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. 225

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 Claimant is in breach of the parties' DCT contract dated 30 December 2016 (**Contract**) by failing to deliver faba beans which met the contractual specification.

Our jurisdiction has not been challenged as the Contract clearly contains (in the *Standard Terms and 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 Simon Clancy, nominated by the Claimant;
2. Mr Andrew Wilsdon, nominated by the Respondent, and
3. Ms Michelle Kerr, 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 (undated, received by GTA on 4 July 2018);

(b) Points of Defence and Counterclaim (undated, received by GTA on 30 July 2018);

(c) Claimant's Points in Reply and Reply to Counterclaim (undated, received by GTA on 14 August 2018)

(d) Respondent's Points of Reply (undated) with statutory declaration of Mr M declared 29 August 2018.

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

2. BACKGROUND TO THE DISPUTE

Pursuant to the Contract the Claimant Seller sold the Respondent Buyer 370 mt faba beans with a specified Delivery Location in Adelaide, then as per Special Terms and Conditions, DCT Melbourne by 14 January 2017 (notwithstanding that the Delivery Period specified under the Contract was 30 December 2016 to 31 January 2018).

The Contract Quality/Specification was

FABABEANS: CSP 5.2.1 NO.1 FARMER DRESSED

Payment terms were "28 days end of day (sic) of delivery."

The Standard Terms and Conditions provided;

This contract is subject to the Trade Rules of Grain Trade Australia Ltd [GTA] currently in effect (including GTA Contract No. 4 conditions for DCT contracts).

Clause 6 of the GTA Contract No. 4 provides;

(a) *Subject to clause 6(b) quality, grade and condition will be finally and conclusively determined by certificate issued by container packer.*

(b) *Any requirement for an independent quality inspection and/or certificate to be declared in Packing Instructions and be for the Buyer's account unless otherwise stated.*

The Claimant issued an invoice dated 21 January 2017 for A$130,381.02 (inc GST)(**Invoice**). The Invoice also stipulated;

LATE PAYMENT/OVERDUE INTEREST OF 18% pa WILL APPLY TO THIS INVOICE IN CONJUNCTION WITH YOUR GTA CONTRACT TERMS INLCUDING GTA 19.2 AND 20.

The Respondent made a series of payments between 15 March 2017 and 23 May 2017 totaling $60,000.

On or about 8 May 2017 the Respondent made the Claimant aware of quality concerns apparently affecting the consignment and provided the Claimant with a report prepared by SGS Egypt Ltd for Egyptian Nile Company (**SGS Report**) apparently substantiating those concerns. The cargo had been destined for Egypt. We assume that the Respondent as DCT Buyer must have sold or otherwise delivered the consignment to Egypt. While not directly relevant to an issue in dispute, it appears that Mr R was at all material times Managing Director of the Respondent and Business A. Mr R ran Business A with Mr A.

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The SGS Report indicated that sampling commenced and was completed on 05.04.2017 and the report was signed that same day. It recorded 94.9% purity, and 5.1% foreign matter. The Respondent also produced test results produced by the Alexandria Governorate Health Affairs Directorate Central Labs dated on or around 6 April 2017 (**Alexandria Report**) to the effect that the samples were unfit for human consumption.

This quality dispute was the apparent justification for withholding the balance of the purchase price. At various times the Respondent has asserted that the Claimant owes it $16,890 (as per letter to Atradius dated 28 June 2017 and that its losses amount to in excess of $40,000 (as per the Respondent's Counterclaim).

Leaving to one side any question about whether the Respondent was entitled to set-off, the issue in this dispute is whether we should admit the SGS Report and/or the Alexandria Report as evidence that the consignment did not meet the contractual specification. If we did, we would then have to establish what if any damages the Respondent had suffered as a result, including whether this was equivalent to the $70,381.02 withheld. We note in passing that the Respondent has tendered insufficient evidence to allow us to make any such assessment.

3. DETERMINATION

It is common in contracts for the sale of goods and particularly export related contracts to specify that weight and/or quality and/or condition is final at the place of export and certificates issued at the place of export will be conclusive evidence. The utility of such clauses is obvious and this case provides a stark example of that utility. Clause 6 of the GTA DCT Contract is such a clause.

The obligation of a Seller under a DCT Contract on GTA terms is to deliver goods that meet the contract specification. Delivery takes place when the containers are delivered to the nominated container terminal at the place of export. Because the contents of the containers cannot be accessed at the container terminal, samples are drawn during the packing process and analyzed. In this case that analysis was certified in the Intertek Analysis Report dated 24/01/2017, Client Reference S002413 Intertek Ref A67068-65497 (**Intertek Report**). The Intertek Report was procured at the request of the Respondent and the fee for that report was included in the Invoice.

As clause 6 provides that this certificate is final evidence of quality we are not required to resolve any apparent inconsistency between the Intertek Report and the SGS Report.

Even if we were required to go further, we note that the payment period was 28 days from delivery at the container terminal. No evidence was produced within the payment period supporting any concern as to quality. The alleged quality issue was only raised well after the invoice due date.

4. INTEREST AND COSTS

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

While the Claimant claims interest at 18% per annum, as claimed in the Invoice, this is inconsistent with the terms of the Contract which incorporate the GTA DCT Contract No. 4. We accordingly find that an interest rate of 8% per annum is appropriate based on the bank bill rate plus 5%.

We also allow the Claimant its arbitration fees paid to GTA ($2750 and $550) but do not otherwise allow the amounts listed in the document headed *Breakdown of Damages Claimed* submitted with the Points of Claim. Any court costs can be claimed as part of the court process.

5. AWARD

For the reasons given above, our final Award is;

(a) The Respondent shall pay the Claimant the amount of $70,381.02 (inclusive of GST);

(b) The Respondent shall pay interest on the principal sum which we fix at $8,947.06 (calculated at 8% per annum, from 22 February 2017).

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

This award is published at Sydney, the 22nd day of October 2018.

Ms Michelle Kerr, Chair Arbitrator appointed by GTA

Mr Simon Clancy, Arbitrator appointed by the Claimant

Mr Andrew Wilsdon, Arbitrator appointed by the Respondent