A.B.N. 70 979 095 411
A.C.N. 097 228 656

PO Box 448
Turramurra NSW 2074

Phone +61 2 9402 9402
Fax +61 2 9144 3526

admin@nacma.com.au
www.nacma.com.au

Member Update – Arbitration Award

Date of Issue: **21 March 2008**

Arbitration number: **31 – issued on 29 January 2008**

Claimant: **Grain Buyer Pty Ltd (Buyers)**
&
Respondent: **Grain Seller Pty Ltd (Sellers)**

ARBITRATORS

- Mr Michael Weller, arbitrator nominated by Claimant
- Mr Cameron Pratt, arbitrator nominated by Respondent
- Mr Henry Wells, arbitrator nominated by NACMA and Committee Chairman

CLAIM

The Claimant claims an order for performance or damages for the non-delivery of grain. The Respondent alleges that the Claimant repudiated the contract when it rejected the transfer of grain.

AWARD

The claim was denied the Respondent was awarded its costs of the arbitration and legal fees.

DETAILS

- The Claimant entered into two separate track contracts, with different brokers, to purchase 4000 tonnes of feed barley for delivery December 2006 to January 2007. The delivery point was Port Kembla basis less NACMA location differential. The Claimant thought the contracts were Natural Port Terminal Contracts not track contracts.
- The Respondent transferred the grain on 30 January 2007 by electronic online title transfer. The grain was transferred from a number of sites across New South Wales from the Port Kembla zone and the Newcastle zone.
- On the 30 January 2007 the Claimant rejected the transfer of sites not in the Port Kembla zone.
- On 31 January 2007 the Respondent called the Claimant in default of the contract and elected to cancel those portions of the contract in accordance with Trade Rule 17.
- On 1 February 2007 the Claimant called the Respondent in default of the contract.

MAJOR FINDINGS

The Committee:

- Held that the Claimant's honest but erroneous conduct should not override the breach of contract. A breach going to the heart of the contract where time is of the essence and delivery due to expire in a matter of hours, given the potentially onerous consequences of not accepting the rejection as repudiation, the Respondent was not acting inappropriately.
- The onus is on the rejecting party to be sure of its contractual position and assess whether the rejection is appropriate.

IMPORTANT POINTS

- Ensure that before a transfer of grain is rejected that you check the contract details and confirm whether that is an option under the terms of the contract.

AWARD IN DETAIL
This award has been stripped of any detail that may identify the parties to this arbitration.

1. INTRODUCTION

The Claimant in this arbitration is Grain Buyer Pty Ltd ("Claimant"). The Respondent is Grain Seller Pty Ltd ("Respondent").

The parties have supplied contracts which incorporate the NACMA Track Contract, which refers disputes between the parties to arbitration under the NACMA Dispute Resolution Rules.

The main issue for determination is whether the Claimant repudiated the contracts when it rejected the transfer of grain from the Respondent.

The Arbitration Committee duly comprised:

- Mr Michael Weller, nominated by the Claimant.
- Mr Cameron Pratt, nominated by the Respondent.
- Mr Henry Wells, Arbitration Committee Chairman, appointed by NACMA.

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

1. Claimant's Submission, dated 18 April 2007.
2. Respondent's Defence, dated 22 May 2007.
3. Claimant's Rebuttal, dated 28 June 2007.
4. Respondent's Surrebuttal, dated 16 August 2007.

The parties waived their right to make oral submissions and the Committee has deliberated solely upon the information provided in the above submissions and attached annexures.

The Claimant seeks the following relief:

i. An order for the performance of the contract by way of delivery of the grain;

ii. In the alternative, damages on default of the contract in the amount of $445,542.14.

The Respondent seeks the following relief:

i. Claimant pay the Respondent's legal and arbitration costs.

2. AGREED FACTS

2.1 The relevant agreed facts are as follows:

2.2 On 22 March 2006 the Claimant entered into a contract with the Respondent to purchase 3000 tonnes feed barley 2006/2007 season (Brokers Note No. X)("the XX Contract").

2.3 On 22 May 2006 the Claimant entered into a contract with the Respondent to purchase 1000 tonnes feed barley 2006/2007 season (Brokers Note No. YY)("the YY Contract").

Transfers

2.4 On 30 January 2007 the Respondent transferred the grain pursuant to the contracts to the Claimant via the GrainCorp and AWB Grainflow electronic title transfer systems.

