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Arbitration No. 152

Notice to Members

Date of Issue: **February 2011**

Claimant: **Commodity Buyer**
&
Respondent: **Commodity Seller**

Arbitration Committee (AC)
- Mr Simon McNair, nominated by the Claimant;
- Mr Hugh Morison, nominated by the Respondent;
- Mr Graeme Dillon, Chairman appointed by GTA.

Claim
The Respondent breached contract by supplying out of spec barley for first 981 mt of a 4000 mt contract. The Claimant and Respondent could not agree on the quantum of the quality claim. The Claimant sought liquidated damages for balance of contract plus quality claim. Respondent denies it must pay liquidated damages and has terminated contract due to unpaid disputed invoice.

Award
1. The Claim is allowed.
2. The Respondent shall pay the Claimant the amount of $76,175.31.
3. The Respondent shall pay interest on the damages at the rate of 8.75% pa from 14 May 2010.
4. The Respondent shall indemnify the Claimant in respect of any fees paid by the Claimant to GTA in relation to this arbitration.

Details
The Respondent admits that the barley it delivered in the First and Second Deliveries was not to the contract specification.

The Respondent says that the losses claimed by the Claimant in respect of those shipments are excessive. Also at issue, is the treatment of the undelivered balance of the contract.

Following the default in respect of the First and Second (and notionally Third) Deliveries, it appears that the parties entered into negotiations in relation to how to deal with the losses resulting from the First and Second Deliveries.

In the course of that negotiation, Respondent gave notice to the Claimant that it was terminating the Contract on the basis of the Claimants non-payment of its invoice in relation to the Second Delivery. In that regard it relied on GTA Trade Rule 13.3 which relates to *Delinquent Payments at Time of Conveyance*.

Subsequently the Claimant wrote to the Respondent rejecting the Claimant's assertion that it was in default, and holding the Respondent in default.

Rule 13.3 relates specifically to payments which are outstanding at the time of conveyance. In this case deliveries had been suspended while the parties tried to find a resolution.

Award findings
The AC found that:
- That the Respondent was in breach of contract in respect of the First and Second Deliveries and was liable to indemnify the Claimant in respect of the claims advanced in the amount of $61,208.82.
- Further, that the Claimant properly held the Respondent in default in respect of the balance of the Contract on 14 May 2010.
- That the Claimant is entitled to damages in respect of the balance of the Contract in the sum of $126.828.24, or a total of $188,037.06.
- Deducting from that sum the amount of the unpaid invoice in respect of the Second Shipment (that is, $111,861.75), the balance payable by the Respondent to the Claimant is $76,175.31.

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 Arbitrations No. 152

DCT buyer
(Claimant)

and

DCT 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 the consequence of breach of contract.

The Arbitration Tribunal comprises:

- Mr Simon McNair, nominated by the Claimant;
- Mr Hugh Morison, nominated by the Respondent;
- Mr Graeme Dillon, Chairman appointed by GTA.

As the Arbitration Committee was constituted prior to 1 October 2010, this award is governed by the *Commercial Arbitration Act* 1984.

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

1. Submissions on behalf of DCT buyer dated 18 October 2010 ("Claim Submissions");
2. Respondents Points of Defence dated 18 November 2010 ("Points of Defence");
3. Claimant's Points of Reply dated 7 December 2010 ("Claimant's Reply");
4. Respondent's Points of Reply dated 24 December 2010 ("Respondent's Reply").

2. Jurisdiction

The contract the subject of this dispute is in the form of a broker's note issued by A Broker no. 16958/90351 dated 23 December 2009. It is headed "Amended Brokerage Contract", it being an amendment to an earlier brokerage contract dated 20 December 2009 also issued by A Broker.

Both forms clearly incorporate the GTA Trade Rules and specifically refer disputes under the contract to arbitration pursuant to the GTA Dispute Resolution Rules.

As neither party has put in issue our jurisdiction to deal with the matters referred to us, we find that we are a validly constituted tribunal with jurisdiction to determine the matters in dispute.

