence of the contract NACMA was obliged to proceed with a request for arbitration. It was suggested that the defendant should participate on a without prejudice basis. The defendant declined to do so and accordingly the arbitration proceeded in its absence.

35 By letter of 18 October 2004 Mr Orr forwarded to NACMA the details of the plaintiff's claim and documents in support of its claim.

36 The claim as summarised by Mr Orr :

> "involved a 200 MT lupin contract which was verbally agreed between John Orr of PGH and Rodney Culleton of Elite Grains, at the end of the working day on 21 May 2003 in a drought affected market, of which a summary record was made in John Orr's day book. A written contract No 30819 referring to NACMA terms was then faxed by PGH to Elite Grains on the morning of 22 May 2003. Elite Grains then proceeded to pick up product within the terms of the abovementioned contract and made a number of payments which began with the terms of the contract for the first two loads, but then payments became increasingly delinquent."

37 A substantial body of material was supplied to the arbitrators, as well as a chronology of the events. The submission to the arbitrators concluded:

> "We believe a contractual agreement clearly existed in this case, evidenced in writing through the existence of a diary note and written confirmation. Actions were then taken by both parties which were consistent with the existence of a contract, resulting in the partial performance of close to 50 per cent of the contract.

> When market prices dropped in the lead up to the 2003/04 harvest period, Elite Grains stopped taking product against the contract and delayed outstanding payments, causing the contract to fall into default and the outstanding product to be resold at a lower market price. We previously detailed our claim for $9,262.59 (references 5 & 6), to which we now add legal fees (reference 16) and the cost of arbitration (references 17 & 18), bringing our total claim to $15,746.09."

38 Further information was sought by the arbitrators and supplied by the plaintiff on two occasions.

39 I perceive nothing in any of these accounts as being inconsistent with the position advanced by the plaintiff in this application.

40 On 25 October 2004 NACMA provided the defendant with a copy of the documents regarding the plaintiff's claim in the arbitration and notified the defendant of its rights to lodge a defence. NACMA informed Elite Grains that if a defence was not lodged, "the Arbitration Committee will consider the claim and issue an award".

The evidence for the defendant

41 Mr Culleton is the Managing Director of the defendant and from 1981 to 1997 he worked in rural Western Australia in the private sector purchasing wool from farmers for sale to overseas clients on a commission basis. In 1995 he became a grain acquisition agent for the Australian Wheat Board and purchased grain on its behalf, writing contracts and deriving his income also on a commission basis. This would suggest to me that although his primary interests were, particularly at the date of the contract, centred more on farming or manufacturing activities, he nevertheless had a reasonable amount of business experience.

42 In 1996 Mr Culleton purchased a farm near Williams in Western Australia with the intention of starting a business to add value to grain by processing it mainly for the equine industry. He commenced a stock food store in 1998 within the metropolitan area in Middle Swan which proved to be successful and also developed a processing plant for cooking raw grain to provide value added product to the equine industry. In 2002 that operation was moved to the farm in Williams.

43 The defendant was incorporated in 2000 and during 2001, while the stock food store was being operated by Mr Culleton in Perth, the

defendant started purchasing grain on a regular basis from the plaintiff. Mr Culleton said the grain was purchased "either by spot or under contract". He produced a schedule of transactions said to have been effected between the parties between June 2001 and May 2004, noting that the frequency of transactions dropped off in 2003 after the processing plant had been relocated to the farm in Williams where the grain could be purchased, he said, far more cheaply directly from farmers in the area.

44 Mr Culleton said that he only became aware of the fact that Mr Orr had been president of NACMA on reading that fact in Mr Orr's affidavit. He said in his affidavit that had he known of that fact earlier it would have been raised by him as another reason why NACMA was not competent to have acted as the arbitrator in the dispute between the plaintiff and the defendant, as one of the plaintiff's directors had previously been the president of the very same entity conducting the arbitration. In fact this was a misunderstanding caused partly by the terminology in Mr Orr's affidavit. Mr Orr had in fact been president of NACMA in Western Australia but held no office with NACMA nationally. It was only the national body of NACMA that conducted arbitrations. Mr Orr held no office with NACMA at any time relevant to the events the subject of this application.

