GRAIN TRADE AUSTRALIA

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GTA Arbitration 51

Notice to Members

Date of Issue: **February 2009**

Claimant: **Buyer (Trader in liquidation)**
&
Respondent: **Seller (Trader)**

Arbitration Committee (AC)

- Gerard Langtry, grain merchant, nominated by the Claimant;
- Ron Storey, grain industry consultant, nominated by the Respondent;
- Alan Winney, grain merchant, Arbitration Committee Chairman, appointed by NACMA.

Claim

- This dispute relates to the NACMA requirements when calling a contract in default and the effect of a subsequent insolvency if the contract is still in existence ("the Contract.")
- The claim was for $365, 973.44

Award

Final Award:

- The Claim was denied.
- The Claimant is to pay the Respondent's Arbitration Fee of $6,700
- The Claimant shall pay the Respondent's costs on a party and party basis, and expenses including relevant fees payable to NACMA.

IN THE MATTER OF THE COMMERCIAL ARBITRATION ACT 1984 (NSW) AND IN THE MATTER OF AN ARBITRATION UNDER THE RULES OF THE NATIONAL AGRICULTURAL COMMODITIES MARKETING ASSOCIATION LTD

NACMA Arbitration No. 51

Grain buyer (in Liq) Trust
Claimant

and

Grain seller
Respondent

Final Award

1. INTRODUCTION

Grain buyer (In Prov Liq) ("Claimant"), is a company (in liquidation) incorporated under the laws of Australia.

The Respondent is Grain seller ("Respondent") a company incorporated under the laws of Australia.

This dispute relates to the NACMA requirements when calling a contract in default and the effect of a subsequent insolvency if the contract is still in existence ("the Contract.")

The Arbitration Committee comprises:

- Gerard Langtry, grain merchant, nominated by the Claimant;
- Ron Storey, grain industry consultant, nominated by the Respondent;
- Alan Winney, grain merchant, Arbitration Committee Chairman, appointed by NACMA.

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

1. Claimant's Claim Submissions, dated 22 September 2008.
2. Respondent's Defence Submissions, dated 21 October 2008.
3. Claimant's Rebuttal Submissions, dated 4 December 2008.
4. Respondent's Points of Reply, dated 12 January 2009.

2. FACTS

The following facts appear to be largely agreed, based on the parties' submissions:

2.1 On or about 23 August 2006 the parties entered into contract number WRB4005 evidenced by Woodside Rural Brokers note under which the Claimant bought from the Respondent 2000 metric tonnes of barley at $200.00 per tonne. The delivery period ran from January 2007 to September 2007, inclusive (Buyer's Call).[1]

2.2 On or about 23 August 2006 the Respondent issued a Sales Contract document no. 501054 for the same 2000 metric tonnes of barley at $200.00 per tonne. The delivery period ran from 1 January 2007 to 30 September 2007.[2]

2.3 On or about 23 August 2006 the Claimant issued a Purchase Contract Confirmation document no. 501054 for the same 200 metric tonnes of barley, but at $206.00 per tonne plus $2.00 each calendar month after the first within delivery period. The difference in price was not explained nor does it seem to be material. The delivery period ran from 1 January 2007 to 30 September 2007.[3]

2.4 On 24 September 2007 the Respondent sent two facsimiles to the Claimant:

- The first facsimile was a "formal notice of breach" of all contracts between the parties. The Respondent indicated an intention to cease deliveries on all contracts "until the account was in line or a satisfactory resolution was agreed" and to cancel the contracts unless the matter was "resolved urgently."[4]

- The second facsimile, later in the day stated that to "avoid any confusion" the Respondent held the Claimant "in default of all contracts that have outstanding monies, outside of the agreed trading terms." This included contract WRB4005.[5]

2.5 On 26 September 2007 the Supreme Court of NSW appointed PM and DK Joint and Several Provisional Liquidators of Grain buyer Pty Ltd and Joint and Several Receivers and Managers of Grain buyer Family Trust.[6]

2.6 On 27 September 2007 Mr M emailed Patrick Haire of Woodside Rural Brokers Pty Ltd to determine a fair market price for the barley delivered to Tabbita/Rockdale for the purposes of washing out the contract. Mr Haire advised the Fair Market Price ("FMP") was $517.50 per tonne.

