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. 216

Grain Seller
(Claimant)

and

Grain Buyer
(Respondent)

Final Award

1. INTRODUCTION

This is a Final Award in an arbitration conducted pursuant to the Dispute Resolution Rules of Grain Trade Australia Ltd (**GTA**). The main issue for us to determine is whether the Respondent, or indeed the Claimant, defaulted under the parties' contract dated 15 June 2016 (**Contract**) for the sale and purchase of 2000-2500mt of feed barley @ A$200 mt "ex farm", for delivery between 1 July and 30 August 2016 (**Contract Delivery Period**).

There is no issue as to our jurisdiction as the Contract clearly contains (in the "Contract Conditions") a referral of disputes to GTA Arbitration.

We find therefore that we are a validly constituted Tribunal under the *Commercial Arbitration Act 2010* (NSW) and with jurisdiction to determine all issues in dispute between the parties.

This Tribunal comprises

1. Mr Ian Dalgliesh, nominated by the Claimant;
2. Mr Jack Fahy, nominated by the Respondent, and
3. Mr Leo Delahunty, nominated by GTA to Chair this Tribunal.

The arbitration has proceeded on written submissions and documents alone and neither party has asked for an oral hearing.

The parties have exchanged;

(a) Points of Claim dated 26 April 2017;

(b) Points of Defence provided under cover of a fax from Everingham Solomons Solicitors, dated 1 June 2017;

(c) Points in Reply dated 7 July 2017

(d) Respondent's Reply to Points in Reply dated 24 July 2017;

(e) Affidavit of the Claimant sworn 11 October 2017;

(f) Affidavit of Mr M sworn 11 October 2017;

(g) Sworn undated statement of the Respondent provided under cover of a letter from Everingham Solomons Solicitors dated 22 December 2017;

(h) Statement of Mr H made 5 February 2018;

(i) Applicant's Submissions dated 24 April 2018;

(j) Respondent's Submissions, undated.

We have carefully considered these submissions, statements and supporting documents and base our decision on the facts and circumstances gleaned from these materials.

We should observe that the parties have elected not to conduct a hearing for this matter so that we have not had the opportunity to questions witnesses or observe them being questioned. While the parties are free to choose this course it does limit our access to available evidence, largely to the witness statements and annexures. Some of those witness statements were sworn, others were not. In the event we did not need to give any greater weight to the sworn evidence.

2. BACKGROUND TO THE DISPUTE

The Claimant Seller is a farming operation and supplier of grain based in the Narromine region of New South Wales.

The Respondent Buyer operates a feed-lot business in Walgett, New South Wales, and as a result required a steady and regular supply of feed grain.

It also appears that the Respondent used, and perhaps relied on the services of Mr H. Mr H has provided a statement in this proceeding in which he states, among other things, that he has been a truck driver for 33 years, a business he started in approximately 1989. It appears from the evidence that Mr H operated his own and subcontracted vehicles.

He also states that "as part of my usual business practice, when I am aware of one party requiring a good or selling a good I then make the connection to introduce another party either selling or requiring the good. I then provide the trucks to transport the goods from one location to the other."

The parties contracted for the supply of 2000-2500mt barley by the Claimant to the Respondent ex farm during the Contract Delivery Period. The contract appears to have been negotiated for the Respondent by Mr H and Mr H was then instrumental in arranging for execution of the contract by providing vehicles for loading grain from the Claimant's sites.

The evidence reveals that 211.99mt of grain was collected in July and a further 491.12mt was collected by 30 August, the end of the Contract Delivery Period.

Neither party held the other in default at the end of the Contract Delivery Period. In fact there appears to have been no correspondence at all between the parties in the month of September other than the issue of invoices and receipt of some payments. Limited correspondence and deliveries recommenced in October and it does not appear to be in dispute that deliveries continued up until 7 October 2016. As at 11 October 2016 the Respondent had taken delivery of 907.19mt of barley, the Claimant had invoiced the Respondent $199,581.80 and the Respondent had paid the Claimant $70,224.

The Events on or around 11 October 2016

As will be apparent, the contracted grain had not been delivered in the Contract Delivery Period.

The parties' principals spoke, for the first time, on 11 October 2016.

The Claimant recalls that he received a call from The Respondent. The Claimant recounts that conversation at paragraph 94 of his affidavit. In summary, his recollection is that The Respondent said words to the effect of;

(a) "We don't want any more grain. We won't take delivery of anymore and as far as I'm concerned the contract has expired."

(b) "We've had to buy grain from Grain Trader X to fill the shortfall of deliveries over the last couple of months due to wet weather."

In his statement, the Respondent recalls that the Claimant called him. The Respondent recalls that the Claimant said words to the effect of "Hello Respondent, it's The Claimant, I am ringing to see if you're able now to take the remaining grain under the contract?"

To which the Respondent replied (consistently with the Claimant's recollection) "We won't be taking any more grain. When we wanted the grain and needed the grain you were unable to supply it because it was too wet."

The Claimant wrote to the Respondent by letter dated 18 October 2016, holding the Respondent in default of the Contract and imposing a final date for collection of 2 November 2016.

