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Arbitration 78 (NACMA)

Notice to Members

Date of Issue of Award: **17th April 2009**

Claimant: **Commodity Seller**
&
Respondent: **Commodity Buyer**

Arbitration Committee (AC)

- Colin Peace - nominated by NACMA

This arbitration was conducted as a Fast Track arbitration and hence has only one arbitrator nominated by GTA and approved by the parties.

Claim

This dispute relates to a claim for $X claimed to be outstanding under a contract between the parties for the sale of a grain type. The issues which fall for determination are:

1. Was the contract between the parties wholly oral or wholly written, or partly oral and partly written?
2. Did the contract contain a pool agreement with a "guaranteed" base price of $1,350 per tonne?

Award

The Claimant was unsuccessful and instructed that the Claimant pay the Respondent's reasonable arbitration and legal fees.

Details

The Claimant commenced proceedings against the Respondent in the Local Court of New South Wales in Griffith. The Respondent successfully brought an application to stay the proceedings on the basis that the Contract contained a GTA arbitration agreement. The Court directed the parties to GTA due to incorporation of the GTA Dispute Resolution clause.

The Claimant submits that they entered into a Purchase Contract for a guaranteed price, whereas the Respondent countered that they had entered into a Pool Contract with the Claimant.

Award findings

The Arbitrator found that:

- A contract was in existence.
- The contract was a pool contract.

Take out for Members

- Where GTA Dispute Resolution Rules are incorporated into the contract, the first point of contact to resolve a dispute is GTA.

IN THE MATTER OF THE
COMMERCIAL ARBITRATION ACT 1984 (NSW)
AND IN THE MATTER OF AN ARBITRATION
UNDER THE RULES OF GRAIN TRADE
AUSTRALIA LTD

GTA Arbitration No. 78

Commodity Seller.
Claimant

and

Commodity Buyer
Respondent

Final Award

1. INTRODUCTION

The Claimant in this arbitration is Commodity Seller, a partnership.

The Respondent is Commodity Buyer, a company incorporated under the laws of Australia.

This dispute relates to a claim for $60,000 claimed to be outstanding under a contract between the parties for the sale of grain commodity ("the Contract.")

The issues which fall for determination are:

1. Was the contract between the parties wholly oral or wholly written, or partly oral and partly written?
2. Did the contract contain a pool agreement with a "guaranteed" base price of $1,350 per tonne?

The reference was conducted as a "Fast Track" arbitration. The jurisdiction of GTA (formerly "NACMA") was not in issue as the parties agreed to GTA Arbitration following a stay of proceedings in the Griffith Local Court so that the parties may arbitrate the dispute.

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

1. Claimant's Points of Claim, dated 19 January 2009.
2. Respondent's Points of Defence, dated 3 February 2009.

2. FACTS

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

2.1 On or about 16 February 2005, the Claimant met with BD and HR, agents for the Respondent, and a number of growers to discuss contracting for the sale and marketing of grain commodity.

2.2 On or about 4 May 2005, the Claimant again met with Mr. D and Mr. H and a number of growers to discuss contracting for adzuki beans.

2.3 On or about 4 May 2005, the Respondent sent a facsimile to the Claimant with a covering letter from Mr. H and a sample copy of a contract between the parties. The covering letter stated:

"Please find following the 2005 Commodity Buyer Grain Commodity Pool documentation, including standard Terms and Conditions."

On the sample contract, next to "Contract Type," was written, "Discretionary Grain Commodity Pool-Area".

Next to "Indicative Price," was written, "AUD$1200.0 - $1500/tonne.

2.4 On or about 6 May 2005, the Claimant called Mr. H to confirm the terms of the agreement.

2.5 On or about 9 May 2005, Mr. H sent a facsimile of a Purchase Confirmation dated 6 May 2005. In the covering letter, Ms. M L, an agent for the Respondent, requested that the Claimant sign and return one copy of the Purchase Contract.

The contract was numbered 977463 and dated 6 May 2005.

