GRAIN TRADE AUSTRALIA

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GTA Arbitration 168

Notice to Members

Date of Issue: **December 2011**

Claimant: **Producer Seller**
&
Respondent: **Trader Buyer**

Arbitration Committee (AC)

- Richard Clark, nominated by GTA

This arbitration was conducted as a Fast Track arbitration and hence has only one arbitrator nominated by GTA and approved by the parties.

Claim

- Amended delivery period and in particular the agreement to "new grade spreads" not confirmed in writing between the parties.
- Contracted tonnage delivered to later delivery period and accepted by the buyer against the contract.
- Buyer reduces contract price by $40/tonne, i.e. the "new grade spreads".
- The claim was for $20,000, i.e. the discounted contract price X tonnage contracted.

Award

Final Award:

1. The Claim is allowed in the sum of $20,000.
2. The Respondent shall indemnify the Claimant in respect of any fees paid by the Claimant to GTA in relation to this arbitration.

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 Arbitration No. 168

Claimant Seller (Producer)

And

Respondent Buyer (Trader)

Final Award

1. Introduction

This is an arbitration pursuant to the Dispute Resolution Rules of Grain Trade Australia Ltd (“GTA”) conducted according to the "Fast Track" Procedure.

At issue in this dispute are the terms on which the time for performance of a contract was extended.

I am sitting as sole arbitrator, nominated by GTA.

As I was appointed after 1 October 2010, this proceeding is governed by the *Commercial Arbitration Act 2010* (NSW) ("CAA").

The contract between the parties incorporated the GTA Trade Rules under which disputes are to be submitted to GTA arbitration. As neither party has put in issue my jurisdiction to determine the matters referred to me, I find that this is a validly constituted tribunal with jurisdiction to determine the matters in dispute.

2. Procedure

I have been provided with the following submissions by the parties.

1. Claims Submissions under cover of a letter from Claimants Accountant dated 5 August; and
2. Defence Submissions dated 5 December 2011.

As this matter is being conducted as a "Fast Track" arbitration, I have very little information before me. There has been no hearing and I have not seen any witness cross-examined.

The amount in issue is not substantial, a fact no doubt relevant to the parties' choice of Fast Track arbitration. In considering my decision, the parties must be mindful of the fact that it is based on the information that they have chosen to put before me.

3. The Dispute

The dispute concerns the performance of a contract between the parties, no. XX48356 dated 24 August 2010 under which the Claimant sold to the Respondent 500mt multi-grade wheat for delivery in November/December 2010. In the event the contract was performed by delivery of the wheat by title-transfer, in store, in January 2011. The Respondent deducted from payment amended grade spreads amounting to $20,000 over the grade spreads agreed in the contract.

It is the Claimant's case that the Respondent authorised delivery in January, without otherwise amending the contract.

It is the Respondent's case that it only agreed to accept delivery in January 2012 on the basis of amended grade spreads.

4. The Evidence

There is no dispute that parties contracted for the delivery of multi-grade wheat latest December 2010.

Similarly there is no doubt that the parties spoke by phone on 21 December 2010 however their recollection of the call (or perhaps calls) differs.

The Claimant says that the Respondents local representative, on behalf of the Respondent, called the Claimant and offered him an extension of the delivery period to 14 January 2011.

According to the Respondent during the conversation the Respondent's local representative advised the Claimant to transfer tonnes against contract XX48356 and discussed an extension of performance to 15 January 2011 as well as "amended grade spreads to be applied to the contract if the grower (Claimant) chose this option."

According to the Respondent, their local representative again spoke to the Claimant on 31 December at 0800hrs "to reiterate that tonnes needed to be transferred as it was the last day of the delivery period." The Respondent does not recount what the Claimant said, if anything, and the Claimant makes no mention of this conversation.

On or about 7 January 2011 the Claimant transferred 500mt of AGP1 to the Respondent.

On 12 January 2011 the Respondents local representative called the Claimant. According to the Claimant, this call was to advise him (the claimant) that the contract had to be completed within the extended delivery period, to which the Claimant replied that the tonnes had already been transferred.

The Respondent says that the purpose of the call was to advise the Claimant that as the tonnes had not been received "in the contractual period" grade spread amendments to reflect

the current market would be applied.

The essence of the dispute appears to be therefore whether in granting an extension of delivery period, the parties also agreed to a variation of the grade spreads.

In reaching my decision, my starting point is the contract itself which required delivery of grain before 31 December 2010. Time is of the essence under the GTA Trade Rules and contract terms which were incorporated into the contract.

To the extent that the parties agreed to vary the contract, they did not do so in writing, notwithstanding Trade Rules 1.3 which states that;
"The specifications of a contract can not be altered or amended without the expressed consent of both Buyer and the Seller. Any alteration mutually agreed upon between Buyer and Seller must be immediately confirmed in writing."

This rule is a statement of common sense and sound practice. It is intended to avoid situations such as the present where the parties may have spoken, but each have significantly different recollections of the effect of those conversations.

There is therefore some confusion in the subjective evidence. The Claimant appears to have believed that as a result of the 21 December 2010 conversation there was an unconditional extension of time for delivery into January 2011.

This is inconsistent with the call the Respondent says it made on 31 December 2010 urging the Claimant to perform within the contractual delivery period, that is by 31 December 2010.

However by the time of the call on 12 January 2011, it appears that the Respondent accepted that time had been extended.

In view of this confusion, I need to focus on the objective evidence to glean the parties objective intentions.

In the event, I have reached a conclusion in favour of the Claimant for the following reasons.

a) As mentioned above, the written contract required delivery by 31 December 2010. There was no written variation of this delivery period.

b) Similarly there is no evidence of a written agreement to amended grade spreads for January delivery.

c) The Claimant purported to perform the contract by delivery of the grain on 7 January 2011.

d) The Respondent could have held the Claimant in default on 1 January 2011. It was open to the Respondent to send the Claimant a simple notice (by phone, email or

post) putting the Claimant "on notice". There is no evidence that it did so.

e) The fact that it did not hold the Claimant in default may also support an inference that it had agreed to extend the delivery period.

f) Moreover, the Respondent accepted the delivery of the grain on or about 7 January 2011, without reservation. Once again, this may support an inference that it had agreed to the variation of the delivery period.

g) The Respondent's conduct in failing to call the Claimant in default and then accepting the grain amounted to a waiver of the "time is of the essence" condition under the GTA Trade Rules.

h) Even if the conduct described in paras (e) and (f) above might support an inference that the parties had agreed to extend the time for delivery, there is no objective evidence whatsoever that the parties had agree to amended grade spreads, and even if they had there is no evidence of what those amended spreads would be. Even the Recipient Created Tax Invoice dated 7 February 2011 is silent as to the grade spreads eventually applied.

There was mention of force majeure in the Claimant's submissions. I do not believe that force majeure is relevant in this case. There is no evidence that notice of force majeure was given or accepted and no evidence that the delay in delivery was occasioned by force majeure events. Indeed such evidence as there is (in the form of the "Transfer Order Details" dated 7 January 2011) suggests that as at 31 December 2010 the Claimant held sufficient stocks of grain to have made delivery to the Respondent.

5. FINAL AWARD

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

1. The Claim is allowed in the sum of $20,000.
2. The Respondent shall indemnify the Claimant in respect of any fees paid by the Claimant to GTA in relation to this arbitration.

And I so publish my Final Award.

……..**Date: …...../…...../2011**

Richard Clark, Arbitrator nominated by GTA