2.5 At or about 1347 hours 30 January 2007 pursuant to the XX contract, the Respondent transferred 1670.87 tonnes from the GrainCorp system from the following sites: Back Creek, Bribbaree, Gilgandra, Trangie, Weja and Junee.

2.6 Pursuant to the XX contract, the Respondent transferred 1329.13 tonnes from the AWB Grainflow system from the following sites: Bogan Gate, Grong Grong, Narromine and Nyngan.

2.7 On or about 1605 hours 30 January 2007 pursuant to the YY contract, the Respondent transferred 996.3 tonnes from the GrainCorp system from the following sites: Gunningbland, Nyngan and Caroona.

2.8 Pursuant to the YY contract, the Respondent transferred 3.7 tonnes from the AWB Grainflow system from the following sites: West Wyalong and Gilgandra.

Rejections

2.9 On 30 January 2007 pursuant to the XX contract the Claimant rejected the transfers from the GrainCorp sites Gilgandra and Trangie, a total of 964.29 tonnes. The other sites were accepted. At 1428 hours the Claimant notified the Respondent by email that it would be rejecting these sites. At 1624 hours the Claimant title transferred the Gilgandra and Trangie grain back to the Respondent.

2.10 On 30 January 2007 pursuant to the XX contract the Claimant rejected the transfers from all AWB Grainflow sites, a total of 1329.13 tonnes.

2.11 On 30 January 2007 pursuant to the YY contract, the Claimant rejected the transfers from the GrainCorp sites Gunningbland, Nyngan and Caroona, a total of 717.29 tonnes. At 1606 hours the Claimant notified the Respondent that it would be rejecting these sites. At 1704 hours the Claimant title transferred the Caroona grain to the Respondent.

2.12 On 30 January 2007 pursuant to the YY contract, the Claimant rejected all AWB Grainflow sites, a total of 3.7 tonnes.

Discussions

2.13 On 30 January 2007 by various emails from the Claimant to the Respondent, the Claimant rejected the above sites on the basis that they were not in the Port Kembla zone.

2.14 On or about 1041 hours 31 January 2007 by email the Respondent called the Claimant in default of the two contracts for the rejected tonnage. The Respondent stated that pursuant to Rule 17 it had elected to cancel the rejected portions of the contracts.

2.15 On or about 1246 hours 31 January 2007 by email the Claimant withdrew its rejection of the sites and tonnage and requested that the transfer be re-issued.

2.16 On 1 February 2007 by facsimile the Claimant called the Respondent in default of the contracts. The Claimant elected to extend the delivery period until 28 February 2007.

3. FACTS IN DISPUTE

3.1 On 30 January 2007 the Claimant telephoned the Respondent to discuss the rejection of the Port Kembla sites. The precise details of this conversation were in dispute. This appears to have been settled by the provision of the telephone transcript dated 1513 hours 30 January 2007. The parties discussed the track contract and the rejected sites. The only reason given for the rejection was the grain was that it was 'not any good for the Kembla zone'.

4. SUBMISSIONS

Claimant

4.1 The Claimant submits it did not repudiate the contract as its repudiation was based on an erroneous assumption. The Claimant submits that a contract is repudiated where *"a party evinces an intention no longer to be bound by the contract or where he intends to fulfil*

the contract only in a manner substantially inconsistent with his obligations and not in any other way."

4.2 The Claimant submits that this text is objective and based on considerations of fact. The Claimant submits that these facts are:

(a) that the Respondent transferred grain to the Claimant;

(b) the title transfer notified the Claimant of the manner in which it might disagree with a transfer and stipulated the action that it was required to take in that event;

(c) the Claimant believed that the contract was "Natural Terminal Port ('NTP'): Port Kembla" and that some of the sites transferred were outside this zone;

(d) in accordance with the title transfer procedure the Claimant accepted those transfers within the Port Kembla zone;

(e) the Claimant rejected the transfers that were outside the Port Kembla zone and gave the Respondent express notice (by email and telephone) that it had done or was doing so;

(f) In accordance with the title transfer procedure, the Claimant transferred the grain back to the Respondent. The Claimant requested replacement tonnages in the Port Kembla zone.

4.3 The Claimant submits that its disagreement with the zone transfers, by its rejection of them, was an ordinary incident of the contractual process and the performance of the contracts. The Claimant submits that it was not a rejection of the contracts whether express or implied.

4.4 The Claimant submits that it was ready to perform the contract and did not realise that it was an incorrect interpretation of the contractual terms. The Claimant submits that the correct approach was that the Respondent should inform the Claimant of its misinterpretation and as the Respondent did not afford the Claimant this opportunity, no finding of repudiation should be made.