3. The Background to the Dispute

As mentioned above, the disputes arise under a contract between the parties issued by A Broker ("A Broker") headed "Amended Brokerage Contract" dated 23 December 2009 ("the Contract").

The Respondent has put in evidence an earlier version of this contract dated 20 November 2009, but neither party appears to be asserting that this earlier version prevails.

Under the Contract, the Respondent sold to the Claimant 4000mt Baudin variety Malt 1 barley of the 2009/2010 season at a price of $210/mt DCT Fremantle.

Other relevant terms and conditions were;

Quality: as per attached Chinese specifications for BA1 malt barley of the 2009/2010 season. As per independent surveyors report.

Rules: as per Grain Trade Australia Ltd Contract no. 4 (DCT Contract)

Shipment: For February to May 2010 delivery to wharf. A carry charge of @2.50/mt per month applies as of March 1, 2010.

Payment: Full invoice value due no later than 14 days from the date of loaded containers being delivered to wharf.

Special Conditions: To be shipped as approx 181 x 20ft containers - each approximately 22mt. AQIS costs for seller's account. Seller to hold samples of each individual container loaded for at least 2 months from date of containers being loaded and make these available to buyers upon request.

It is common ground that 2 deliveries were made under the Contract. These were evidenced by the following invoices issued by the Respondent;

1. Invoice no. 00017502 dated 15 February 2010 in the amount of $114,566.76 (inc GST) evidencing delivery of 495.96mt of "Farmers Dressed M1 Barley bulk in containers", last container delivered 12 February 2010 ("First Delivery"). This invoice was paid by the Claimant on 22 February 2010.

2. Invoice no. 00017627 dated 2 March 2010 in the amount of $111,861.75 (inc GST) evidencing delivery of 484.25mt "Farmers Dressed M1 Barley bulk in containers", last container delivered 26 February 2010 ("Second Delivery"). This invoice remains unpaid.

The Respondent made a 3rd delivery of 503.64 mt of barley in containers to port in or about March 2010 ("Third Delivery"), but this was diverted by the Respondent to another contract. There is no suggestion that the Claimant was invoiced for this delivery.

Samples of the grain were drawn and tested by Australian Superintendence Company Pty Ltd. It prepared 3 reports (dated 19 February, 8 and 12 March in relation to the First, Second and Third Delivery respectively) each of which indicated that the grain was not of the contractual specification.

In any event, this does not appear to be in dispute. At paragraph 19 of the Points of Defence the Respondent admits (or at least "does not dispute") that the barley it supplied was not of the quality specified in the Amended Contract, and that the Claimant suffered loss and damage as a result. This is reiterated in paragraph 33(1) of the Points of Defence.

No other deliveries were made against the Contract.

4. The Dispute

As mentioned above, the Respondent candidly admits that the barley it delivered in the First and Second Deliveries was not of the contractual specification.

It says however that the losses claimed by the Claimant in respect of those shipments are excessive.

Also at issue is the treatment of the undelivered balance of the contract.

4.1 The First Delivery

The Claimant says that on 23 December 2009, it entered into a "back to back" contract with Claimant's Buyer and that the delivered barley was to be shipped to Claimant's Buyer nominated counterparty in Thailand between February and May 2010.

That contract with Claimant's Buyer was not produced.

In any event, the First and Second Deliveries were shipped to Thailand in February 2010.

The Claimant asserts that Claimant's Buyer received quality claims from its customer in relation to the First Shipment and held the Claimaint liable to indemnify it in respect of those claims. There was apparently an "arms length" negotiation between the Claimant and Claimant's Buyer and the claim was settled for $61,208.82.

The Respondent appears to accept that the Claimant's Buyer claims in respect of the first shipment were not unreasonable.[1]

4.2 The Second Delivery

Having ascertained the actual quality of the Second Shipment, Claimant's Buyer re-shipped that cargo to a customer in China at a discount to the Contract price.

