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. 229

GRAIN BUYER (Trader)

(Claimant)

and

GRAIN SELLER (Trader)
(Respondent)

Final Award

1. INTRODUCTION

1.1 This is Final Award in an arbitration conducted pursuant to the Fast-Track Dispute Resolution Rules of Grain Trade Australia Ltd ("GTA").

1.2 There has been no challenge to my appointment as the subject Confirmation of Purchase Contract No XXXXXX dated 28 November 2016 (**Contract Confirmation**) clearly incorporates the GTA Dispute Resolution Rules.

1.3 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.

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

1.5 The Claimant has relied on Points of Claim dated 4 May 2018 supported by a bundle of accompanying documents.

1.6 The Respondent relies on Points of Defence dated May 2018. The Respondent has not submitted any documents in support of its defence.

1.1 I have read and considered these submissions and supporting documents and base my decision on the facts and circumstances arising from these materials.

2. THE RELVANT FACTS

2.1 While the amount in dispute in this matter (A$156,016.46) is outside the mandatory Fast Track jurisdiction, the parties have elected to proceed with a Fast Track arbitration meaning that the length of submissions and number of supporting documents is restricted. It also means that the Claimant had no right of reply to the Respondent's Points of Defence.

2.2 There are also no statements of evidence nor an agreed statement of facts so I base this award on the following factual findings which I glean from the papers and which don't appear to be in dispute.

2.3 Firstly, there is no dispute that the parties contracted for the sale by the Respondent to the Claimant of 500MT canola meal at A$370 mt for delivery DCT Melbourne for delivery in December 2016.

2.4 The Contract Confirmation specified that the Governing Terms were the GTA DCT Contract No.4 in force at the contract date (that is, 28 November 2016). The relevant form can be found on the website of Grain Trade Australia, dated May 2015 (**DCT Terms**).

2.5 Clause 2(a) of the DCT Terms provides;

The Buyer warrants that it will give the Seller written Packing Instructions (including last permissible day for delivery to terminal gate ("Delivery Date") at least 14 calendar days prior to the Delivery Date.

2.6 Clause 2(c) of the DCT Terms provides;

Unless otherwise agreed, Packing Instructions must specify: Terminal Gate; container yard and empty container release number; Customs and Quarantine clearance details inc RFP and EDN; bag weights and printing details; Import Permit; vessel name, voyage number, and ETD; port(s) of destination.

2.7 As contemplated under the GTA DCT Terms, the Claimant Buyer issued Packing Instructions (called *Pack Advice*) with references COO3566 (for 285.19MT to be shipped in 16 containers aboard ANL ELINGA) and COO3567 (for 139.69MT in 8 containers for shipment on ANL ECHUCA). Both indicated Timaru New Zealand as the Final Destination and contained the following clause 9 (in quite small print, at the bottom of the page) (**Clause 9**)

9. IN ADDITION TO THE ABOVE IT'S CRITICAL THAT THERE'S NO CROSS CONTAMINATION OF OUR MEAL WITH WHOLE SEEDS BECAUSE IF A SINGLE SEED IS FOUND BY NEW ZEALAND QUARANTINE OFFICIALS THE WHOLE CONSIGNMENT WILL BE DETAINED.

2.8 Neither the Contract Confirmation nor the Packing Instructions specify or incorporate a particular Canola Meal standard. I note that while the Australian Oilseeds Federation Inc publishes "Quality Standards, Technical Information & Typical Analysis" including for Oilseed Meals, that standard was not referenced in the Contract Confirmation.

2.9 The Packing Instructions direct that composite shipment samples be directed to the Agrifood Technology laboratory at Werribee Victoria. No certificates of analysis by Agrifood Technology have been produced by either party.

2.10 Finally, the Contract Confirmation stipulates that "Quality Condition Final at Origination."

2.11 I note that paragraph 3(d) of the Points of Defence makes reference to a Manufacturer's Certificate dated 30 November. While it is asserted that the Claimant signed the Manufacturer's certificate which certified that "a representative sample has been inspected

and contains no viable seeds" for some reason the said certificate was not annexed to the Points of Defence but is apparently with the Respondent's solicitors and available for inspection. Given the Fast Track procedure adopted by the parties gives me no opportunity see the certificate, nor for the Claimant to make submissions with respect to the relevance of the alleged certificate I shall make no further reference to it.

2.12 Having been shipped to New Zealand (as indicated in the Packing Instructions) each consignment was detained and rejected by NZ authorities who detected the presence of prohibited contaminants (namely barley and brassica seeds) in the consignment.

2.13 There appears to be no dispute about the presence of the contamination, or that it was sufficient for the NZ authorities to reject the consignments, which they did.

3. MY DECISION

3.1 The Claimant alleges that the presence of the seeds amounted to a breach of contract by the Respondent. The Points of Claim are perhaps a little unclear as to precise nature of the alleged breach but I think in essence the Claimant alleges two breaches, namely

(a) Breach of an obligation to deliver meal to Timaru (see paragraphs 5 and 11 of the Points of Claim) (the **Delivery Claim**);

(b) Breach of Clause 9 (the **Contamination Claim**).

3.2 I reject the Delivery Claim. This was a DCT contract. The Respondent's obligations were discharged when it delivered containers at the nominated container terminal in Australia.

3.3 In relation to the Contamination Claim, the Respondent says that Clause 9 did not form part of the agreement between the parties.

3.4 For the reasons that follow, I agree with this submission and consider that the Respondent is not in breach of contract.

3.5 In essence, the Claimant's argument is that by virtue of Clause 9, it was a term or condition of that contract that there was zero-tolerance for viable seeds. This term or condition could have been achieved by saying as much expressly in the Contract Confirmation, or by specifying a quality standard in the Contract Confirmation that included zero-tolerance for viable seeds. This is an important obligation with significance both for price and liability. It should have been included in the Contract Confirmation.

3.6 Those matters which can be included in a Packing Instruction are, unless otherwise agreed, of the nature of those matters set out at clause 2(c) of the DCT Terms set out above. It is certainly not appropriate for a Packing Instruction to contain a proviso that attempts to impose significant additional obligations and liabilities on a DCT Seller.

3.7 As I have observed elsewhere in these Reasons, because the parties agreed to a Fast Track arbitration the submissions before me are limited and the Claimant has not had an opportunity to reply to the Points of Defence.

3.8 Similarly, the Respondent has not claimed legal costs as part of its Points of Defence.

4. AWARD

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

(a) The claim is dismissed;

(b) No order as to costs;

(c) The Claimant indemnify the Respondent in respect of the GTA arbitration fees paid in the sum of $4400.

This award is made at Sydney this _____ day of June 2018.

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Tim Teague, Sole Arbitrator appointed by GTA.