GRAIN TRADE AUSTRALIA

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Arbitration 183

Notice to Members

Date of Issue: **October 2013**

Claimant: **Grain Buyer**
&
Respondent: **Grain Seller**

Arbitration Committee (AC)

- Mr David Lengren, nominated by the Claimant;
- Mr Neil Warden, nominated by the Respondent;
- Mr Malcolm McMahon, Chairman appointed by GTA.

Claim

The dispute between the parties concerns an alleged contract for the sale of 800mt of wheat, SFW1, at a price of $177/mt, on-farm for delivery 200mt in June and 600mt in July 2012 plus $2.50 carry for July.

Issues for determination:

- The issue that falls for determination is whether a contract between the parties was in existence and if so did GTA have jurisdiction to hear this dispute.

Award

- The Claim was allowed in favour of the Claimant in the amount A$23,300 plus interest at 8% from the 1 September 2012. The Respondent shall indemnify the Claimant in respect of any costs to GTA and legal fees related to this arbitration.

Details

According to the Claimant a contract was evident by a Bid Acceptance Notification transmitted by email and generated by an on-line grain marketing platform, the Claimant agreed to buy and the Respondent to sell 800mt of wheat.

After the generation of the Bid Acceptance Notification, the Claimant attempted to negotiate further terms with the Respondent. That negotiation proved unsuccessful and the contract was subsequently terminated by the Respondent.

The Claimant called the Respondent in default. The Respondent claims there was no contractual agreement and GTA did not have jurisdiction to hear the dispute.

Award findings

The AC found that:

- based on the submissions and annexed documents, a contract came into existence on the terms and conditions evidenced by the on-line platform's Bid Acceptance Notice.

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.183

Grain Buyer
(Claimant)

and

Grain Seller
(Respondent)

Final Award

1. Introduction

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

At issue in this dispute is the performance and alleged breach of a contract for the sale of wheat between the Claimant as Buyer, and the Respondent as Seller.

The Tribunal comprises:

- Mr David Lengren, nominated by the Claimant;
- Mr Neil Warden, nominated by the Respondent;
- Mr Malcolm McMahon, Chairman appointed by GTA.

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

1. Buyer's Claim Submissions dated 2013 ("Claim Submissions");
2. Respondent's submissions in a letter from its solicitor dated 17 July 2013 ("Defence");
3. Claimant's Points of Reply dated 8 August 2013 ("Claimant's Reply");
4. Respondent's further submissions in a letter from its solicitor dated 13 August 2013 ("Respondent's Reply");

2. Jurisdiction

This dispute is concerned with the terms of and performance of an alleged contract between the Claimant and Respondent.

It is the Respondent's position that no contract was concluded and that we therefore have no jurisdiction to hear this dispute.

It is the Claimant's submission a contract was concluded between the parties which included incorporation of the GTA Trade Rules, and referral of disputes to arbitration.

For the reasons which follow in this Final Award, we have concluded that we do have jurisdiction and are therefore a properly constituted Tribunal with power to determine this dispute.

3. The Background to and Nature of the Dispute

The Claimant is an experienced trader in agricultural commodities.

The Respondent appears to be a grain producer. In any event the Respondent is the alleged Seller in this matter.

According to the Claimant, pursuant to a contract evidenced by a Bid Acceptance Notification transmitted by email on 14 June 2012, generated by an on-line grain marketing platform, the Claimant agreed to buy and the Respondent to sell 800mt of wheat, SFW1, at a price of $177/mt, on-farm for delivery 200mt in June and 600mt in July 2012 plus $2.50 carry for July.

After the generation of the Bid Acceptance Notification, the Claimant attempted to negotiate further terms with the Respondent. That negotiation proved unsuccessful and the contract was subsequently terminated by the Respondent pursuant to an email transmitted at 10.13am on 28 June 2012.

The Respondent's primary submission is that GTA and this Tribunal lack jurisdiction.

This submission and its further defence submissions are be based on the assertion that no contract was concluded between the parties at all, and not that a contract may have been formed, but without a GTA jurisdiction agreement.