Claimant's Buyer losses included the discount on purchase price and additional shipping costs[2]. No evidence of these expenses was produced by the Claimant.

[1] See para 1.4 of the text of the email set out at para 31 of the Points of Defence.
[2] See paras 33 (c), (d) and (e) and 34 of the Claims Submissions.

The Respondent's principal objection appears to be that Claimant's Buyer could have achieved a higher price for the barley. The Respondent bases this on its knowledge of the Chinese market at the time.

Mitigation of loss is an imperfect science. It is often the case, in hindsight, that a party could have done more to mitigate its losses. That is not however the question. What matters is whether, objectively, the party conducted itself unreasonably in failing to do more to mitigate its losses.

In light of the explanation set out in paragraph 34 of the Claims Submission, we can see no evidence that it did so.

4.3 The Balance of the Contract

Following the default in respect of the First and Second (and notionally Third) Deliveries, it appears that the parties entered into negotiations in relation to how to deal with (specifically) the losses resulting from the First and Second Deliveries.

In the course of that negotiation, on 5 May 2010 the Respondent gave notice to the Claimant that it was terminating the Contract on the basis of the Claimants non-payment of its invoice in relation to the Second Delivery. In that regard it relied on GTA Trade Rule 13.3 which relates to *Delinquent Payments at Time of Conveyance*.

Subsequently on 14 May 2010, the Claimant wrote to the Respondent rejecting the Claimant's assertion that it was in default, and holding the Respondent in default.

We do not think that the Respondent can rely on Rule 13.3. It relates specifically to payments which are outstanding at the time of conveyance. In this case deliveries had been suspended (following 3 non-contractual deliveries) while the parties tried to find a resolution. In a situation where no delivery is pending, and so no conveyance imminent, we do not see how Rule 13.3 can apply.

We also note that the reason for the non-payment was in an albeit undeclared set-off in respect of possible liabilities under the Contract caused by the breaches by the Respondent. In circumstances where the GTA Trade Rules do not expressly prohibit set-off, we accept the Claimant's submission that the Respondent cannot rely on a situation caused or contributed to by its own contractual misconduct, to hold the Claimant in default.

Conversely, we consider that the Claimant properly held the Respondent in default on 14 May 2010. The Respondent was in material breach of the Contract having made 3 uncontractual deliveries for which it had failed to give any or any proper account or explanation. It had similarly been unable to give the Claimant any assurance that these were isolated incidents which would not be repeated.

Further, we also accept and agree that by its 5 May 2010 email the Respondent had wrongfully held the Claimant in breach of the Contract and that act alone entitled the Claimant to accept the Respondent's conduct as wrongful repudiation.

It is entitled to damages as a result of the failure to perform the balance of the contract.

4.4 Quantum of Loss

On the Claimant's evidence, provided in the form of a report from Allied Grain Pty Ltd dated 12 October 2010, and from Claimant's buyer also dated 12 October 2010, the fair market value is between $256.16mt and $272mt with a midpoint of $264.

On the Respondent's evidence, provided by A Broker, the fair market price was between $230 and $250mt with a midpoint of $240.

It is apparent from this evidence that it was a difficult and illiquid market. Using the midpoints of the various estimated fair market values provided by the parties, the Tribunal has concluded that a fair market value is $252mt.

We therefore conclude that the Claimant is entitled to damages calculated as $42mt (that is, $252 less the Contract price of $210), multiplied by the undelivered tonnage of 3019.72mt, which equals $126.828.24.

The Claimant claims interest at the rate of 10% per annum, from 14 May 2010.

The Respondent had claimed 6% interest.

With reference to the relevant Court interest rates, we find that the Claimant is entitled to interest at the rate of 8.75% per annum, from 14 May 2010.

Finally, the Claimant is entitled to its costs, including legal costs and fees paid to GTA.

5. OTHER MATTERS

Other matters arose in the course of submissions. While not strictly affecting our decision, it is appropriate that we comment on some of them.

