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GTA Arbitration 199

Date of Issue: **1 July 2015**

Claimant: **Commodity Seller (Grain Producer)**
&
Respondent: **Commodity Buyer (Grain Trader)**

Arbitration Committee

- Mr David Syme, nominated by GTA to Chair this Tribunal.

Claim

This dispute relates to the Claimants assertions that the Respondent repudiated a Contract between the Parties by refusing to accept delivery of 150MT of Albus Lupins and unilaterally terminating the contract in circumstances where no right to terminate arose.

Award

1. The Claim fails;
2. The Claimant shall indemnify the Respondent in respect of GTA Arbitration fees in the amount of A$3,850.

Details

The Claimant listed 150MT of Albus Lupins at $600MT on the website of an Independent Broker which were purchased by the Respondent. A Brokers Note was generated by the Independent Broker, although unhelpfully, the document identified the GTA CSC reference as “Albus” and the Grade as “Albus” whilst another confirmation listed quality as “*No.1’s*”.

After a delay by the Claimant to deliver the Lupins, two separate loads were rejected upon delivery to an independent handling facility, on both instances being over the defects specification. At this point the Claimant made arrangements to have the lupins screened by a seed cleaner.

A sample of the cleaned grain was presented to the Respondent but were found to be *“4% defective, 0% screenings and excessive poor colouring that would not make the GTA No. 1 Albus Lupin Standard”.* The Respondent subsequently spoke to the Claimant which was followed by an email titled “Cancelled Contract” which indicated, as per their conversation earlier that day, the Albus Lupin Contract had been cancelled.

The Claimant appeared to accept this decision at the time and the Respondent heard no more about the matter until this Arbitration commenced. The lupins were subsequently sold to another buyer at a reduced price of $400MT.

Award findings

The Tribunal found that:

- According to the Claimant, the default occurred either when the Respondent wrongfully refused to take delivery of the lupins and/or when they wrongfully terminated the Contract.
- However no notice of any kind was given by the Claimant to the Respondent, holding the Respondent in default. (*Refer GTA trade Rule17.0 Default*)
- At one level this dispute relates to the quality of the lupins the Claimant sought to deliver. In such a dispute the first question is “what is the contractual specification?” In this case the relevant GTA specification (SCP 8.2.1) didn’t appear on any of the contractual documents.
- During the telephone conversation on 8 October 2014 the parties amicably agreed to cancel the Contract, without recourse.

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. 199

Grain Seller (Grain Producer)
(Claimant)

and

Grain Buyer (Grain Trader)
(Respondent)

Final Award

1. INTRODUCTION

This is Final Award in an arbitration conducted pursuant to the Fast-Track Dispute Resolution Rules of Grain Trade Australia Ltd ("**GTA**"). The main issue for determination is whether Albus lupins tendered for delivery pursuant to a contract between the parties dated on or about 7 August 2014 ("the Contract") were of the contractual specification, and whether there was a wrongful repudiation or termination of the Contract by the Respondent.

There is no issue as to my jurisdiction as the Contract clearly contains (refer GTA form Brokers Contract Note No. XYZ dated 7 August 2014) a referral of disputes to GTA Arbitration.

I find therefore that I am a validly appointed arbitrator under the *Commercial Arbitration Act 2010* (NSW) and with jurisdiction to determine all issues in dispute between the parties.

As is standard for Fast-Track arbitration, this reference has proceeded on written submissions and documents alone and without a hearing.

The Claimant has relied on:

1. Points of Claim dated 19 May 2015;

2. Affidavit of the Claimant affirmed on 19 May 2015.

The Respondent has relied on:

1. Points of Defence received by GTA on or about 9 June 2015;

2. Affidavits of Respondent employee (affirmed on 9 June 2015);

3. Affidavit of an independent grain storage and handling site operator (affirmed on 9 June 2015); and

4. Affidavit of an Independent Broker (either sworn or affirmed on 4 June 2015).

When I refer to evidence in this Award I am referring to these affidavits and annexures.

I have carefully considered these submissions and supporting documents and base my decision on the facts and circumstances gleaned from these sources.

2. BACKGROUND TO THE DISPUTE

The Claimant and his son conduct a substantial mixed farming enterprise in Central West New South Wales. One of the crops they produce is lupins.