4.5 The Claimant submits that after the Respondent notified it of default, the Claimant made enquiries and formed the view that its interpretation of the contract was incorrect. The Claimant submits that it immediately withdrew its rejection. This occurred within the time for performance and should have been accepted by the Respondent.

4.6 The Claimant submits that the Respondent breached its implied obligations to act in good faith in executing the contracts.

Respondent

4.7 The Respondent submits that there are further relevant facts to be considered when considering repudiation. The Respondent submits that those facts are:

(a) The Claimant does not forward a contract confirmation in accordance with Rule 1.2(1) Trade Rules;

(b) The Claimant was bound by the Respondent's contract confirmation as per Trade Rule 1.2(2);

(c) The Claimant and the Respondent discussed the terms of the contract by telephone on 30 January 2007;

(d) The Respondent gave the Claimant written notice of its default on 31 January 2007, approximately 21 hours following the telephone conversation between the parties;

(e) That the Claimant and a third party discussed these contracts and that third party stated that the transfers should have been okay and to check the contracts;

(f) The Respondent and Claimant had an email discussion regarding the Victorian Track contracts.

4.8 The Respondent submits that the Claimant is a sophisticated market participant and should have been fully aware that the contracts were Track and not NTP. The Respondent submits that it made the Claimant aware of the misunderstanding by the telephone conversation between the parties on 30 January 2007.

4.9 The Respondent submits as a sophisticated market participant the Claimant should have been fully aware of its legal obligations under the contracts and the Respondent's express rights under the contracts and the Trade Rules. The Claimant should have paid closer attention to what the terms of the contract actually were.

4.10 The Respondent submits that the rejection was not made erroneously by the Claimant. As a sophisticated market participant it would be a mockery of these trades if a party with whom the Claimant contracted was somehow expected to waive its rights under the contract and the Trade Rules simply because the Claimant was in default of its own contractual obligations.

4.11 The Respondent submits that the Claimant had ample time and opportunity to reconsider its position before the Respondent finally called the Claimant in default. There is no reason why a sophisticated participant should have been unsure of the terms of its contracts.

4.12 The Respondent submits that once a party elects to exercise its contractual right to terminate a contract, the other party to the contract cannot unilaterally reinstate obligations under the terminated contract because an "election to terminate" and the discharge of the parties' obligations are final.

4.13 The Respondent submits that it is irrelevant that the Claimant changed its position and decided to accept the tonnage after the Respondent had lawfully terminated those portions of the contract.

4.14 The Respondent submits that it acted in good faith throughout.

Claimant's Rebuttal

4.15 The Claimant submits that when a trade is made through a broker it is not necessary to issue contract confirmations as the brokers note governs the contract as per Trade Rule 1.2(3).

4.16 The Claimant submits that during the conversation between the parties on 30 January 2007 the Respondent did not alert the Claimant that the contracts were Track and not NTP.

4.17 The Claimants submits that the Respondent failed to cooperate as much as possible and thus was in breach of its obligation to act in good faith.

Respondent's Surrebuttal

4.18 The Respondent submits that the conversation between the parties on 30 January 2007 evidences the Claimant's awareness that the contract was on Track terms as the Claimant stated he was calling about the 'Track' contract.

4.19 The Respondent submits that once the Claimant formally communicated that it was rejecting the tonnage and the Respondent elected to exercise its contractual right to formally accept the rejections and terminate the contracts, it was not open to the Claimant to reinstate obligations.

4.20 The Respondent submits that express notice is not a prerequisite to the Claimant being on notice or being alerted to the Claimant's misunderstanding of the contract.

4.21 The Respondent submits that simply because the AWB Grainflow transfers are done electronically does not prevent the Claimant from rejecting a portion of those transfers.

5. REPUDIATION[1]

5.1 The main issue is whether the Claimant repudiated the contract when it rejected portions of the transferred grain. Before we can evaluate whether the Claimant repudiated the contract it is necessary to consider what amounts to repudiation.

5.2 Repudiation means repudiation of obligation and describes a situation in which a party's absence of readiness or willingness to perform gives rise to a right to terminate, provided the absence of readiness and willingness satisfies a requirement of seriousness.

5.3 The test for whether a party is ready and willing to perform is:

(a) Party must be ready, willing and able to perform;

(b) Performance is a question of fact;

(c) Party must be both ready and willing to perform;

(d) The extent of readiness and willingness required is determined by the terms of the contract (that is in accordance with the standard of contractual duty imposed by the contract);

(e) Only ready and willing when performance is due;

(f) Proof that a party was not ready and willing to perform at the time when performance fell due is generally sufficient proof of a breach of contract by failing to perform.