The telephone conversation

45 Mr Culleton said that he was unable to recall whether or not he had a telephone discussion with Mr Orr on 21 May 2003 but in reference to a paragraph of Mr Orr's first affidavit, categorically denied that he, on behalf of the defendant, agreed to purchase 200 MT of lupins from the plaintiff as alleged in Mr Orr's affidavit or at all. He said that the defendant would never have committed to purchasing such a large amount of lupins to be consumed in a narrow five month time frame.

46 The relevant paragraph of the affidavit of Mr Orr referred only to the telephone conversation and it was to these remarks that Mr Culleton was responding. As he cannot recall whether or not he had a telephone discussion on that day, the denial about reaching agreement can only be in substance, a conclusion or belief as distinct from an actual recollection. In contrast to this Mr Orr said he had an actual recollection supported by refreshing his memory from his contemporaneous notes. Although contemporaneous was not a word Mr Orr used, he confirmed that he wrote the notes at or shortly after the time of the discussion.

47 I fully accept the evidence of Mr Orr. I found him to be an impressive witness. He was willing to concede ground where necessary

and did not seek to argue with or challenge the cross-examiner. I was unable to form as favourable a conclusion generally of Mr Culleton and specifically in relation to some aspects of the evidence of Mr Culleton.

48 I prefer the evidence on this topic of Mr Orr and I find that the agreement for the plaintiff to sell the defendant 200 MT of lupins during the period of May 2003 to October 2003 was reached on the telephone on 21 May 2003 late in the day.

49 I also accept the evidence of Mr Orr that on the following morning he faxed the contract on behalf of the plaintiff to Mr Culleton on behalf of the defendant. This document set out the same terms as were contemporaneously recorded in his day book and added some additional terms to which I shall return shortly.

50 In my view it would be highly improbable that Mr Orr would have manufactured in his day book a contemporaneous chronological account as to a transaction. That it was chronological appears from the surrounding references in his day book on which he was cross examined.

Arguments raised by the defendant

51 The day book records the telephone number of Mr Culleton. Counsel for the defendant submits that it would be highly unlikely that an order as large as 200 MT would be placed by Mr Culleton on the spur of the moment if Mr Orr had telephoned him. I agree with this submission. However it is just as likely in my view that Mr Orr was returning a phone message from Mr Culleton and recorded the telephone number of the latter in his day book. I do not consider that the phone number being noted in the day book is significant either way.

52 Mr Culleton said that as at May 2003 the defendant's consumption of lupins which represented a small percentage of its manufacturing requirements was no more than 10 MT per month and it simply did not have the storage capacity to deal with such a large order which would have taken 20 months to consume. Nevertheless, there was at least one occasion when lupins were purchased by the defendant from the plaintiff and forwarded direct to a third party without the lupins passing through any storage facility owned by the defendant. Additionally, I have observed that contracts of the same size had been ordered in the past but admittedly they were contracts for delivery over a longer period of time than this contract. Mr Culleton observed that the purchase of 200 MT of lupins at that stage would have severely impacted upon the defendant's cash flow and "made it uncompetitive in relation to its competitors."

53 Again, this is in essence an argument rather than evidence but it was not an argument that was put in writing in any form until the time of this hearing. In that regard, the defendant was generally able to produce only the most modest quantity of documentation to support a variety of assertions which it made. Mr Culleton explained that this was because while he was working he would frequently be in a shed a kilometre from the farm house. While he would receive calls on his mobile telephone in the shed he had no day book, no diary, no electronic diary and no note book recording the content of those discussions in contrast to the procedure adopted by the plaintiff. He explained, and I fully accept, this is because he did not work behind a desk but was involved in actual manufacturing. He did however have a white board in the shed where he could record relevant transactions.

54 Mr Culleton made the point on oath that the defendant has never made a contract with the plaintiff which has not been signed by both parties. This position was rather awkward for the defendant as the documents themselves show that there were, on occasions, contracts which were not signed but, nevertheless, were acted upon by both parties in terms of delivery and payment. In support of the assertion that the defendant had never made a contract with the plaintiff which had not been signed by both parties, Mr Culleton said that two of the contracts which were shown in the plaintiff's papers as being unsigned by the defendant had in fact been signed and were still within the defendant's records at his home property but no-one had asked him to bring them to court.