2.7 On 27 September 2007 Mr M sent a facsimile to the Respondent declaring the insolvency of the Claimant as an 'Insolvency Event' under Rule 17.6 of the NACMA Trade Rules.[7]

2.8 On 2 November 2007 Mr M sent a facsimile to the Respondent with reference to its 27 September 2007 letter and notifying the Respondent that the Fair Market Price for the barley was $520 per metric tonne and that the close out differential was $304.00 as quoted by Woodside Rural Brokers. As 1,203.86 metric tonnes of barley remained outstanding at the time of the insolvency event, the Respondent was liable

[1] Claimant's Claim Submissions, p 1 at 2.1.9 and Annexure 'B' to SB statutory declaration.
[2] Claimant's Claim Submissions, p 2 at 2.2.13 and Annexure 'C' to SB statutory declaration.
[3] Claimant's Claim Submissions, p 3 at 2.3.18 and Annexure 'D' to SB statutory declaration.
[4] Claimant's Claim Submissions, p 4 at 2.4.22 and Annexure 'E' to SB statutory declaration.
[5] Claimant's Claim Submissions, p 4 at 2.4.23 and Annexure 'F' to SB statutory declaration.
[6] Claimant's Claim Submissions, p 4 at 2.5.24; Annexure 'A' and at 3 of MP statutory declaration.
[7] Claimant's Claim Submissions, p 5 at 2.5.25 and Annexure 'C' to MP statutory declaration.

for $365,973.44 as the close out invoice value. An invoice for this amount was included with the facsimile. [8]

2.9 On 13 February 2008 Mr M and Mr K were appointed Joint and several liquidators of Grain buyer Pty Ltd and their appointment as Receivers and Managers of the Grain buyer Family Trust was affirmed.[9]

3. JURISDICTION

In determining jurisdiction, there are several references to NACMA's Trade and Dispute Resolution Rules in the contractual documents. The Woodside brokers note states, "All contract terms and conditions as set out above shall overrule the NACMA Standard Terms and Conditions with which they conflict to the extent of the inconsistency."[10]Further, the Claimant submits that both parties are NACMA members.[11]

The Sales Contract number 501054 issued separately by the Respondent states, "Trade Rules to Govern: NACMA."[12] Further, on the second page of the Claimant's Purchase Contract Confirmation number 501054 the terms and conditions stated, "Disputes: Either of the parties hereto shall be entitled to refer any dispute arising out of these Contracts and which cannot be resolved between the parties to NACMA mediation for expert mediation and/or arbitration."[13]

Based on the contracts submitted by the parties and in the absence of dispute, NACMA has jurisdiction to arbitrate this dispute.

4. CONTRACT

Status of contracts at the time of "insolvency event":

The Claimant's initial submissions rely on Rule 17.6.2.(b) of the NACMA Trade Rules, that there were outstanding contracts between the parties at the time of the Claimant's insolvency, and the Respondent was "in the money", therefore, the Claimant submits, it is accepted in the trade that the Respondent as the counterparty must pay the Claimant as the insolvent trader.[14] The Claimant submits that at the time the contract between the parties was closed out due to the insolvency event the Respondent was in the money in the amount of $304.00 per tonne.[15] As there was 1,203.86 tonnes of barley still to be delivered on the contract, the Claimant would therefore be entitled to the sum of $365,973.74 from the Respondent [16]as the difference between the contract price and market price.[17]

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[8] Claimant's Claim Submissions, p 5 at 2.5.28 and Annexure 'E' to MP statutory declaration; at 8 of MP statutory declaration.
[9] Claimant's Claim Submissions at 13 of SB statutory declaration; at 4 of MP statutory declaration.
[10] Claimant's Claim Submissions, Annexure 'B' to SB statutory declaration.
[11] Claimant's Claim Submissions, p 1 at 4.
[12] Claimant's Claim Submissions, Annexure 'C' to SB statutory declaration.
[13] Claimant's Claim Submissions, Annexure 'D' to SB statutory declaration.
[14] Claimant's Claim Submissions, p 5 at 2.6.29; Claimant's Rebuttal Submissions, p 1 at 1.1.2.
[15] Claimant's Claim Submissions, p 5 at 2.6.30.
[16] Claimant's Claim Submissions, p 5 at 2.6.31.
[17] Claimant's Claim Submissions at 14 of SB statutory declaration.