Destination v Origination Quality

While both parties made submissions[3] as to whether the basis of trade under the Contract was Destination Quality, or Origination Quality, for the purposes of Rule 7 of the Trade Rules those submissions did not seem to go anywhere. We suspect this was because "destination" for the purposes of a "DCT" contract is the relevant container terminal. This seems clear to us and is consistent with the express terms of the contract.

Defence and Cross-Claim

The proceedings were commenced by the Claimant seeking damages.

While the Respondent has served "Points of Defence", it has in fact made cross-claims at paragraph 45 of the Points of Defence.

While it should be apparent from the above, the Respondent's cross-claim is dismissed in so far as its claims in sub-paragraphs 45(2),(3) and (4) are concerned.

[3] See for example para 14 of the Claims Submissions, and paras 12-15 of Points of Defence.

The cross-claim in respect of sub-paragraph 45(1) is allowed, but as expressed in our finding below the amount of the outstanding invoice is set-off against the damages payable to the Claimant.

Nature of the Breach

The Claimant has made various submission "further and in the alternative" at sub-paragraphs 42(m),(n) and (o) of its Claims Submissions. To the extent that it is necessary to make a finding, we find that the Claimant succeeds on each of the alternative grounds set out at sub-paragraphs 42(l)-(o).

Evidence

Both parties have provided less evidence (in the form of contemporary documents, emails, or witness statement) that we would have expected.

The parties may have been trying to minimise legal costs, which is understandable, however it remains important that the parties provide evidence in support of their claims, unless they are fully admitted.

For example, the Claimant claimed A$21,563.48 in respect of the First Delivery, and $61,208.82 in respect of the combined First and Second Deliveries.

In fact, the Claimant was claiming an indemnity in respect of the amount it paid to Claimant's Buyer, though it did not express its claim in this way.

While it says that it paid this amount[4], it produced no evidence either that it paid the amount, or that Claimant's Buyer actually incurred that loss.

Had the circumstances of these proceedings been different, this omission may have been fatal.

In the event, the Respondent did not put the Claimant to proof of these losses (in its Points of Defence, at least) and conceded that the Claimant had suffered loss in respect of the First and Second Deliveries, and chose to focus only on the mitigation point with respect to the Second Delivery.

While we note that in paragraph 1(3) of the Respondent's Points of Reply it raises the absence of evidence, we note that had it done so in its Points of Defence the matter may have been put in issue and the Claimant afforded an opportunity to produce the appropriate evidence.

Finally, the amounts claimed in respect of the First and Second Deliveries seem in our professional experience to be reasonable, based on our combined knowledge of the barley trade.

[4] See para 35 of the Claims Submissions

6. FINDINGS

Accordingly, we find:

- That the Respondent was in breach of contract in respect of the First and Second Deliveries and was liable to indemnify the Claimant in respect of the claims advanced by Claimant's Buyer in the amount of $61,208.82.

- Further, that the Claimant properly held the Respondent in default in respect of the balance of the Contract on 14 May 2010.

- That the Claimant is entitled to damages in respect of the balance of the Contract in the sum of $126.828.24, or a total of $188,037.06.

- Deducting from that sum the amount of the unpaid invoice in respect of the Second Shipment (that is, $111,861.75), the balance payable by the Respondent to the Claimant is $76,175.31.

7. AWARD

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

1. The Claim is allowed.

2. The Respondent shall pay the Claimant the amount of $76,175.31.

3. The Respondent shall pay interest on the damages at the rate of 8.75% per annum from 14 May 2010.

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

5. The Respondent shall pay the Claimant'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.

……...**Date: …...../…...../2011**

Simon McNair, Arbitrator nominated by the Claimant.

……...**Date: ……..../…...../2011**

Hugh Morison, Arbitrator nominated by the Respondent.

……...**Date: ..……../…...../2011**

Graeme Dillon, Arbitration Tribunal Chair, appointed by GTA.