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Arbitration 157 & 158

Date of Issue: **November 2011**

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

Arbitration Committee (AC)
- Mr Stuart Richardson, nominated by the Claimant;
- Mr Jack Fahey, nominated by the Respondent;
- Mr Graham Barron, Chairman appointed by GTA.

Claim
The Claimant's case is that on 31 August 2010, through oral and written communication between the parties and conduct of the Respondent, there was an agreement to vary the Contracts by extending the time for delivery.

Issues for determination:
1. Was the contract period for on farm pick up extended?
2. Who was in default, the Claimant Buyer or the Respondent Seller?

Award
Having considered the Submissions and for the reasons stated above, thre Tribunal made the following Final Award:
1. The Claim is allowed.
2. The Respondent shall pay the Claimant the amount of $119,000.00 immediately.
3. The Respondent shall pay the interest on the damages at the rate of 8.75% per annum from 28 September 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 33B(5) of the Commercial Arbitration Act (NSW) 2010.

Details
The Tribunal consider that it would be unreasonable to hold that due to the weather conditions and the Claimant's limited opportunity to collect the grain during the month of August the agreement would not have been varied and extended. We maintain that it would be unjust to do otherwise.

The Respondent had an obligation to provide the Claimant with access to the grain. If the Respondent was aware of the wet conditions, the Respondent should have provided a force majeure notice to the Claimant prior to 31 August 2010 allowing them additional time in September to collect the grain.

Award findings
The AC found that:
- That the Respondent wrongfully cancelled the Contracts by calling the Claimant in default on 17 September 2010.
- That the Respondent is liable to indemnify the Claimant in the amount of $119,000.00 for the non-delivery of grain pursuant to the Contracts.

IN THE MATTER OF THE COMMERCIAL ARBITRATION ACT 2010 (NSW) AND IN THE MATTER OF AN ARBITRATION UNDER THE RULES OF GRAIN TRADE AUSTRALIA LTD

GTA Arbitrations No. 157/158

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”), formerly the National Agricultural Commodities Marketing Association Ltd ("NACMA").

At issue in this dispute is the question of the performance of a contract and possible breach.

The Arbitration Committee comprises:

- Mr Stuart Richardson, nominated by the Claimant;
- Mr Jack Fahey, nominated by the Respondent;
- Mr Graham Barron, Chairman appointed by GTA.

As the Arbitration Committee was constituted after 1 October 2010, this award is governed by the *Commercial Arbitration Act* 2010 (NSW).

The following submissions (with supporting evidence in the form of various statutory declarations) were received from the parties and have been considered by the Committee:

1. Claimant's Points of Claim dated 22 March 2011 ("Points of Claim");
2. Respondent's Submissions executed 28 April 2011 ("Points of Defence");
3. Claimant's Points of Reply dated 24 May 2011 ("Claimant's Reply");
4. Respondent's Points of Reply served under cover of a letter dated 29 June 2011 ("Respondent's Reply").
5. Claimant's Further Submissions, dated 27 July 2011 ("Claimant's Further Submissions");
6. Respondent's Further Points of Reply served under cover of a letter dated 14 August 2011 ("Respondent's Further Reply").

The parties have elected to have the matter dealt with on documents alone. There has been no hearing and we have not had the opportunity to examine witnesses, or see witnesses examined.

2. Jurisdiction

The contracts the subject of this dispute are AB51055 and AB51057 ("Contracts"). The Contracts 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 two contracts of a total of three contracts between the parties which were entered into on 23 July 2010. Materially, both contracts identify the Claimant as buyer and Respondent as seller of SFW1 Australian Origin Wheat of the 2009/2010 season.