It is the Claimants evidence that on 6 August 2014 he posted a listing on an Independent Broker website offering 150 mt Albus Lupins for sale at A$600mt. The listing identified that the lupins were On-Farm.

The listing further provided;

Comments: *No 1's*

GTA Standard: *This listing meets GTA standard*

"No.1's" is not a GTA standard.

It is the Respondents evidence that on 4 August 2014 the Independent Broker contacted her to advise that they may have 150mt of 13/14 Albus Lupins No. 1 quality as per GTA CSP 8.2.1 for sale. They say they then made an offer to purchase the lupins through the website. While they say in her affidavit "ref attachment" there does not appear to be any such offer attached.

There is however attached to the Claimants affidavit an email Bid Notification received by the Claimant advising a bid made at 4.52 PM on 6 August 2014. The bid was for 150mt at $600mt for delivery 4 August 2014 – 15 September 2014, with 100mt to be picked up before 24 August and balance after 14 September.

It is the Claimants evidence that he wished to split the delivery in this way because he had a trip overseas planned. The evidence does not disclose how the Respondent became aware of the Claimant's desire to split the delivery in this way given it does not appear in the Brokers website listing.

A Brokers Contract Note was generated by the Independent Broker dated 7 August 2014. Unhelpfully that document identified the GTA CSG reference as "Albus". It also identified the Grade as "Albus." "Albus" is neither a grade of lupin nor a GTA standard. It is a variety of lupin.

Also GTA CSG, as noted on the Brokers Contract Note, stands for Grain Trade Australia Commodity Standard Grain. As lupins were the commodity being traded the correct terminology should read PA CSP standing for Pulse Australia, Commodity Standard Pulse.

These details are important as a quality reference details exactly what is being sold and what is being bought. The Brokers Contract Note provided for delivery 04/08/14-15/09/14 ex-farm.

The Respondent then produced its own Purchase Contract Confirmation No. 1234, dated 7 August 2014. It noted, so far as relevant;

Commodity/Grade & Price *LUPINS – Albus: $600.00 per mt*

Quality/Specification *As Per Sample – Farmer Dressed*

Delivery Period *07 Aug 2014 To 30 Sep 2014*

Other Terms and Conditions 100Mt to be picked up before Aug 24th – remaining after 14th Sept.

There is no evidence as to why the Quality/Specification and the Delivery Period in the Brokers Contract Note and Purchase Contract Confirmation were different.

In the event the execution of the contract was as sloppy as its drafting.

It is the Claimants evidence that he didn't hear from the Respondent until 21 August 2014 when he received a call from a truck-driver wishing to arrange to collect the first 100mt. The Claimant told the driver that he was "going overseas in the next day or so" and it would have to wait till he returned.

On his return on or around 15 September 2014, the Claimant contacted the Respondent to arrange the freight and the first load was taken to an independent handling facility on 24 September where it was rejected as being "0.5% over the defects specification."

The Claimants response to this was not surprise, but simply to direct the driver to return the load and he would "try another load from deeper within the pile."

The next consignment on 26 September 2014 fared no better, being rejected by the independent handling facility as being "2% over the defects specification."

Arrangements were then made to have to have the lupins screened by a seed cleaner. It is at this point that the evidence diverges.

According to the Claimant, he took a sample of the graded lupins to the independent handling facility on 7 October. According to the Claimant,

"They inspected the sample and said that it was all fine, and there was nothing to grade out. They said cleaning was actually taking out too much good grain, and I should get the seed cleaners to ease back on the remainder of the grading. I recall them saying there was about 2% defects in the sample. He didn't even bother putting the sample through a screening because we both could see there was hardly any defects in the sample and it wasn't even worth screening."

The Claimant says that later that day he collected another sample from the seed cleaner and presented it to the independent handling facility who "inspected it and again told me it was fine and there was no need to change anything with the remainder of the grading."

The independent handling facility has a different recollection. He says that

"On or about the 7th October when (sic) the Claimant brought in the graded lupins. I tested them and found them to be 4% defective (not including poor colour), 0% screenings and excessive poor colouring and they would not make the GTA No. 1 Albus Lupin Standard. I notified the Respondent of the results and the truck was rejected. The Respondent said to take a sample to their office and they would be in town the following day to have a look at the sample."