55 I found this evidence difficult to accept, given that on the day before the hearing he did produce two other contracts which had been signed by both parties in response to two contracts in respect to which the plaintiff had produced versions signed only for the plaintiff. It strikes me as improbable that only those two signed contracts would be produced if the other two signed contracts were in the defendant's files at Williams. This, together with the evidence from the plaintiff to the contrary, gave rise to my rejecting the suggestion that the defendant has never made a contract with the plaintiff which has not been signed by both parties. Of course, such an assertion if accepted, would have supported the contention by the defendant that his failure to sign the contract should be taken as meaning that the parties had not reached an agreement.

56 Mr Culleton explained receipt of the four deliveries from May to September 2003 on the basis that they were purchases on a spot basis from the plaintiff on occasions when the lupins could conveniently and cheaply be back loaded to the farm at Williams after orders had been

delivered to various of the defendant's customers in Perth. Mr Culleton said that any reference to the Contract No 30819 by the plaintiff in its tax invoices would not have been of any significance to his wife or to him. His wife was responsible for payment of invoices on behalf of the defendant. There was some confusion in this regard, but it was clear by the end of the hearing that the invoices which had been produced for the arbitration purposes were reproductions through a computerised accounting system and it was not suggested by the plaintiff that the original invoices did actually make reference to the contract number.

57 One of the most significant deliveries in 2003 was the transaction leading up to the generation of the tax invoice from the plaintiff dated 17 October 2003 for 48.28 MT of lupins. Again Mr Culleton says that this was a spot purchase which was brought about as a result of a telephone conversation from Mr Orr who told him that the plaintiff had a load of lupins which had to be cleared out of a silo in the Lake King area to make room for the new season's grain and that Mr Culleton, on behalf of the defendant, agreed to purchase the lupins on commission. He says that it was agreed that payment for them would be delayed as this was a large volume of lupins to acquire in a single transaction. He says that the agreed price for the lupins was $268 per tonne and produced a copy of the original tax invoice received for that transaction which the plaintiff "has not seen fit to produce". He said that later, because of the delay in paying for the lupins, the defendant agreed to pay $295 per tonne. I am unable to accept this account.

58 In fact the price shown on that invoice is $268.1819 per tonne.

59 I accept the evidence of the plaintiff that the reason the original tax invoice at $268 approximately per tonne was not produced was because it was an error produced by the computer, and was realised to be an error shortly after it was dispatched as it failed to include provisions for GST. The unusual sum of $268.1819 when multiplied by 110 per cent for GST purposes gives exactly (to the nearest thousandth of a cent) the contract price. I accept the plaintiff's evidence that this invoice was replaced shortly after with a corrected invoice which did include GST, bringing the price to $295 per tonne. I also accept that the evidence of Mr Orr that the plaintiff has never contracted at a price per tonne going to four decimal places of a dollar. It follows that this attempt by the defendant to dispute the plaintiff's evidence that all purchases were at the rates agreed under the contract cannot be accepted.

60 Again, there was no documentation produced by the defendant in relation to any of the deliveries of 2003. The defendant says that contracts are not prepared for spot purchases, but this appears to me to be incorrect as purchases for significantly lower sums than the 48.28 MT of lupins invoiced in October 2003 were reflected in contract documentation produced by both parties. Specifically there were written contracts or 10 MT, 15 MT and 25 MT of lupins delivered to and paid for by the defendant in September 2001, November 2001 and November 2001 respectively. The latter two purchases are in effect spot purchases and they are supported by documents which have been signed by Mr Culleton. The only contractual documentation capable of relating to these deliveries is relevantly the same as that which is the subject of the contract.