On the contract, next to "Contract Type," was written, "Discretionary Grain Commodity Pool-Area".

Next to "Indicative Price," was written, "AUD$1200.0 - $1500/tonne.

The Claimant did not sign and return the contract.

2.6 On or about 11 May 2005, Mr. H sent the Claimant a further facsimile attaching a letter on the voluntary levy payable to the NSW Dry Bean Growers Association and the Purchase Confirmation. Mr. H requested that Mr. K sign and return the Purchase Confirmation.

2.7 On or about 11 May 2005, Mr. D sent two copies of Purchase Contract to the Claimant.

2.8 Between 26 May 2005 and 15 June 2005, the Claimant made nine deliveries of grain commodity to Commodity Buyer at a storage and handling depot at Tabita, Griffith.

2.9 Between 27 May 2005 and 15 June 2005, the Respondent made four payments to the Claimant for the deliveries received. Invoices were issued for these payments.

2.10 During March 2007, Commodity Buyer sold the grain commodity in the marketing pool for a net price of $816.36 per metric tonne.

3. JURISDICTION

On or about 16 October 2007 the Claimant commenced proceedings against the Respondent in the Local Court of New South Wales in Griffith. The Respondent successfully brought an application to stay the proceedings on the basis that the Purchase Contract no. 977463 contained a GTA arbitration agreement.[1]

The Purchase Contract states, "This contract incorporates the Rules and By-laws of the National Agricultural Commodity Marketing Association (NACMA) in force at the time this contract was entered into. All disputes will be settled amicably or will be referred to Arbitration in accordance with the Rules and By-laws of NACMA and shall be resolved by application of Australian law. The Buyer reserves the right to defer any dispute to a NSW court of law for resolution at its sole discretion. The specific terms and conditions of this contract will overrule conflicting NACMA terms if any."[2]

GTA derives its jurisdiction from this arbitration agreement and the parties' agreement to arbitrate this dispute through GTA.

4. DECISION

The Claimant submits that the parties entered into an oral agreement during the meeting on 4 May 2005. He states that the oral agreement contained the following terms:

- That the price the Claimant would receive for the grain commodity would be at least $1,350 per tonne and may be as much as $1,650 per tonne[3];
- That 80% of the price would be paid as a first payment and the remainder would be paid 12 months after harvest[4].

The Claimant submits that it received the sample contract on 4 May 2005 from the Respondent and that Mr. K (the Commodity Seller) "glanced" at the first page and saw the word "indicative" written on the contract.[5] He did not recall the word being used at the 4 May 2005 meeting. [6] The Claimant submits that it had a telephone conversation with Mr. H on or about 6 May 2005 and that Mr. K received copies of the Purchase Contract from the Respondent dated 6 May 2005 and a Purchase confirmation and Grain Commodity Vendor Declaration on 9 Mary 2005. [7] While the Claimant acknowledges that it saw reference to a "pool contract" with an indicative price of AUD$1200.0 - $1500/tonne on the Contract from the Respondent, and a request for the Claimant's signature, Mr. K did not sign the contract as he perceived that there was a valid oral agreement between the parties and that he had not entered into a written contract. [8] The Claimant submits that its subsequent deliveries were based on the perceived terms of the oral contract. Finally, the Claimant relies on the

[1] Respondent's Defence, page 2 at 3.
[2] Respondent's Defence, Annexure "D".
[3] Claimant's Claim, Affidavit of MK, page 3 at 11 and 14.
[4] Claimant's Claim, Affidavit of MK, page 3 at 10.
[5] Claimant's Claim, Affidavit of MK, page 4 at 17.
[6] Claimant's Claim, Affidavit of MK, page 4 at 17.
[7] Claimant's Claim, Affidavit of MK, page 4 at 19.
[8] Claimant's Claim, Affidavit of MK, page 5 at 20.

Recipient Created Tax Invoice it received from the Respondent which states that the "base price $1,350.00 per tonne" confirmed the details of the verbal contract.