The Respondent denies that the provisional liquidators were appointed to Grain seller Pty Ltd while the contract between the parties was on foot.[18]It submits that on or before 24 September 2007 the Respondent determined, by exercise of due diligence, that the Claimant was in default of the contracts between the parties, owing an amount of $262,926.58 to the Respondent[19]. The Respondent submits that the two facsimiles sent to the Claimant on 24 September 2008 called the Claimant "in default" of the contracts in accordance with Rule 17.2 of the NACMA Trade Rules[20] And brought the contracts between the parties to an end. As a result, Rule 17.6 of the NACMA Trade Rules relating to an 'insolvency event' could not apply.[21]The insolvency provision can only apply to extant contracts.[22]

In response, the Claimant accepted that it was "in default in relation to non payment of $262,926.58" and that the Respondent "validly issued a default notice on 24 September 2007 as it was entitled to do under Rule 17.2 of the Trade Rules." However, it submits that the Respondent's facsimiles on 24 September 2007 did not cancel or terminate the contracts between the parties, therefore the contracts were still on foot and the insolvency close out provisions of Rule 17.6.2 apply.[23]The Claimant submits that, properly construed, the facsimiles evidenced an intention by the Respondent to negotiate an agreement between the parties with the intention of fulfilling the contract.[24]

In support of these submissions, the Claimant states that it is "basic contract law" that a breach of the terms of the contract does not automatically terminate a contract.[25] The innocent party must clearly and unambiguously communicate to the party in default their intention to terminate or waive the breach.[26]A default notice issued under the Trade Rules alone does not bring the contract to an end; the innocent party must also elect to terminate the contract, extend the delivery period or resell the grain.[27] The Claimant relied on the language used by the Respondent in the facsimiles to indicate that there was no "clear and unambiguous intention to terminate the contracts."[28]It submits that if the Respondent had intended to cancel the contract it was required to use language that clearly indicated that, and the writer's intention was irrelevant.[29]

The Respondent contends that due to the events surrounding the insolvency of the Claimant it did not notify the Claimant which option it wished to exercise as required by Rule 17.2 of the NACMA Trade Rules. In the event, it elected to resell the defaulted portion of the barley.[30]

The Claimant states that the existence of a dispute is not a valid reason for the Respondent's failure to notify, especially as the notification or lack thereof was central to the dispute.[31]The

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[18] Respondent's Defence Submissions, p 1 at 2.
[19] Respondent's Defence Submissions, p 5 at 5.A.
[20] Respondent's Defence Submissions, p 2 at 5.B.
[21] Respondent's Defence Submissions, p 2 at 5.C.
[22] Respondent's Defence Submissions, p 2 at 5.C.
[23] Claimant's Rebuttal Submissions, p 1 at 1.1.
[24] Claimant's Rebuttal Submissions, p 1 at 1.1.
[25] Claimant's Rebuttal Submissions, p 2 at 2.5; *Photo Production Ltd v Securior Transport Ltd* [1980] AC 827; Carter & Harland, *Contract Law* 4th Ed at paras [1967] and [1859].
[26] Claimant's Rebuttal Submissions, p 2 at 2.5; *Mannai Investments Co Pty Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 768.
[27] Claimants Rebuttal Submissions, p 2 at 2.6.
[28] Claimant's Rebuttal Submissions, page 3 at 2.9.
[29] Claimant's Rebuttal Submissions, page 3 at 2.10.
[30] Respondent's Defence Submissions, page 2 at 5.D.