Neither party has submitted statements of evidence, though the Claimant's submissions recount alleged conversations between representatives of the Claimant and Respondent.

The primary documents on which we must base our decision are documents annexed to the various submissions being copies of contract documents and email exchanges.

We have concluded, based on these annexed documents, that a contract was concluded on the terms set out in the on-line platform Bid Acceptance Notification.

The Claimant relies on this document. It purports to record a bid made at 04.21pm on 13 June 2012, and accepted on 14 June 2012 at 06.30pm. The provenance of this document was not explained by either party. The Respondent produced and referred to the on-line platforms Terms and Conditions (though it did cast some doubt on whether the terms produced were in fact the terms in force when the alleged contract was concluded). It construed those terms as suggesting that the on-line facility introduced potential buyers and sellers but that contracts were then to be negotiated privately.

That does not appear to be quite what those terms say.

Firstly, the terms refer to potential Sellers being registered to use the site. This would suggest that Sellers (including the Respondent) use the site knowingly and voluntarily and are aware of the terms on which they use the site.

Secondly, the terms explain that a listing of grain for sale is not an offer to sell that grain, but an invitation to interested parties (such as the Claimant) to bid.

Potential Buyers may then make offers to the Seller. The Seller may then accept one of those offers and if that offer is accepted, an Acceptance is created.

The terms provide that "once an Acceptance is made: a binding and enforceable contract is formed…." and on-line platform provider "will notify the seller and buyer of the other party's contact details by email."

The Bid Acceptance Notice appears to be the notification referred to. Even without recourse to the on-line service provider's terms, the Bid Acceptance Notice appears on its terms to be evidence of a contract. It refers to "Sale Details"; "Accepted Price" and "Accepted Quantity." It states that the next step is for the Buyer to contact the Seller to organise delivery.

The Bid Acceptance Notice contains on its face all of the main terms one would expect to find on a Broker's Note, for example.

Thereafter the Claimant submitted a Purchase Contract form to the Respondent. Despite some attempt at negotiation the documents tendered by the Claimant were not accepted by the Respondent. The Claimant's submissions in particular purport to record conversations between the Claimant and Respondent. Even though we are not formally bound by the rules of evidence, we would be slow to give too much weight to these reported conversations. Suffice to say that no further document was agreed and the contract was not performed. So much appears to be clear.

The Respondent's position appears to be either that there was no performance because there was no contract, or that if there was a contract, any contract was terminated because the Claimant dropped the agreed carry charges.

It is our conclusion, based on the submissions and annexed documents, that a contract came into existence on the terms evidenced by the on-line platform's Bid Acceptance Notice. It is inherently unlikely that such a document would have been spontaneously generated by the on-line platform without some participation by and knowledge of the parties. It seems more likely than not that those dealings were on terms at least similar to those produced by the Respondent. We might expect that the Respondent would have told us if the terms around 14 June 2012 were significantly more favourable to the Respondent.

If such a document had been generated without consent of the Respondent we would have expected to see some form of protest by the Respondent alleging for example a mistake on the part of the on-line service provider. There is no such protest by the Respondent.

In failing to perform that contract, the Respondent was in default of that contract and liable for damages.

4. Damages

The Claimant says that following the default by the Respondent, it bought in grain against the Respondent, purchasing 500mt on 3 July 2012 and a further 300mt on 20 July at a significantly higher price.

In our view the Claimant is entitled to damages based on the 3 July contract price delivered Brisbane meaning damages of $23,300.

The Claimant is not entitled to claim the administration fee as these terms were not accepted by the Respondent.

5. FINAL AWARD

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

1. The Claim is allowed in the amount of A$23,300.

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

3. The Respondent shall pay interest at 8% on the A$23,300 from 1 September 2012.

4. The Respondent shall pay the Claimant's reasonable consultant's/legal costs subject to presentation by the claimant of an invoice and evidence of payment of the said invoice.

And we so publish our Final Award, at Sydney, 30 August 2013.

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David Lengren, Arbitrator nominated by the Claimant.

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Neil Warden, Arbitrator nominated by the Respondent.

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Malcolm McMahon, Arbitration Committee Chair, appointed by GTA.