GRAIN TRADE AUSTRALIA

Grain Trade Australia Limited Level 11, 56 Pitt Street Sydney NSW 2000
PO Box R1829 Royal Exchange NSW 1225
Phone: +61 2 9247 6408 Fax: +61 2 9247 9153
Email: admin@graintrade.org.au Web: www.graintrade.org.au

Arbitration 150

Notice to Members

Date of Issue: **February 2013**

Claimant: **Grain buyer**
&
Respondent: **Grain seller**

Arbitration Committee (AC)

- Mr Gerard Langtry, nominated by the Claimant;
- Mr Vern Ezzy, nominated by GTA at the request of the Respondent;
- Mr Leo Delahunty, Chairman appointed by GTA.

Claim

According to the Claimant, they (the Claimant) overpaid the Respondent and are entitled to financial rectification of the mistake.

The Claimant claims rectification, and $113,423.91 from the Respondents.

Award

1. The Claim was denied and the Claimant was responsible to pay the Respondent's Arbitration and legal fees.

Details

The Parties entered into a contract for the sale of wheat. The Confirmation sent to the seller and signed by both Parties clearly stated the price basing point was the local silo.

The Clamant, some months later, after the grain had been delivered and paid for, claimed the contract confirmation was wrong and the price basing point was a Port and hence the price at the country silo should have been the Port price less the GTA Location Differential.

In effect the Claimant claimed they overpaid the Respondent $51 per tonne. The issue was picked up by the auditors.

Award findings

The AC found that:

- There is insufficient evidence to conclude that the Respondent's subjective intention was to sell their grain to the Claimant at A$261 basis Track Newcastle.
- Even if they were convinced, they would have elected not to exercise our discretion to grant rectification due to the considerable time that has now elapsed.
  "On the Claimant's evidence, the error was not discovered until on or about 19 June 2009.[1] By that time the grain has been transferred and paid for. The error in this case was entirely that of the Claimant. It had numerous opportunities to detect its errors, but took at least 6 months to do so. That is too long, in our view."

IN THE MATTER OF THE COMMERCIAL ARBITRATION ACT 1984 (NSW) AND IN THE MATTER OF AN ARBITRATION UNDER THE RULES OF GRAIN TRADE AUSTRALIA LTD

GTA Arbitration No. 150

Grain buyer
(Claimant)

and

Grain seller
(Respondent)

Final Award

1. Introduction

This is an arbitration pursuant to the Dispute Resolution Rules of Grain Trade Australia Ltd ("GTA").

At issue in this dispute is the question of mistake and rectification of contract.

The Arbitration Committee comprises:

- Mr Gerard Langtry, nominated by the Claimant;
- Mr Vern Ezzy, nominated by GTA at the request of the Respondent;
- Mr Leo Delahunty, Chairman appointed by GTA.

This reference has been the subject of a previous interim award published on 30 November 2010 in relation to an alleged time bar. In that earlier interim award we found that the proceedings were not subject to a time bar.

As the Tribunal was constituted prior to 1 October 2010, this proceeding is governed by the *Commercial Arbitration Act* 1984 (NSW).

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

1. Claimant's Submissions dated 13 December 2010;
2. Respondent's Submissions dated 11 February 2011;
3. Claimant's Points of Reply dated 3 March 2011;
4. Respondent's Points of Reply dated 23 May 2011;

2. Facts

The circumstances of this claim are reasonably straight-forward.

On or about 11 November 2008, Mr P S for the Respondent apparently signed a contract with the Claimant, no. 605611 dated 10 November 2008 ("the Contract Note").

The signed Contract Note was faxed to the Claimant on or about 9 January 2009.

The terms of the Contract Note were as follows;

Commodity: Wheat Multi Bin Grade as per NACMA Standards 2008/2009 Season.

Pricing/MT: 2000mt AUD 261

Del.Basis/FOB Point: Del GrainCorp (town name).

The Contract Note also contained reference to "full terms and conditions attached" but these were not placed in evidence by either party.

The Contract Note was performed according to its terms. In fact, the Respondent delivered an additional 40mt to the Claimant, at the contract price. A Recipient Created Tax Invoice was generated, and the Respondent was paid.

None of that is in dispute.

Some significant time later, the Claimant detected what it says was a mistake in the Contract Note. It says that instead of "Delivery GrainCorp (town name)", the contract should have provided for "Delivery Newcastle Track".