The Respondent concedes that it did not have written acceptance by Mr. K of the terms of the purchase contract.[9]However, the Respondent submits that the parties had an agreement that was party written and partly oral. To the extent that the agreement was oral, it was based upon representation made on 16 February 2005 and 4 May 2005 to potential growers, of which Mr. K was one.[10] The oral agreement reached between the parties was that there was a "marketing pool", with an initial indicative price range per tonne of produce, and upon delivery of the produce by the growers, they would receive a nominated price per tonne.[11] To the extent the agreement was written, the Respondent sent a copy of the Purchase Contract and letter to the Claimant dated 11 May 2005, reflecting the oral terms.[12] As the "Final Pool Price" was only $816.36 per tonne, no further payments were payable under the agreement.[13] The Respondent submits that the Claimant has engaged in conduct that indicates it accepting the oral agreement and the terms as reflected in the Purchase Contract dated 6 May 2005.[14] Namely, the Claimant:

- did not assert that the written documentation was inconsistent with the alleged oral contract;[15]
- made numerous deliveries between 26 May 2005 and 15 June 2005[16]; and
- received corresponding payments from the Respondent.[17]

According to the Respondent, the Claimant's post-contractual conduct is admissible on the question of whether a contract was formed: *Brambles Holdings Limited v Bathurst City Council* (2001) 53 NSWLR 153 at 163. The Respondent also received executed contracts from four of the six grain growers in the Griffith region.[18]

I accept the Respondent's submissions that the agreement was party oral and partly in writing. To the extent that it was oral, the agreement was for a "pool contract" between the parties, with only one fixed payment. A contract of this type does not usually have two fixed payments.

I also find the Respondent's submission persuasive that the Claimant elected not to object to the written material provided and delivered grain against the written contract. I must assess the parties conduct objectively. This conduct goes towards acceptance of the Purchase Contract. The contractual documents submitted by the Respondent to the Claimant were inconsistent with the oral terms alleged by the Claimant. I have seen no evidence which satisfies me that these material inconsistencies were discussed and agreed between the parties.

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[9] Respondent's Defence, page 8 at 23.
[10] Respondent's Defence, page 10 at 29(c).
[11] Respondent's Defence, page 3 at 13.
[12] Respondent's Defence, page 10 at 29(b).
[13] Respondent's Defence, page 8 at 22(j).
[14] Respondent's Defence, page 9 at 25.
[15] Respondent's Defence, page 9 at 25(a).
[16] Respondent's Defence, page 9 at 25(b)
[17] Respondent's Defence, page 9 at 25(c).
[18] Respondent's Defence, Affidavit of M L L, page 5 at 14.

The submissions and evidence of the parties reflect that the oral agreement was a "pool contract" with only one fixed payment, as it would be unusual to have two fixed payments for this type of contract. It is appropriate in such an agreement to have a written contract confirming a verbal agreement. Further, the Claimant relies heavily on the Recipient Created Tax Invoice, which is not a contract. Accordingly, I find that there was a written "pool contract" between the parties reflecting an earlier oral agreement.

Damages

The Claimant seeks $60,000 in damages plus costs and interest dating from 30 June 2006, as a result of the Respondent's failure to pay a "base price" of $1,350 per tonne for the delivery of 206.14 tonnes of grain commodity. The Claimant abandons the sum of $1,223.58.[19]

As the Claim is not allowed and the Claimant's request for damages is denied.

5. AWARD

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

1. The Claim is not allowed.

2. The Claimant shall pay the Arbitration fees of $3000 being the arbitration fees paid by the Respondent.

3. The parties shall otherwise bear their own legal costs in accordance with Rule 5.7 of the 2002 GTA Dispute Resolution Rules.

And I so publish my Award.

……..**Date: ..……../…...../2009**

Mr Colin Peace, Arbitrator, appointed by NACMA.

[19] Claimant's Claim, Statement of Claim, page 1 at 1.