The Respondent wrote to the Claimant by letter dated 21 October 2016, affirming that it would not be taking any more grain because "it was too wet to get the grain out of your property when it was needed and we had to purchase grain from another supplier", and holding the Claimant in default "for not being able to supply the grain on time. As we consider this something out of your control due to the wet weather we did not pursue this matter any further."

As may be apparent from the parties' differing positions, by October 2016 the market price for barley was below the contracted price.

It is the Claimant's case that the Respondent is in default of its obligations under the contract and the Claimant is entitled to damages.

3. DETERMINATION

This was an ex farm contract for delivery in July and August.

Limited deliveries of grain were made until, on or about 11 October, the Buyer declared it would not be taking further deliveries and the Seller held the Buyer in default in respect of the undelivered balance.

GTA Trade Rule 13.1(2) provides that in the case of ex farm contracts, "the Buyer shall give the Seller not less than five [5] Business Days written notice of intent to present appropriate transportation for

the commencement of loading, and, the Seller shall, within two [2] Business Days of receipt of such notice, give delivery or consigning instructions to the Buyer."

This Rule makes it clear that the onus is largely on the Buyer to initiate and orchestrate the delivery process. If due to some external agency, such as weather or flooding, the Buyer can't send trucks in, or the Seller can't make grain available, we would expect to see that carefully documented.

Reading the evidence, witness statements and affidavits as a whole, we are unable to conclude that weather was the sole or even a significant reason why the grain wasn't delivered within the Contract Delivery Period. If weather had been a major factor (and we repeat, the onus was on the Buyer to arrange delivery) we might have expected photographs or evidence of calls, texts or email between the Seller and Buyer (or its agent or logistics provider) acknowledging the difficulties presented by the conditions, discussing attempts which could be made to secure delivery notwithstanding the weather and/or calling force majeure or frustration and/or extending the contract delivery period.

From the Seller's perspective, the evidence suggests repeated failures by the Buyer's contractor to present trucks as arranged.

While the Buyer's evidence suggests that these failures were due to weather, that is not consistent with the limited objective evidence presented in the form of text messages annexed to the Claimant's affidavit none of which say that the weather was impeding the Buyer's ability to access the sites.

Apart from evidence of the conversation with the Claimant on 11 October 2016, the Respondent's personal evidence is limited to the deliveries and invoices received, and his conversations with Mr H.

There is nothing in Mr Hs' evidence to say that he sent trucks to collect grain which, due to rain, could not access the Claimant's properties. His evidence is general, not specific. He candidly admits (at paragraph 15 of his Statement) that he did not see the state of the relevant roads.

While we don't doubt that he was an experience transport operator and familiar with the conditions and roads in the area, and while we accept that there was substantial rain in the area throughout this period, his evidence, and the evidence overall, does not persuade us that the only or even main reason the grain wasn't loaded in the Contract Delivery Period was due to rain.

Even if the rain had been a dominant factor preventing delivery during the Contract Delivery Period, the Respondent took no steps to extend the Contract Delivery Period, declare force majeure or frustration (if that was open to it) or terminate the contract (if that had been open to it). Arranging for additional loads in October had the effect of affirming the Contract so that the effect of the purported termination on 11 October was in fact to put the Respondent in breach of the Contract.

We find therefore that the Respondent is in breach of contract and the Claimant is entitled to compensation.

On the question of damages, we find that damages should be awarded based on the difference between the 907.19 mt delivered and the minimum 2000 mt required under the Contract. Given that the Contract was for F1, F2, or F3 Barley and that the Claimant produced evidence of selling F3 at $67/mt, we find that the Claimant is entitled to the difference of the unsold Barley (1092.81 mt) at $133/mt. Consequently the figure should be $145,343.73 plus GST.

The Claimant has also claimed maintenance costs in the amount of $20,714.00 (ex GST) but we can see no basis for allowing this aspect of the claim.

COSTS

Having found in favour of the Claimant, the Claimant is also entitled to costs.

We have invited both parties to make submissions on costs, in the event they were successful.

The Respondent's costs were $12,567.50. The Claimant's costs were nearly 3-times that amount, at $34,340.50. The difference can possibly be attributed to the Claimant's significant reliance on counsel, but its submission on costs does not actually provide us with a break-down.

As we have a complete discretion in relation to costs, and in view of the significant difference between the Claimant and Respondent's costs, we will allow the Claimant $26,000 by way of costs.

This assumes that half of the total fees were counsel's fees, which we allow in full (say, $17,000). In view of what may be duplication between the solicitors and counsel, we allow half of the balance (say $9,000).

AWARD

For the reasons given above, our final Award is;

(a) The Respondent shall pay the Claimant the amount of $145,343.73 plus GST.

(b) The Respondent shall pay interest on the principal sum which we fix at 5% per annum, from 21 October 2016.

(c) The Respondent shall indemnify the Claimant for the arbitration and any other fees paid by the Claimant to GTA.

(d) The Respondent shall pay the Claimant's legal costs which we fix in the amount of $26,000.

This award is published at Sydney, the day of 2018.

Mr Leo Delahunty, Chair Arbitrator appointed by GTA

Mr Ian Dalgliesh, Arbitrator appointed by the Claimant

Mr Jack Fahy, Arbitrator appointed by the Respondent