"Track" contracts are common in the Australian grain trade. The classic Track contract is the GTA Contract No. 2. Under such a contract, grain is sold according to its price at a nominated place, usually a port. Grain can be delivered against that contract "up country" at certain agreed places, but the "port price" is then discounted according to the relevant "location differential" applicable to the delivery point. The location differential represents the cost of moving the grain from the delivery place, to the port.

According to the Claimant the mistake is significant because it resulted in a substantial overpayment to the Respondents. The Respondents would have remained free to deliver the grain at (town name), but would have been subject to a deduction of the relevant location differential, which the Claimant says amounts to $51 per tonne.

The Claimant claims rectification, and $113,423.91 from the Respondents.

3. The Dispute

The Claimant claims rectification on the basis of mutual mistake. There was some debate about whether the claim was based on unilateral mistake, but that was clarified and it appears clear that the claim is made solely on the basis of mutual mistake.

Rectification is an equitable remedy. The Respondents have reserved their position in relation to whether we have equitable jurisdiction.

Subject to this reservation, rectification of the Contract Note is available if we are satisfied that the instrument as signed did not reflect the true agreement of both parties. In gleaning the parties true intentions, we are concerned to establish their subjective intention, not just their objective intention.

Even if there is evidence that the parties' common intention is not reflected in the instrument, we also have a discretion as to whether we grant the relief sought.

Contrary to a submission by the Respondents, we are satisfied that we are able to consider pre-contractual negotiations, and that the Parole Evidence Rule does not apply in this case.

We are also satisfied that we are able to glean that subjective intention as a matter of inference, but that in doing so, there must be clear and convincing proof of that intention.

In order to make out its case therefore, the Claimant must establish in clear and convincing terms that by the conclusion of negotiations, the Respondents had intended to sell the grain to the Claimant on terms "Track Newcastle".

At all material times, the Respondents were represented by Mr J S. Mr S has submitted 2 statutory declarations. The parties elected for this reference to be conducted on documents, and accordingly no witnesses have been examined before us.

There is no objective evidence before us that would indicate that Mr S had formed an intention to sell his grain "track Newcastle". To the contrary, Mr S expressly eschews such a suggestion. He says he actively considered an alternative of selling his grain to packers at (another town name) at a price around $281 for APH, plus spreads.[1] He concedes that the price being offered by the Claimant was a good price.[2] It is not surprising or remarkable that Mr S would elect to sell his grain for the best price on offer.

If we are to find for the Claimant therefore, we would need to glean the parties common intention from the Claimant's evidence alone, by inference, which must be convincing.

To be clear, what must be established here is that by the end of negotiations with the Claimant, the Respondents intended to sell their grain at a price $261 Newcastle "Track", and that the Contract Note did not reflect that true intent.

This is an extremely "high bar" for the Claimant, and we do not believe it has achieved it. For reasons we shall give, even if we had felt that there was sufficient evidence of common intention, we would not have exercised our discretion to grant relief.

4. The Claimant's Evidence

The Claimant's evidence consists of two statutory declarations by Mr N. Critical to the case is the evidence of key conversations between Mr N for the Claimant, and Mr S.

The first occurred on 10 November 2008. By Mr S recollection[3], the conversation was brief.

Mr S: I want to sell 1000mt of multi-grade wheat. It's already warehoused at GrainCorp (town name). Could you give me a cash price?

Mr N: $261 plus spreads.

Mr S: I'll get back to you.

Mr S recollection is consistent with his brief note. [4]

Mr S then says that on 10 or 11 November 2008 he spoke again to Mr N, and accepted his price for 2000mt, and received a faxed contract on 11 November 2008.[5]

[1] Para 6 of Mr S 1.
[2] Para 11 of Mr S 1.
[3] Para 5 of Mr S 1.
[4] See annexure "A" to Mr S 1.
[5] Paras 12 and 14 of Mr S 1.

Mr N's recollection is of more detailed conversations on 10 November 2008. He gives evidence of how the pricing for that day was reached, namely in discussion with other traders, and based on the Newcastle Track price being offered by GrainCorp and AWB.

One curious aspect of the evidence is this; why would the Respondent want to sell Track, and why would he care what the Track price was? We can understand that the Newcastle Track price may have influenced the price that the Claimant was offering at (town name), but so may have other considerations of little concern to Mr S.