Despite divergent recollections of the events of 7 October, the parties appear to agree that the next day, 8 October 2014, the Respondent emailed and spoke with the Claimant. The email is annexure C to the Claimants statement. It is headed "Cancelled Contract" and states "As per our conversation this morning 8th October 2014 the Claimants Albus Lupin Contract XYZ/1234 has been cancelled."

Both parties recollection of the telephone conversation is similar.

According to the Respondent "The conversation was very rational and the Claimant seemed to understand where I was coming from."

The Claimant recalls that the Respondent said "Well sorry, but I am cancelling" to which the Claimant replied "Okay then. I will talk to you later."

It is the Respondents evidence that this was the last they heard of the matter until they received notification from GTA of the commencement of the arbitration being 6 months after the event.

Unknown to the Respondent, the Claimant relisted the lupins for sale and ultimately achieved a sale as feed, at $400 per tonne in November 2014.

3. CONSIDERATION

According to the Points of Claim, the Claimant asserts that the Respondent repudiated the Contract by refusing to accept delivery of the lupins and unilaterally terminating the contract in circumstances where no right to terminate arose.

According to the GTA Trade Rules (which formed part of the Contract), a party is entitled to certain remedies in an event of default.

Rule 17.0 provides

Rule 17.0 DEFAULT

1) A party in default of any of its obligations under a contract or who anticipates that it will default must serve notice on the other party as soon as practicable.

2) The notice must state the date of default or anticipated default and the nature of and reasons for the default.

3) The party in receipt of such notice must immediately or as soon as is reasonably practical, notify the other party of its election to either;

a. affirm the contract; or

b. buy in, or sell against the defaulter; or

c. cancel all or any part of the defaulted portion at Fair Market Price.

4) In a case of actual default where no notice has been given, the liability will remain in force until the non defaulting party, by the exercise of due diligence, can determine the default. The party not in default must then give the defaulting party notice containing the details in (2) above and as soon as is practical thereafter advise the defaulter which of the options in 3 above it elects to pursue.

In this case, according to the Claimant, the default occurred either when the Respondent wrongfully refused to take delivery of the lupins and/or when the Respondent wrongfully terminated the Contract.

However no notice of any kind was given by the Claimant to the Respondent, holding the Respondent in default.

I understand fully that the parties to commercial contracts can and should attempt to accommodate each other. I can understand too that parties should not necessarily be criticized for sloppy contracting and execution, which was the case here.

However, GTA contract procedures exist for a reason. They are designed to set basic ground-rules which, when followed, should prevent disputes arising. Parties don't have to incorporate GTA Trade Rules into their contracts but if they do they would be well advised to follow them.

At one level this dispute relates to the quality of the lupins the Claimant sought to deliver. In such a dispute the first question is "what is the contractual specification?"

As I have mentioned above, the relevant GTA specification (CSP 8.2.1) didn't appear on any of the contractual documents. Even if it had, how am I as an arbitrator now expected to assess the quality and grade of the lupins the Claimant tendered, based on the evidence before me which I note did not include a quality certificate?

As should be quite obvious, the reason for the Default procedures in Trade Rule 17 is to put both parties on timely notice of where they stand so that they can take all necessary steps to protect their interests.

That hasn't happened in this case.

I find therefore that during the telephone conversation on 8 October 2014 the parties amicably agreed to cancel the Contract, without recourse.

That should be an end to the matter, but if I am wrong, and the Claimant maintained a right to bring a claim against the Respondent, I would still find against the Claimant.

My first reason for finding against Claimant would be because even if I could make a finding about the specification agreed between the parties, I simply cannot make a determination on the balance of probabilities on the evidence before me about the grade, quality or condition of the lupins the Claimant sought (on various occasions) to tender under this Contract.

My second reason for finding against the Claimant would be that such evidence (and I use that term loosely) that there is tends to suggest that the stock of lupins held by Claimant was at best of mixed quality.

In closing, I want the parties to be quite clear that I understand that this is a Fast Track Arbitration. This (relatively) informal procedure is designed for low-value disputes. Formal proofs of evidence may not be required but that does not mean that what evidence there is need not be cogent, something lacking in this case.

4. AWARD

For the reasons set out above, I make the following Award;

1. The Claim fails;

2. The Claimant shall indemnify the Respondent in respect of GTA Arbitration fees in the amount of A$3,850.

This award is published on the 1st **day of** July **2015.**

……...

David Syme, Sole Arbitrator appointed by GTA.