Other relevant terms of the Contracts were as follows:

(a) Contract ET51055

Quantity: 1000 metric tonnes

Price: A$200 per metric tonne

Delivery Point: Walgett Free on Truck

Delivery Period: August Buyers Call

Payment Terms: Payment 30 days end of week delivery

Trade Rules: GTA

(b) Contract ET51057

Quantity: 700 metric tonnes

Price: A$200 per metric tonne

Delivery Point: Walgett Free on Truck

Delivery Period: August Buyers Call

Payment Terms: Payment 21 days end of week delivery

Trade Rules: GTA

Pursuant to the Contracts, the Claimant was required to collect the grain on "buyers call" between 1 August 2010 and 31 August 2010 ("Contract Period"). Due to rain during the month of August 2010, the Claimant had a limited number of days to arrange for the collection of the grain. Certain amounts of the grain were collected on the following dates:

- 27 July 2011;
- 28 July 2011;
- 20 August 2011;
- 30 August 2011; and
- 31 August 2011.

On 31 August 2010, there were discussions between the parties regarding performance of the Contracts. Whether the Contracts had been varied however, is disputed.

What is clear is that as at 1 September 2010, neither party purported to terminate the Contracts, or otherwise hold the other party in default.

On 17 September 2010, the Claimant received correspondence from the Respondent's solicitors stating that the Claimant was in default of the Contracts and indicating its intention to cancel the remaining portions of the Contracts.

On 28 September 2010, the Claimant responded stating that the Respondent had repudiated the Contracts and demanded payment of the sum of $119,000 as damages within 14 days.

4. The Dispute

The primary issues in dispute are outlined and addressed below.

4.1 Performance and Variation of the Contracts

It is not in dispute that parties were not able to fully execute the Contracts within the contractual delivery period.

While the Claimant called for delivery, the Respondent replied that due to wet conditions, it was not able to comply. It is perhaps a moot point as to whether the Respondent in these circumstances was in breach and should have attempted to claim "force majeure". This argument has not been raised by the parties and we shall say no more about it.

For the Respondent's part, it says that the reason that full delivery of grain was not made in August was not due to rain, but due to the fact that "Grain buyer failed to provide adequate transportation for the collecting of grain." [1]

While this seems to be the Respondent's primary argument, there is considerable evidence (and indeed submissions by the Respondent[2]) to the effect that it was the wet conditions which prevented loading.[3]

However it occurs to us that even if the failure to provide adequate transport was the sole reason for the failure to deliver the full quantity in August, come 1 September 2010, the Respondent could (and in our view, should) have stated unequivocally that the period for delivery was over and no more deliveries would be made under the Contracts.

The Claimant's case is that on 31 August 2010, through oral and written communication between the parties and conduct of the Respondent, there was an agreement to vary the Contracts by extending the time for delivery.[4]

The Respondent however, asserts that the Contracts were not varied as there was no agreement in writing to that effect as required by Rule 1.3 of the GTA Rules.[5] The Respondent further stated that they had provided the Claimant with sufficient time to take delivery of the grain[6] and as time was of the essence[7] and the Claimant had not collected the grain during the Contract Period, the Claimant breached its contractual obligations.

We do not agree. Under a "buyer's call" contract, once the buyer has "called" for delivery, the obligation rests with the seller to facilitate or arrange for delivery to take place as required under the contract. The obstacles and delays in this case were largely on the Respondent's side such that come 1 September 2010 the Claimant would have been within its rights to hold the Respondent in default for the undelivered portion of the Contracts, or simply declare that no further deliveries would be made.

However, and perhaps not surprisingly, rather than hold the Respondent in default, the Claimant continued to attempt to make arrangements to take delivery of the balance under the Contracts. Whether or not there was express and/or written agreement to this effect is beside the point. The parties' conduct makes it quite clear that the Claimant wished to continue taking deliveries and that attempts to perform the Contracts only came to an end on 17 September 2010.