According to Mr N, it was Mr S who first mentioned "delivered Newcastle"[6], having earlier been quoted a price delivered (town name), apparently based on Track Newcastle pricing. We are to infer therefore that Mr S apprehended that the quoted price was based on a Track Newcastle price, and added back the location differential, to be able to quote a price of $261 delivered Newcastle.

This seems unlikely.

Moreover, by 10 November 2008 much of Mr S's wheat had already been delivered at 9town name).

Somewhat tellingly, Mr N gives evidence that during the first conversation on 10 November 2008, Mr S said

"I have been delivering grain to AWB (another town name) but most of my grain deliveries are going to (town name)….".[7]

He says that Mr S indicated that he "intended to deliver the majority of the wheat to (town name) silo". [8]

Mr N then states that "Mr S proceeded to deliver multigrade wheat to about mid November 2008", and annexes to his statement "a copy of the grain receipts issued by the silo operators which detail the deliveries made by Mr S….". [9]

However, according to Mr S, these documents do not record the delivery of grain; they record the transfers of grain from Mr S to the Claimant. [10]

This appears to be a significant error on Mr N's part. It may also suggest that Mr N's recollection of events may have been recreated with reliance on objective evidence, the significance of which has been misunderstood.

Nevertheless, the Claimant's Points of Reply, and Mr N's Supplementary Statutory Declaration are silent as to this significant inconsistency in circumstances where it should have been addressed.

The Claimant's case must rely on inference. Another key inference on which the Claimant relies is the assertion that the price in the Contract Note was above the then current market price. Even if we are satisfied that it was, that alone does not establish that the Respondents intended to sell for $261 Track Newcastle. The evidence, without more, is inconclusive.

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[6] Para 12 of Nolan 1.
[7] Para 7 of Mr N 1.
[8] Para 16 of Mr N.
[9] Para 22 of Mr N 1.
[10] Para 16(p) of Mr S 1.

Similarly the Claimant leads some evidence of other similar mistakes for which it says it has secured repayments. Even if this is correct, it sheds little light on the Respondent's true intention.

As we mentioned above, it is for the Claimant to prove the Respondents' subjective intention. The Claimant needs to establish that before he saw the Contract Note, Mr S believed that he was selling his grain for $261 per tonne, Track Newcastle. It is not sufficient to establish that a "reasonable person" in Mr S' position would have understood that the price being offered was $261 per tonne, Track Newcastle.

In a case such as this, where an instrument has been executed, and performed on its terms, the Claimant must be able to demonstrate, not just that Mr S was confused about the price, or that Mr S "couldn't believe his luck", or felt that the price offered by the Claimant was "too good to be true". The Claimant must prove that the Respondent had formed an intention to sell his grain at a price of $261 Track Newcastle, prior to seeing the Contract Note. The evidence of that intention, particularly if based on inference, must be clear, precise and convincing. It should go without saying therefore that we would need to find the Claimant's evidence to that effect compelling.

Unfortunately for the Claimant, we do not.

Even if we did, we would be reluctant to exercise our discretion to grant rectification. On the Claimant's evidence, the error was not discovered until on or about 19 June 2009.[11] By that time the grain has been transferred and paid for. The error in this case was entirely that of the Claimant. It had numerous opportunities to detect its errors, but took at least 6 months to do so. That is too long, in our view.

5. FINDINGS

There is insufficient evidence for us to conclude that the Respondent's subjective intention was to sell their grain to the Claimant at A$261 basis Track Newcastle.

Even if we were convinced, we would have elected not to exercise our discretion to grant rectification due to the considerable time that has now elapsed.

6. FINAL AWARD

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

1. The Claim is dismissed.

2. The Claimant shall indemnify the Respondent in respect of any fees paid by the Respondent to GTA in relation to this arbitration.

3. The Claimant shall pay the Respondent's legal costs on a party and party basis. 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 Final Award.

[11] Para 6 of Mr N 2.

……..**Date: …...../…...../2011**

Gerard Langtry, Arbitrator nominated by the Claimant.

……..**Date: ……../…...../2011**

Vern Ezzy, Arbitrator nominated for the Respondent.

……..**Date: ..……../…...../2011**

Leo Delahunty, Arbitration Committee Chair, appointed by GTA.