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GTA Arbitration 201

Date of Issue: **4 September 2015**

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

Arbitration Committee (AC)

- Ms Michelle Kerr, Sole Arbitrator appointed by GTA.

Claim

- The Claimant states the contract was for March/April delivery and that they called on and discussed delivery of the grain within the delivery period.
- At the beginning of May the seller got in touch with the buyer and refused to deliver stating they were out of contract.
- The market had moved from $575 delivered at the time of contracting to $810 delivered at the end of the delivery period.
- The Claimant is claiming $18,800 in damages.

Award

1. The Claim succeeds;

2. The Respondent is to pay the Claimant damages by way of washout of $18,800 within 7 days of the date of this Award;

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

Award findings

The Tribunal found that:

- Whilst both parties submit that a conversation regarding delivery took place early in the delivery period, there was conflicting recollection of said discussions.
- Any alterations to a contract must be received in writing. In this instance, no re-negotiation regarding the delivery period was made under GTA Trade Rule 2.2 therefore the delivery period remain unchanged.
- The Claimant made several attempts to contact the Respondent via mobile and landline to arrange delivery.
- The Contract did not state that it is 'buyers call' for delivery therefore GTA Trade Rule 13 applies, which states *"Unless otherwise agreed, the Seller shall have the right of conveyance"*
- The Respondent had not recorded any attempt to make delivery of the grain by contacting the Claimant after initial discussions.

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. 201

Commodity Buyer
(Claimant)

and

Commodity Seller
(Respondent)

Final Award

1. INTRODUCTION

This is a 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 the Respondent is in default of a contract between the parties dated on or about 22 January 2015 ("the Contract") for failing to make delivery as required by the Contract.

There is no issue as to my jurisdiction as the Contract clearly contains 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. Submission of a grain trader employed by the Claimant received by GTA on or about 24 July 2015 with supporting documents;

The Respondent has relied on:

1. Points of Defence dated 10 August 2015 with one supporting document.

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 facts surrounding this dispute are quite straightforward.

The parties entered into the Contract No. 1234 dated 22/01/2015. A copy of the Contract is annexure A to the Claimant's submission. It is unsigned but not in dispute.

The Contract was for the sale by the Respondent to the Claimant of 80MT of Kabuli Chickpeas of the 2014/15 crop year.

The Contract provided;

Delivery Period *01/03/2015 to 30/04/2015*

Delivery Terms *Grain Site – Regional VIC*

Delivery to up-country receival sites is less the applicable GTA location differentials

The Contract is written for delivery March/April. No other details (such as "Buyer's Call") are included in "Delivery Terms".

In its submission the Claimant states that ".. at the time of contracting the nominated grain site was busy with seed". This suggests that the grain needed to be cleaned once delivered. This was not stipulated on the contract under sections "Commodity" or "Grade" and there are no additional comments on the Contract, but it may have been known at the time of contracting to both parties. This seems to be the main reason the Claimant could not take delivery early in the delivery period and the Claimant submits that during discussions with the Respondent at a community event in early March) "delivery could not be agreed on due to cleaning requirements" of the Respondent's grain.

The Respondent submits that in conversation with the Claimant at this community event “a delivery time was agreed to” and “was assured that the Respondent would be ready to take delivery in March”. There are no specific dates given by the Respondent when delivery would take place in March.

Significantly, there were conflicting recollections of discussion had at the community event between Claimant and Respondent.

The Respondent submits that it obtained a freight quote for delivery to the nominated delivery point. There is no evidence supplied from the Respondent that delivery was attempted to be made by contacting the Claimant to arrange delivery at any point. The quote letter dated 3 August 2015 provided from the freight provider, also states that “since 16 March I have not had any correspondence with you (Respondent) in regards to the cartage of your chickpeas, as you enquired about”.

There is no further correspondence noted by either party made in March.

No re-negotiation regarding the delivery period was made under GTA Trade Rule 2.2 therefore delivery period remained unchanged as March-April. Any alterations to a contract must be confirmed in writing.

At no point were any adjustments made to the delivery period on the Contract.

During April the Claimant notes several attempts were made to contact the Respondent via mobile and landline. Only one of these calls is recorded in supporting evidence other than diary notes. Phone records indicate that a call was made and received by the Respondent’s landline phone number on 22 April 2015.

At no time during April 2015 did the Respondent contact the Claimant.

The Claimant notes that the Respondent made contact on 4 May 2015 and that the Respondent “had not received a message until Sunday 3 May and was now busy with seeding and could not bring the grain in that week”.

The Claimant notes that further discussion had with Respondent on 11 May suggests that attempts to discuss alternative arrangements to assist in the delivery of the grain were not agreed upon. The Claimant notes that as no delivery was going to be made by Respondent that the “only option was to washout the contract”.

In the Respondent's submission there is no reference to such conversations, only that the Respondent "denies that first contact he made was on the 4th May" and refers to the discussion had at the community event in early March 2015.

The letter from the Respondents Solicitors dated 13 May 2015 to the Claimant states that "your company did not request delivery of the Kabuli chickpeas within the delivery period specified in the Purchase Contract. We note that your company has failed to perform the Purchase Contract and now is in default of the Purchase Contract".

The Contract does not state that it is "buyers call" for delivery.

The following GTA Trade Rules are relevant;

Rule 13 states: Unless otherwise agreed, the Seller shall have the right of conveyance.

Rule 13.1.1 states: "In cases of a contract other than "loaded", Immediate" or "prompt, the SELLER shall give the buyer five (5) business days written notice of commencement of delivery or Shipment, and the Buyer shall within two (2) business days of receipt of such notice shall give delivery of consigning instructions to the Seller".

The Respondent has not recorded any attempts to make delivery of the grain by contacting the Claimant after initial discussion had 4 March 2015.

I view this as the Respondent being in Default of the Contract.

As the Respondent has not held the Claimant in Default of the said Contract, the Claimant has rightfully under GTA Rule 17.3(c) exercised its option to cancel all or any part of the defaulted portion of the Delivery or Shipments at Fair Market Price based on the close of the market the next business day.

For these reasons I find in favour of the Claimant.

3. DAMAGES APPLICABLE

The Respondent is to settle the claim under GTA Rule 17.3(c) (within 7 days) being a washout at Fair Market Price ascertained one (1) Business Day after clarity that contract was not going to be performed and the Respondent was in default being 11 May 2015. The Washout price is as ascertained by the Claimant (and not substantively challenged by the Respondent) for a published cash price on day after default identified.

Amount Contracted $575/MT. Fair Market Price used being a published cash price (Chick Pea Kabuli 090) on 12 May 2015 $810/MT.

Respondent to pay Claimant $235/MT for 80MT contract excluding GST therefore $18,800.

4. AWARD

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

1. The Claim succeeds;

2. The Respondent is to pay the Claimant damages by way of washout of $18,800 within 7 days of the date of this Award;

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

This award is published on the 4th **day of** September **2015.**

……...

Ms Michelle Kerr, Sole Arbitrator appointed by GTA.