Claimant states that the Respondent's admission that it failed to make an election and communicate it to the Respondent indicates that the contract was still on foot in accordance with Rule 17.6.2(b) on 27 September 2007. It further submitted that the Claimant's default at the time the contracts were closed out had no impact upon the interpretation of Rule 17.6.2(b).[32]

Finally, the Respondent submitted that it does not "ignore contract law", as submitted by the Claimant, rather that common law is largely irrelevant to the issues in this dispute.[33]In response to the Claimant's submission that the Respondent failed to use "clear and unambiguous" language and that the contract was still on foot, the Respondent submits that the second facsimile could have no other purpose than to cancel the contract.[34] The Respondent submits that as the Claimant conceded that a valid default notice was served[35]the question to be answered is whether it is no longer permitted to exercise one of the three options set out in Rule 17.1.[36]The use of the word 'prompt' refers to 5 business days in the context of Rule 12 and that Rule 17.1 is silent on the point. In such circumstances the Respondent submits that an interpretation must be favoured "which will avoid consequences which appear capricious, unreasonable inconvenient or unjust": *Australian Broadcasting Commission v Australasian Performing Right Association Limited* (1997) 129 CLR at 99-109.[37] An insolvency event being triggered between notification of default and exercising one of the three options would result in an inequity being suffered by the Respondent as it would be deprived of the balance of the contract.[38]The Respondent submits that "long standing custom" is not a sufficient reason for such an outcome.[39] The Respondent also challenged the cartage and handling costs claimed by the Claimant.

NACMA requirements in an insolvency event:

The Respondent submits that even in the event that there had been contracts still in existence between the parties the non-insolvent company would not be obligated to pay the external administrators of the insolvent company any proceeds received as a result of closing out the contract.[40] Rather, it submitted, the non-insolvent party is entitled to retain the proceeds. [41] In interpreting this section, the Respondent relied on the NACMA Trade Rules as they related to closing out contracts in circumstances of Default. In the default provision at Rule 17.5 it is clear that the defaulting party must pay the non-defaulting party.[42] Rule 17.6 does not provide for such an outcome. The Respondent submits that the intention of the section must therefore be that the non defaulting party retain the proceeds from the contract.[43] This interpretation of Rule 17.5 is in keeping with NACMA's position that the Rules should not operate as to benefit a defaulting party. The Respondent further submits that as the contracts were buyer's calls contracts, with delivery to take place on 30 September 2007, the Claimant was required

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[31] Respondent's Rebuttal Submissions, page 4 at 2.12.
[32] Respondent's Defence Submissions, page 4 at 2.13.
[33] Respondent's Surrebuttal Submissions, page 1 at 1.
[34] Respondent's Surrebuttal Submissions, page 1 at 2.A.
[35] Respondent's Surrebuttal Submissions, page 1 at 2.B.
[36] Respondent's Surrebuttal Submissions, page 2 at 2.B.
[37] Respondent's Surrebuttal Submissions, page 2 at 2.B.
[38] Respondent's Surrebuttal Submissions, page 2 at 2.B.
[39] Respondent's Surrebuttal Submissions, page 3 at 4.
[40] Respondent's Defence Submissions, p 3 at 7.C.iii and iv.
[41] Respondent's Defence Submissions, p 3 at 7.C.iii and iv.
[42] Respondent's Defence Submissions, page 3 at 7.C.iii and iv.
[43] Respondent's Surrebuttal Submissions, page 2 at 3.

to provide pre-delivery notice to the Respondent on or before 15 September 2007 advising of a delivery date in accordance with Rule 13.2 of the NACMA Trade Rules.[44] The Respondent submits that no notice was provided.[45]