5.4 Repudiation may be established or proved by reference to a party's words and conduct. It is not necessary to prove that the party was unable to perform.

5.5 Whether the repudiation was serious, a party must establish that the absence of readiness and willingness relied on extends to all of the party's obligations; or that it clearly indicates that the party will breach the contract in a way which gives rise to a right to terminate for breach.

5.6 Repudiation based on words or conduct may be express or implied and an express refusal to perform is the clearest case of repudiation. A wilful, but partial, refusal to perform is not necessarily repudiation. However, repudiation may occur merely because the party refuses to perform in accordance with the contract. The test for an implied refusal to perform is "whether the acts or conduct…amount to an intimation of an intention to abandon and altogether refuse performance of the contract".

5.7 Where a party adopts an erroneous construction of the contract a repudiation may occur if the party acts on its construction of the contract by breaching one or more terms, or evincing an intention to perform only in accordance with their construction. Performance in accordance with an erroneous construction will not discharge the party, and will

---

[1] Source material: Carter, Peden and Tolhurst, *Contract Law in Australia,* 2007 (5th Ed) para [30-28] – [30-66]; Carter, *Breach of Contract,* 1991 (2nd Ed) Chapter 7 and 8.

amount to a breach of contract, but repudiation will not occur unless the requirement of seriousness is satisfied, for example, because the party is not ready and willing to perform major contractual obligations.

5.8 In considering whether repudiation has taken place, it is legitimate to have regard to whether the party acted bona fide and whether the words or conduct are absolute in character. However the test of repudiation is objective and based mainly on considerations of fact.

5.9 Repudiation must be accepted to terminate the performance of the contract. Acceptance is required to complete the party's cause of action of damages in cases where the repudiation precedes the time for performance. Before repudiation is accepted a party may withdraw its words or conduct and request performance. Acceptance prevents the party retracting the repudiation.

6. DECISION

6.1 As stated above the main issue is whether by the Claimant's words and conduct it repudiated the contract. This is to be determined objectively based mainly on a consideration of the facts.

6.2 There are four main elements for us to consider:

6.2.1 whether the Claimant was ready and willing;

6.2.2 the words or conduct alleged to be repudiatory;

6.2.3 the seriousness of the effect of the words or conduct; and

6.2.4 the effect of an erroneous construction of the contract.

6.3 The terms of the contracts stated that the Claimant would purchase 4000 tonnes of feed barley with delivery due 31 January 2007. The parties had incorporated NACMA standard contracts and NACMA Trade Rules into their contractual terms which state that time is of the essence.

6.4 On 30 January 2007, at various times, the Respondent transferred the grain in accordance with the contract to the Claimant.

6.5 On 30 January 2007, at various times, the Claimant rejected portions of those transfers on the basis the delivery locations were not within the Port Kembla zone. The Claimant says that this was done on the erroneous belief that the contract was delivery NTP rather than Track. The Claimant does appear to have accepted at least one transfer in the Newcastle zone. Whilst the delivery point on each brokers note mentions Port Kembla, it is clear to the arbitrators that the contracts were basis Track

6.6 In this instance to be ready, willing and able to perform required the Claimant to accept grain that was in conformity with the contractual terms. The Claimant may have been ready and able to accept the grain but it was not willing to do so. Thus as at 30 January 2007, the Claimant was not ready and willing to perform.

6.7 The words and conduct in this instance were by telephone, email and at the time the grain was title transferred back to the Respondent. In that correspondence the Claimant did request that the Respondent transfer replacement grain from the Kembla zone. The question is whether this was an express or implied refusal to perform. The Claimant expressly stated that it was rejecting the portions of the transfers outside of Port Kembla, but we do not consider this an express refusal as the Claimant did not state outright that it did not intend to perform at all or reject all of the grain transferred. However the Claimant did reject what were, in the eyes of the Respondent and the contract, valid transfers and the Claimant had no valid reason to reject them. The Claimant rejected the transfers by email almost instantaneously and without hesitation. The grain was title transferred approximately one hour later, which would have more than sufficient time for

a prudent grain trader to review the contracts and withdraw the erroneous rejection. We consider that the email rejection could have been withdrawn and may not have constituted repudiation alone. However by the conduct of title transferring the grain back the Claimant made it plain that it would not perform in accordance with the contract at the time the words and conduct were conveyed.