Taking this into account, along with the evidence submitted by the parties, we consider that it would be unreasonable to hold that due to the weather conditions and the Claimant's limited opportunity to collect the grain during the month of August

[1] See para. 114 of the Points of Defence.
[2] See for example paras.116 and 117 of the Points of Defence.
[3] See for example annexure Q to the Points of Defence.
[4] See para. 10 of the Points of Claim and para. 3 of the Claimant's Points of Reply.
[5] See para. 79 of the Points of Defence.
[6] See para. 111 of the Points of Defence.
[7] See para. 99 of the Points of Defence.

the agreement would not have been varied and extended. We maintain that it would be unjust to do otherwise.

The Respondent had an obligation to provide the Claimant with access to the grain. If the Respondent was aware of the wet conditions, the Respondent should have provided a force majeure notice to the Claimant prior to 31 August 2010 allowing them additional time in September to collect the grain. Further, it is well established that notice is required to make time of the essence.[8] Therefore, following the extension, if the Respondent wanted to make time of the essence in the Contracts again, with the intention of cancelling the Contracts, it should have given the Claimant reasonable notice first before stating that it was cancelling the balance of the Contracts.

4.2 **Estoppel**

As a supplementary basis for its case, the Claimant says that it relied on the representations made on 1 September 2010 and 5 September 2010 and was induced to believe that the parties were proceeding on the basis that the time for completion for the Contracts had been extended, at least to 30 September 2010. The Claimant therefore asserted that the Respondent is estopped from denying that the Contracts were extended to 30 September 2010.[9]

The Respondent denies this.

We agree with the arguments presented by the Claimant in this regard. From an examination of the evidence, it is reasonable that the Claimant would have relied on the representations made and therefore it would be unconscionable and unjust for the Respondent not to be estopped from denying that the contract was extended to 30 September 2010.

4.3 **Force Majeure**

Though not strictly necessary to dispose of this matter, in deference to the arguments put forward by the parties in relation to force majeure, we note that the Respondent asserts that the Claimant should have provided notice and admitted that if that was done, the Respondent *"would have been bound to provide the grain to Elders, pursuant to this rule, on a Buyers call, with 21 days end of week payment for the month of September 2010."*[10]

The Claimant submits that, in light of all the circumstances, a notice of a force majeure event was provided through the emails from Cara Morton on 31 August 2010.[11]

[8] See for example, *Louinder v Leis* (1982) 149 CLR 509 and *Neeta (Epping) Pty Ltd v Phillips* (1974) 131 CLR 286.
[9] See para. 15 of the Points of Claim and para. 4 of the Claimant's Points of Reply.
[10] See para. 141 of the Points of Defence.
[11] See para. 5.2 of the Claimant's Points of Reply.

Rule 23 of the Trade Rules requires that notice in writing be given by the party seeking to rely on the force majeure event. Rule 23 provides no further guidance as to the form or content of that notice.

We think that in order to invoke Rule 23, the notice must make at least some reference to the events alleged to constitute force majeure and/or the consequences of the alleged force majeure events, and to claim the relief extended by that clause. Ideally the notice would state expressly that it was notice under Rule 23 but we can anticipate circumstances where that might not be the case, but the notice would still amount to notice under that Rule.

We do not believe that as a matter of construction, the exchanges of correspondence on 31 August 2010 could be considered to be notice of force majeure for the purposes of Rule 23.

5. Findings

Accordingly, we find:

- That the Respondent wrongfully cancelled the Contracts by calling the Claimant in default on 17 September 2010.
- That the Respondent is liable to indemnify the Claimant in the amount of $119,000.00 for the non-delivery of grain pursuant to the Contracts.

6. 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 $119,000.00 immediately.
3. The Respondent shall pay the interest on the damages at the rate of 8.75% per annum from 28 September 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 33B(5) of the *Commercial Arbitration Act (NSW) 2010.*

And we so publish our Final Award.

……..**Date: ……../……../2011**

Stuart Richardson, Arbitrator nominated for the Claimant.

……..**Date: ……../……../2011**

Jack Fahey, Arbitrator nominated for the Respondent.

……..**Date: ……../……../2011**

Graham Barron, Arbitration Committee Chair, appointed by GTA.