61 There were exchanges between the parties in September 2003 to which Mr Culleton refers in support, as I perceive it, of his suggestion that the plaintiff's records from time to time were not accurate and that the plaintiff was from time to time mistaken (at best) as to the nature of the contractual relationship, if any, between it and the defendant. I accept that the plaintiff's records are not without imperfection. Nevertheless, it does seem to me that in the exchanges which occurred in September 2003 concerning prospective contracts for sale of both oats and lupins, that when the plaintiff made it clear that there was still a large amount due to be purchased by the defendant, the defendant yet again failed to put in writing at that time its denial of the existence of a contract. There was clearly ample opportunity for it to do so. The first written objection was not until almost a year later.

62 The significance of the fact that the price paid for the deliveries in 2003 was exactly the same as the contract price is more profound having regard to the evidence that during the same period lupin prices were extremely volatile (between May and September 2003) due to a drought affected market. Spot price sales in this period were subject to significant price variations. Evidence was produced of fluctuating prices during that period at which lupins were purchased from farmers. The variations in price were passed on to the plaintiff's spot delivery customers during that time. Notwithstanding this, the price at which the plaintiff always paid for deliveries was exactly the same as the contract price.

63 The references by Mr Culleton to certain subsequent communications gave rise to Mr Orr producing a number of pages from his daily diary recording communications with Mr Culleton in which there would have been ample opportunity from Mr Culleton to deny the existence of the contracts. I accept it the evidence of Mr Orr that he did

not do so until the reference of the dispute to arbitration. Even then, the factual basis for the denials as to any contractual obligation was not articulated to any level of detail.

64 It would be unusual in my view for an experienced businessman such as Mr Culleton to receive detailed written assertions as to a contractual obligation without reasonably promptly and clearly setting out a written denial of such an obligation and the reason for such a denial. He has now been able to develop these positions on affidavits but did not do so before these proceedings.

Was the contract sent by facsimile?

65 The primary position of the defendant is that even if I were to find that the telephone conversation took place as alleged by the plaintiff, there is no satisfactory evidence that the fax was received by the defendant and, indeed, any copy that has been produced was unsigned, suggesting that it was not sent as the plaintiff alleges. That being so, the arbitration clause which was not on either account referred to in the phone conversation could not be imported into the purchase contract between the parties.

66 It is for the party asserting the existence of an arbitration agreement to prove on the balance of probabilities that an arbitration agreement does in fact exist between the parties. In the end it is to be determined on the facts of each case.

67 I am persuaded on the balance of the evidence, and accepting as I do that Mr Orr was a truthful witness, that he did successfully fax the contract to the defendant.

68 On the basis of the evidence that I have outlined, together with the fact that the defendant's searches of its documentary records appear to be substantially less than adequate, there is no adequate evidence to rebut the inference that the facsimile would have been received.

69 Once a facsimile is received on a facsimile machine it is not unreasonable to treat it as having been delivered to the principal. In this instance, while Mr Culleton denied the possibility that the fax might have been misplaced, misfiled or lost, it is clear that he has not pursued a significant search for it. I conclude it is more likely than not that Mr Culleton did receive the fax, did not sign it as he had not always signed such agreements in the past but nevertheless knew that it reflected the agreement that had been reached on the telephone and knew that it was in the standard terms and conditions.

70 As to the receipt of the fax, I am mindful of the observation of Debelle J in ***Jalun Pool Supplies Pty Ltd v Onga*** [1999] SASC 20 at [18]:

> " ... once the message has been received on the recipient's machine, it is not unreasonable to treat it as delivered because it is the recipient's responsibility to monitor and clear his machine: *Brinkibon Ltd v Stahag Stahl CmbH* [1983] 2 AC 34 per Lord Fraser at 43. For example, the message will be stored electronically, even if the facsimile machine has run out of paper. Once it has been refilled with paper and reactivated, it will print messages which have been electronically stored. The sender should not be penalised because of a failure by the recipient to monitor his facsimile machine in a satisfactory way."

71 The plaintiff submits that once I make those findings, that is the end of the matter. It is common ground that it is unnecessary for an arbitration agreement to be signed: ***Re Davis & Brown's Arbitration (No 2)*** [1957] VR 127 per Scholl J at 137. Indeed the requirements of an arbitration agreement can be satisfied even where none of the parties sign the document, provided the circumstances establish that the document constitutes an agreement: ***Anglo-Newfoundland Development Co Ltd v King*** [1920] 2 KB 214 per Bankes LJ at 223. The passage in Jacobs, "Commercial Arbitration: Law and Practice" (2001) at [4.140], [4.150] and [4.160] supports these propositions.

