GRAIN TRADE AUSTRALIA

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Arbitration 177

Notice to Members

Date of Issue: **February 2013**

Claimant: **Grain seller**
&
Respondent: **Dairy Farmer**

Arbitration Committee (AC)

- Mr. Andrew Woodhouse, Advance Trading.

Claim

The dispute between the parties concerns a contract for the sale of 200 tonnes Canola Meal – 2009 at a price of A$467 per tonne plus GST, delivered Mytown.

Issues for determination:

- The issue that falls for determination is whether the Claimant is in default for failing to make the deliveries or whether the Respondents are in default for failing to call for or take delivery.

Award

1. The Claim was denied and the Claimant was responsible to pay the Respondents Arbitration fees.

Details

The delivery period of the contract was amended to suit the needs of the Respondent.

The Claimant submits that it was the Respondent's obligation to call for the contracted commodity.

The contract was subject to the GTA Trade Rules. The Claimant accepts that it had the right of conveyance but says that it was "standard industry practice" for the customer to call for delivery on a particular date.

Award findings

The AC found that:

- GTA Trade Rule 13(1) provides that unless otherwise agreed, the Seller shall have the right of conveyance. Under Rule13.1(1), the Seller is obliged to give the Buyer 5 business days written notice of commencement of delivery, and the Buyer shall then within 2 business days give delivery instructions to the Seller.

- Even if it is "standard industry practice" for the Buyer to call for delivery, I cannot believe that it is standard industry practice for the Seller to say nothing to a Buyer allegedly in default for 8 months or so.

- The Arbitrator reached the conclusion therefore that it was in fact the Claimant Sellers who were in default in failing to make the deliveries required under the amended contract.

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. 177

Grain seller

Claimant

and

Dairy Farmer

Respondent

Final Award

1. Introduction

This is the award in an arbitration conducted under the Grain Trade Australia Ltd ("GTA") “Fast Track” Dispute Resolution Rules ("Rules").

Pursuant to those Rules, I have been appointed as sole arbitrator.

In reaching my conclusion I have had regard to the Claimant’s Points of Claim (with Annexures) dated 29 October 2012 (“Claim” or “Points of Claim”). Consistent with the GTA Fast-Track Arbitration Rules, there has not been a hearing and I have proceeded on documents alone.

2. Jurisdiction

Neither party has challenged my appointment or jurisdiction to deal with the referred dispute.

That said, I note that the Respondent has elected not to participate in this reference. I am satisfied that the Respondent is on notice of these proceedings by virtue of correspondence sent by GTA to the Respondents’ last known address at RMB 1234, Mytown NSW 1234.

3. The Dispute

The dispute between the parties concerns a contract dated 7 August 2008 between the Claimant as Sellers and the Respondents as Buyers for the sale of 200 tonnes Canola Meal – 2009 at a price of A$467 per tonne plus GST, delivered Mytown.

The contract provided for delivery between 1 January 2009 to 31 December 2009, even spread.

The contract incorporated the "NACMA" Rules, NACMA being the previous name of Grain Trade Australia Ltd. As is well understood in the grain industry, those Rules themselves contain a referral of disputes to arbitration administered by GTA.

I find that by virtue of the incorporation of the NACMA (for which read "GTA") Rules I have jurisdiction to determine this matter.

The Respondents were unable to perform the Contract. Among the papers annexed to the Points of Claim are 2 letters from the Respondents.

The first is a letter dated 3 September 2010 from the Respondents (Garry and Lee Hibberd) to the Claimant. It is in reply to a letter from the Claimant dated 23 August 2010 and makes reference to phone conversations. Significantly it does not deny the existence of a contract but notes that the Respondents were experiencing hardship and offers to takes loads of canola in Jan-June 2010, which appears to have been intended to be 2011.

This offer was accepted by the Claimant by letter dated 14 September 2010 and a fresh contract note was issued, "reprinted" on 6 October 2010. The shipment period as specified to be "Start: 1/01/2011 End: 30/06/2011". The quantity remained 200mt and the price remained $467 per tonne. According to the Points of Claim the letter was sent to the Respondent on 14 September 2010 and the amended contract note was sent by mail on 6 October 2010.

It appears from the Respondents' letter dated 26 August 2011 that they did not receive this correspondence but for the reasons that follow, I don't believe anything turns on this.

The first relevant difference in the reprinted contract was that it referred to GTA instead of NACMA, and contained on its face a more detained referral of disputes to arbitration.

The second was that it specified under "Contract Notes", "1 load per month – Jan – June." This is consistent with the offer made by the Respondents in their 3 September 2010 letter.

No canola was delivered under the amended contract. In response to a notice of default sent by the Claimant on 24 August 2011, the Respondents replied in an unsigned letter dated 26 August 2011.

On this occasion however the Respondents took a different line, asserting that the Claimant had failed to make the 6 monthly deliveries as offered by the Respondents in the 3 September 2010 letter.

The issue that falls for determination therefore is whether the Claimant is in default for failing to make the deliveries or whether the Respondents are in default for failing to call for or take delivery.

4. Consideration

As mentioned above, I have submissions (if they can be called that) from the Respondent, in 2 letters.

While the Claimant's submissions are more detailed, with annexed documents, there is no statement of evidence, sworn or otherwise.

Based on the documents and submissions therefore, and without the benefit of hearing from any witnesses, it appears that the only relevant events which took place between the issue of the fresh contract on 6 October 2010, and the notice of default on 24 August 2011 were those set out in a document titled "Name and Address Profile – Notes" for Dairy Farmer which is document 8 annexed to the Claims Submissions.

However most of those actions appear to relate to outstanding payments for "other products", according to paragraph 16 of the Points of Claim and not the performance of this contract.

It appears therefore that apart from following-up the Respondents in respect of some other payments, the Claimant took no action in relation to the contract in dispute between 6 October 2010 and 24 August 2011.

The contract was subject to the GTA Trade Rules. The Claimant at paragraph 33 of its Points of Claim accepts that it had the right of conveyance but says that it was "standard industry practice" for the customer to call for delivery on a particular date.

GTA Trade Rule 13(1) provides that unless otherwise agreed, the Seller shall have the right of conveyance. Under Rule13.1(1), the Seller is obliged to give the Buyer 5 business days written notice of commencement of delivery, and the Buyer shall then within 2 business days give delivery instructions to the Seller.

Even if it is "standard industry practice" for the Buyer to call for delivery, I cannot believe that it is standard industry practice for the Seller to say nothing to a Buyer allegedly in default for 8 months or so.

I have reached the conclusion therefore that it was in fact the Claimant Sellers who were in default in failing to make the deliveries required under the amended contract.

The claim must therefore be dismissed.

I therefore make my Final Award as follows;

1. The Claim in this arbitration set out in the Claimant's Points of Claim dated 29 October 2012 be dismissed.

And I so publish my Final Award, at Sydney:

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Dated February 2013

Andrew Woodhouse, Sole Arbitrator