6.8 The fundamental terms of these contracts were the sale and purchase of grain that is, the exchange of grain for a financial benefit, with time expressly of the essence. Whether the contract required delivery in a particular location or incorporated other terms is peripheral to the main purpose, to buy/sell grain. To reject grain that is legitimately transferred otherwise in conformity with the contract is a breach of a fundamental term. As time was of the essence in these contracts, if the Respondent did not deliver the grain by 1600 hours 31 January 2007, it would be in default of the contract and liable to the Claimant for damages at the market rate. If the Respondent had attempted to comply with the Claimant's construction the Respondent risked being in breach itself. The market differential at the time of delivery was substantial and any default would have had large financial consequences for the Respondent. Given the breach of a fundamental term and the possible consequences if the Respondent defaulted on the contract, we consider that rejecting the grain satisfies the element of seriousness.

6.9 A repudiation may occur if a party acts on an erroneous construction of the contracts by evincing an intention to perform only in accordance with that construction if that conduct is serious As discussed above, we consider that the element of seriousness has been satisfied. The question is whether the Claimant indicated or revealed that it would only accept NTP Port Kembla grain. The Claimant received the transfers throughout 30 January 2007. On each occasion it rejected portions of the transfer based on location. In our opinion each rejection reinforced that the Claimant only intended to be bound by its construction of the contract, whether or not that was correct. It also made this intention clear by email and telephone and conclusively by title transferring the grain back to the Respondent. We consider that whilst the Claimant was relying on an erroneous construction, it sufficiently evinced its intention to perform only in accordance with that construction.

6.10 A repudiation can only be retracted before it is accepted. It is clear and unequivocal to the Committee that the Respondent accepted the repudiation by its email dated 31 January 2007. The Claimant lost the right to retract its rejection once the Respondent had accepted the Claimant's repudiation.

6.11 We cannot overlook that the Claimant is a sophisticated participant in the grain trade market and should have been aware of its contractual obligations. Given the implication of rejecting such a large portion of a contract, particularly in the market conditions of the time, it would have been prudent to check the contract details in the Claimant's own trading system first. It was not necessary for the Claimant to accept or reject the title transfers immediately or to physically transfer the grain back to the Respondent. It had the time and opportunity to check its own contractual records before proceeding to reject the transfers.

6.12 The Claimant submitted that the requirement of good faith should be implied into this contract. The Respondent does not dispute this implication but argues that if such an obligation is to be implied, it is not in breach of it.

6.13 We should observe that while it has not been argued before us, we would hesitate before we would readily imply any obligation of good faith into a contract for the sale and purchase of grain between sophisticated market participants, when time is expressly of the essence. We are not aware of this having been done anywhere in the world, and we do not believe it should start at NACMA.

6.14 The Claimant says that the Respondent had not acted in good faith as it had not cooperated with the Claimant to do all things necessary to enable the other party to have the benefit of the contract. It says good faith is an implied requirement to act honestly and reasonably. With regard to repudiation the question is whether the repudiating party acted bona fide. There is no doubt that the Claimant was acting honestly, but

erroneously, when it rejected the transfers of grain. There has been no evidence to suggest that the Respondent was acting dishonestly by not going out of its way to notify the Claimant that its contractual interpretation was incorrect. There is no obligation on the Respondent to educate the Claimant in contract law and construction.

6.15 The recorded telephone conversation between the parties would certainly indicate to the Respondent that the Claimant was aware that it was a track contract. The question is then whether the Claimant's honest but erroneous conduct should override the breach of contract. In our minds it should not. As explained above it was a breach going to the heart of the contract, with time of the essence, that was due to expire in a matter of hours and it may not have been possible for the Respondent to comply with the contract based on its interpretation of the contract. Given the potentially onerous consequences of not accepting the rejection as repudiation, we do not consider that the Respondent was not acting bona fide. The onus was on the rejecting party to be sure of its contractual position and assess whether the rejection was appropriate. The Claimant should have examined its contractual obligations sooner than it did.

6.16 As such we conclude that the Claimant repudiated the contract and that repudiation was accepted by the Respondent.

7. AWARD

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

1. The Claim is denied;

2. The Claimant shall reimburse the Respondent for the NACMA Arbitration fees paid by it of AUD$4,900;

3. The Claimant shall pay the legal support fees incurred by NACMA in running this arbitration of A$2,851.20;

4. The Claimant shall pay the Respondent's costs as agreed or assessed by the Court on a party and party basis.