Knowledge of the NACMA terms

72 The defendant in making the submission that the plaintiff has the onus to prove both that an agreement was entered into between the parties and its terms relies on the fact that Mr Culleton says that he had never heard of NACMA prior to or at the time of the contract. The plaintiff submits I should reject that evidence as it is wholly unlikely that someone with substantial commercial experience in rural industries would not have heard of NACMA. I do not propose to reject the evidence. I accept Mr Culleton's evidence that he was not familiar as at May 2003 with the Trading Terms or the arbitration provisions of NACMA.

73 It is clear in my view that there must be proper proof that the parties intended the arbitration clause contained in some document over and above their oral agreement to contract, to be incorporated: ***The Rena K*** [1979] QB 377 and Jacobs, "Commercial Arbitration Law and Practice" [4.220].

74 In this regard in the course of his cross-examination, Mr Orr said, as he was invited to do, that he believed that it was likely that he would have said before completing the conversation with Mr Culleton that he would " ... fax through a standard PGH contract". I accept that a statement to that effect was entirely likely and that it was made.

75 There is no doubt that those standard contracts always included the arbitration clause, cl 11, which referred any disputes to NACMA for arbitration under the provisions of the NACMA Arbitration Rules. While Mr Culleton was not familiar with those rules that does not mean in my view that he did not agree to be bound by those rules at the time of concluding the oral contract on 21 May 2003 by telephone. All the previous dealings, even on Mr Culleton's evidence, had been pursuant to or evidenced by written contractual terms incorporating the arbitration clause. Parties signing standard offer and acceptance forms importing conditions written by third party bodies may not be able to detail the terms and effects of the conditions but they are, nonetheless bound by them. There was, I find, acceptance by the defendant that the "standard PGH contract" would apply. In the circumstances of the previous dealings between the parties and Mr Culleton's knowledge of the term, if not the detailed terms and conditions, that is sufficient to import the arbitration clause. I accept that it may not always be so but the express reference to the clause in this standard contract ensures that it is binding: ***Daval Aciers D'Usinor et de Sacilor v Armare Srl (The Nerano)*** [1994] 2 Lloyd's Rep 50 at 52 per Clarke J, affirmed ***Daval Aciers D'Usinor et de Sacilor v Armare Srl (The Nerano)*** [1996] 1 Lloyd's Rep 1, CA.

76 I conclude that when Mr Orr confirmed in the discussion with Mr Culleton that he would fax to him the standard contract, there was a meeting of minds between the parties that the contract would contain all the usual clauses including the arbitration clause. Further, the faxing of the contract containing the arbitration clause in my view reduced to writing the agreement which the parties had orally reached. For the purposes of the *CAA* the arbitration agreement is that written agreement. I believe that it is the written agreement also for the purposes of the terms of the NACMA arbitration agreement to which I was taken and which required the consent of both parties. In my view the effect of the exchange, given the history and background of the parties constituted the necessary consent.

Subsequent conduct

77 In addition to this finding, the subsequent conduct supports the existence of the contract. Taken alone it would not suffice to imply a contract but taken with the telephone conversation despite the fact that the fax was not signed by the defendant, still suggests that the defendant indicated an intention to contract: *cf* ***Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd*** (1988) 14 NSWLR 523, where the Court of Appeal held that notwithstanding the failure or refusal by a property developer to execute a printed contract submitted by managing architects engaged in a protracted property development involving large sums of money, assent to the printed contract could be inferred from the whole of the circumstances of the dealings between the parties.

78 It was also held per McHugh JA; Samuels JA agreeing, that where an offeree with a reasonable opportunity to reject the offer of goods or services takes the benefit of them under circumstances which indicate that they were to be paid for in accordance with the offer, it is open to a tribunal of fact to hold that the offer was accepted according to its terms.