The Claimant submits that the Respondent would not be paying the provisional liquidators, as it had submitted, rather any monies received in closing out the contract are payable to the Claimant, though they will be applied by the administrator to meet the creditors' claims against the Claimant.[46] In relation to the Respondent's submissions comparing the default provisions at Rule 17.6 of the NACMA Trade Rules with Rule 17.5, the Claimant agrees that the Trade Rules differentiate between a close out due to an insolvency event.[47] However the Claimant submits that this difference alone does not support the proposition that the non insolvent party should retain the proceeds of closed out contracts, nor does the Respondent elaborate on the difference.[48] The Claimant views that the default provisions in the Rules 17.1 and 17.2 are distinguishable from Rule 17.6.2(b) on insolvency defaults as the insolvency provision requires the party not in default to make an election from three options in proceeding and without these options, Rules 17.1, 17.2 and 17.5 would apply.[49]

In addition, the Claimant raises two points distinguishing Rule 17.5 of the September 2005 NACMA Trade Rules (applicable to these contracts) from Rule 17.6. Firstly it is submitted that Rule 17.5 is specifically distinguishable from Rule 17.6 as Rules 17.1 and 17.2 adequately address default situations and 17.5 only adds that monies due are to be paid within 7 days of demand by the non defaulting party and determines how those monies are to be calculated.[50]Rule 17.5 does not state that a party in default is not able to claim damages from another party. Secondly, the Claimant submits that it is long-standing custom of the grain industry that Rule 17.6.2(b) operates so that the party who obtains a commercial advantage from the close out of the contract pays out the other party irrespective of whether the party is solvent or insolvent.[51]The Claimant relies on NACMA Award No.14 of 2007 in support of this proposition.[52]

5. DECISION

In our opinion, the two faxes sent by the Respondent on 24 September 2007 were appropriate notification that the Claimant was in default due to a breach of contract terms, and enlivening Rule 17.2. While the Respondent did not at that time give notification to the Claimant of which of the three options it would be exercising in relation to the default provisions, we accept the Respondent's argument that Trade Rule 17.2 clearly contemplates that the election may follow the notice of default, "promptly", and that supervening insolvency will render the requirement to give notice of election superfluous. The contract was not on foot at the time of insolvency event and therefore the Respondent was not required to pay out the contract.

Damages

[44] Respondent's Defence Submissions, page 2 at 5.A.
[45] Respondent's Defence Submissions, page 2 at 5.A.
[46] Claimant's Rebuttal Submissions, page 4 at 3.1, 3.2.
[47] Claimant's Rebuttal Submissions, page 5 at 3.6.
[48] Claimant's Rebuttal Submissions, page 5 at 3.6.
[49] Claimant's Rebuttal Submissions, page 5 at 3.8.
[50] Claimant's Rebuttal Submissions, page 5 at 3.9.
[51] Claimant's Rebuttal Submissions, page 6 at 3.12.
[52] Claimant's Rebuttal Submissions, page 6 at 3.13.

The Claimant submits that the Respondent has failed to honour the washout agreement between the parties, with damages in the amount of $365, 973.44 claimed[53] or such other amount as the Arbitration Committee thinks fit.[54]The Claimant also claims interest at 10% per annum on any amounts found to be due to the Claimant, in accordance with the NSW Supreme Court interest rates.

As the Claimant has been unsuccessful in this arbitration, it is not entitled to damages.

6. AWARD

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

1. The Claim is denied.

2. The Claimant is to pay the Respondent's Arbitration Fee of $6,700.00.

3. The Claimant shall pay the Respondent's costs on a party and party basis, and expenses including relevant fees payable to NACMA. The parties are directed to attempt to settle costs between them within the next 14 days, failing which the costs shall be assessed by the Supreme Court of New South Wales in accordance with section 34(1)(c) of the *Commercial Arbitration Act (NSW) 1984.*

And we so publish our Award.

……...**Date: …...../…...../2009**

Gerard Langtry, Arbitrator nominated by Claimant

……...**Date: ……..../…...../2009**

Ron Storey, Arbitrator nominated by Respondent

……...**Date: ..……../…...../2009**

Alan Winney, Arbitration Committee Chairman, appointed by NACMA.

[53] Claimant's Claim Submissions, page 1 at 7.
[54] Claimant's Claim Submissions, page 5 at 32.a).