Prior dealings between the parties

79 The plaintiff argues that if I do not find the contract was faxed and received, that in the alternative the adoption of the arbitration clause should be incorporated as a term of the contract between the parties as it was always a part of their previous course of dealings and there was no basis to think otherwise on this occasion. I have found that the contract was faxed and received but I will consider the alternative argument. In *Halsbury's Laws of Australia* at [110-2090] it is suggested:

> " ... In order to decide whether terms have been incorporated by a course of dealing, regard must be had to the steps taken by the party alleging that terms have been incorporated and the extent of the dealing between the parties. The course of dealing must be consistent and sufficiently long. In order to rely on a course of dealing as incorporating terms into a contract a party need not show that the other party had actual knowledge of the terms. However, the degree of knowledge is a factor to [be] considered.
>
> The analysis that such cases imply is that a contract may be orally agreed to, but contain implied terms (incorporated by the course of dealing) which has the effect of modifying the terms which would otherwise be implied into the contract. By way of

contrast with the ticket cases, it is not relevant or material to ask whether the document which in fact contains the terms alleged to be incorporated is 'contractual in character'. The time at which the document is received is not crucial once a course of dealing is established. Terms may therefore be incorporated by a course of dealing even though they are expressed in a document received after the (oral) contract has been formed. This is on the basis that each party has led the other reasonably to believe that he or she intended that the rights and liabilities towards one another which would otherwise arise by implication of law from the nature of the contract should be modified in the manner specified in the written document."

80 Similarly, in "Carter on Contract" at [10-180]:

"A course of dealing occurs when the contract between the parties is preceded by a series of transactions over time. Such a course of dealing may have the effect of incorporating terms into a contract. 1. For example, an oral contract may contain implied terms incorporated by the course of dealing. 2. The two requirements are:

(1) a course of dealing; and

(2) conduct sufficient to justify, from an objective perspective, that the terms are to govern the contract.

In order to decide whether the terms are incorporated by the course of dealing regard must be had to the extent of dealing between the parties and the steps taken. The course of dealing must be consistent and sufficiently long. For example, in *J Spurling Ltd v Bradshaw* [1956] 1 WLR 461 a course of dealing was established by reason of the fact that the parties had contracted on 'many' occasions prior to the contract which gave rise to the dispute. And in *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31 the course of dealing extended over three or four years and involved three or four transactions each month. In Australia, in *Chattis Nominees Pty Ltd v Norman Ross Homeworks Pty Ltd* (1992) 28 NSWLR 338, Cohen J [see also *Ralph McKay Ltd v International Harvester Australia Ltd (Receivers and Managers Appointed)* [1999] 3 VR 675 at 683 per Tadgell J] it was held that the incorporation of a term for retention of property in goods could be based on a

> consistent course of dealing and the failure to object to the term thus incorporated; and in *Teys Bros (Beenleigh) Pty Ltd v ANL Cargo Operations Pty Ltd* [1990] 2 Qd R 288 at 295 per Cooper J standard conditions were regarded as incorporated into the contract where parties habitually contracted for sea carriage under those terms.
>
> By way of contrast, no course of dealing was established in *D J Hill & Co Pty Ltd v Walter H Wright Pty Ltd* [1971] VR 749 even though the parties had contracted on a number of occasions. A clearer case is *Hollier v Rambler Motors (AMC) Ltd* [1972] 2 QB 71; [see also *Pondicil Pty Ltd v Tropical Reef Shipyard Pty Ltd* (1994) ATPR Digest 46-134 at 55,656 per Cooper J (four occasions not sufficient where reasonable notice of contract terms never given)] where there were only three or four occasions spread over a period of five years, and the clause was not incorporated into the contract. Similarly, if there is inconsistency in the dealings between the parties the court may conclude that there is no course of dealing. Thus, in *McCutcheon v David MacBrayne Ltd* [1964] 1 WLR 125; [1964] 1 All ER 430, inconsistency in the dealings between the parties to the contract meant that there was no course of dealings in relation to the terms of a carriage contract.
>
> In *McCutcheon v David MacBrayne Ltd* Lord Devlin said ([1964] 1 WLR 125 at 134; [1964] 1 All ER 430 at 437) that even if a course of dealing is established, actual knowledge of the terms is required. However, this view was disapproved in *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31 at 90; 104-5, 130; [1968] 2 All ER 444 at 462, 474-5, 496. See also *Pondcil Pty Ltd v Tropical Reef Shipyard Pty Ltd* (1994) ATPR Digest 46-134 at 53,652-4 per Cooper J (see S Kapnoullas, (1996) 10 JCL 173). It is thus established that in order to rely on a course of dealing one party need not show that the other party had actual knowledge of the terms."

81 In ***Barrymores v Harris Scarfe Ltd*** (2001) 25 WAR 187 Roberts-Smith J at 207 held:

> "Contractual terms may be inferred from the business relationship of parties if the course of their dealings raises the reasonable expectation that terms imposed on previous occasions will form part of the contract on a subsequent

occasion. For that to be done four requirements need to be satisfied:

(1) the terms previously used must be identifiable (usually by reference to contractual documents);

(2) those previous occasions must be sufficiently numerous and frequent;

(3) the conduct must be consistent enough to constitute a regular course of dealing;

(4) which raises the reasonable expectation that the same terms should be included in the subsequent contract.

(D W Greig & J L R Davis, 'The Law of Contract', Law Book Co Ltd, 1987, p 575.)"

82 Prior to this contract being entered into the plaintiff and the defendant had, pursuant to written contracts which imported the arbitration clause, contracted on at least seven occasions between April 2001 and April 2002 inclusive. On every one of those occasions, the arbitration clause had been contained in the contractual documents.

83 Although there had been something of a lull in a new contract following 29 April 2002 there had been, as there were with the previous contracts, many deliveries and payments in that interim period. The parties were actively involved in a process of sale and purchase of grain on a simple written contract which clearly referred disputes to arbitration under the arbitration clause which gave rise to the award which the plaintiff now seeks to enforce. They had only ever dealt with each other on this basis in multiple delivery contracts. In my view that written clause was, regardless of faxing the contract, imported into the oral contract by course of dealings sufficient to constitute an arbitration agreement for the purposes of the *CAA*.

The nature of the defendant's consent

84 As an additional argument the defendant contended that neither for the purposes of the *CAA* nor for the NACMA dispute resolution rules had the defendant properly consented to the arbitration as it had not consented in writing.

85 Reliance was placed on s 2 of the NACMA dispute resolution rules, in particular cl 2.2, which provides:

> "In the absence of a court order a case between a Member and a Non Member may not be properly considered by the AC [the Arbitration Committee] without the consent of both parties. If the contract in dispute between a Member and Non Member provides for arbitration by NACMA or under NACMA trade rules, the parties to the contract shall be deemed to have consented to Arbitration under these Dispute Resolution Rules."

86 The purpose of cl 2.2 of the *Arbitration Rules* appears to be to impose a requirement that NACMA non-members only be subject to a NACMA arbitration if they have consented. (This is the effect of the first sentence of cl 2.2). The purpose of the deemed consent in the second sentence is to facilitate the resolution of disputes through the NACMA process and to reduce formality, not to increase it. The clause has the effect that there will be a deemed consent to arbitration under the *Arbitration Rules* if the contract simply refers to arbitration by NACMA or arbitration under the *Trades Rules*.

87 In my view there is no need for this consent to be in writing. I accept the plaintiff's submission that such a construction finds no support in the express terms of cl 2.2 of the *Arbitration Rules*; is inconsistent with the general law concept of a contract (which includes contracts made orally, in writing, partly oral/partly in writing, and by conduct); is inconsistent with the definition of "contract" in the *Trade Rules*; would impose an additional layer of formality not required by the *CAA* and would be inconsistent with established principle; and is unsupported by any compelling commercial justification.

88 In this instance, although at the time of referral of the matter to arbitration, the defendant then purported to not consent, in my view as at the time of entry into the contract the defendant had for the reasons stated already given sufficient consent. It is improbable that the second part of cl 2.2 purports to take the matter any further than the conclusion I have already reached.

Conclusion

89 In my view the plaintiff is entitled to the relief it seeks and I will give the plaintiff leave to enforce the award.