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Arbitration 127

Notice to Members

Date of Issue: **12 August 2010**

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

Arbitration Committee (AC)
- Mr. Mike Chaseling, nominated by the Claimant;
- Mr. Jock Benham, nominated by the Respondent;
- Steven Burt, Chairman, appointed by GTA.

Claim
The Claimant (Seller) alleges Respondent (Buyer) did not take delivery of the entire 2000t wheat on their Buyers Call contract.

Award:
The Claimant was successful. The Respondent was ordered to pay damages of $60,422.30.interest and the Claimant's arbitration and legal fees.

Details
The parties entered into a "Track" contract for 2000t Wheat at $412 per tonne, (Special Condition - Final delivered price to be agreed on will depend on location of stock transferred and market prices on day).

Delivery period was December/January 2007 Sellers Call, (Special Condition - To be converted to delivered Goulburn Valley contract Jan to Sept 2008 Buyers Call at time of Track Transfer).

The Claimant submits that on 22 December 2008 Respondent telephoned Claimants Agent, advising that he believed the parties had completed the Contract.

The Claimant submits that on 23 December 2008 the Claimants Agent advised the Respondent that the last correspondence between the parties had attached an amended contract advising of outstanding tonnages and carrying over the Contract and that the Respondent advised that he had not received the correspondence.

The Claimant submits that at the time of the discussions, there was still 425.65 metric tons to be delivered under the Contract.

Award findings
The AC found:

• That the Respondent had an obligation under the terms of the "Buyer's Call" contract to manage the contract delivery tonnage and call for the delivery of the entire contracted tonnage within the delivery period.

• That the Respondent failed to substantiate its defences based on the alleged representation that the Contract had been fulfilled or that the parties had agreed to waive the balance of the tonnage deliverable under the Contract.

• Therefore the Respondent was in default for failing to take delivery of the contracted tonnage within the contract period as extended.

Take out:
Buyers in a Buyers Call contract must keep proper records of remaining amounts to be delivered.

N 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. 127

Claimant

And

Respondent

Final Award

1. INTRODUCTION

This is an arbitration pursuant to the Dispute Resolution Rules of Grain Trade Australia Ltd ("GTA"). The dispute concerns the performance of a contract between the Claimant Sellers and the Respondent Buyers dated on or about 13 September 2007 on the Claimant's standard form. That standard form contains a clause on the reverse under which;

"Any dispute may be settled by Arbitration in accordance with NACMA Arbitration Rules in the edition current at the date of the establishment of the Terms of Trade of the Contract."

The Respondent did not challenge the jurisdiction of GTA (NACMA's new name).

The Arbitration Committee comprises:

- Mike Chaseling, nominated by the Claimant;
- Jock Benham, nominated by the Respondent;
- Steven Burt, Chairman appointed by GTA.

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

1. Claimant's Claim, dated 2 October 2009.
2. Respondent's Defence, dated 2 November 2009.
3. Claimant's Rebuttal, dated 30 November 2009.
4. Respondent's Surrebuttal, dated 17 December 2009.

2. FACTS

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

2.1 On or about 13 September 2007, the parties entered into "Track" Contract ("the Contract"). The Contract was on the Claimant's standard form and contained (among others) the following terms:

- the Claimant would sell and the Respondent would buy 2000 metric tonnes of Australia Premium White Wheat 1 ("APW1") or better grade;
- The price was expressed to be $412 per tonne, with a special condition that "Final delivered price to be agreed on will depend on location of stock transfed and market prices on day as per emailed spreadsheet on 13/9/7 by Person A"(sic);
- Delivery period was "December January 2007 Sellers Call";
- Delivery at "Up-Country depots within the NTP Geelong Zone";
- Special condition that "To be converted to delivered Goulburn Valley contract Jan to Sept 2008 Buyers Call at time of Track Transfer".

2.2 On or about the end of December 2007 the Claimant reduced the contracted delivered value to the Respondent to $400 per metric ton with monthly carries commencing on 1 February 2008 over the period of the contract on a "Buyer's Call" basis.

2.3 From February 2008 to December 2008 the Respondent ordered, accepted and paid for 1,574.35 metric tons of wheat, including an agreed washout of 500 metric tons of wheat in or around March 2008.

2.4 On or about 14 September 2008, there was 571.67 metric tons outstanding under the Contract.

2.5 From 18 September 2008 to 24 September 2008 the Claimant delivered and the Respondent accepted 59.98 metric tons of wheat, leaving a remaining 511.69 metric tons of wheat outstanding under the Contract by the end of the contract period at 30 September 2008.

2.6 On or about 12 December 2008 and 18 December 2008 the Respondent ordered and paid for another two loads of wheat totaling approximately 86.04 metric tons.

3. CONTRACT

The parties rely on GTA Trade Rule 17.2.

The parties also rely on clause 13 of GTA Contract No. 2.

Contract

Breach of GTA Trade Rules

The Claimant submits that the Respondent is in breach of GTA Trade Rule 17.2 as the Respondent failed to take delivery and pay for the wheat specified in the Contract by 30 September 2008. The Claimant submits that it called the Respondent in default in accordance with Trade Rule 17.2.

Variation

The Claimant submits that on 14 September 2008 Person X, an agent for the Claimant, and Person Y agreed to extend the Contract until 31 October 2008 and that the Respondent was to pay an additional $4.00 per metric tonne storage fee to the Claimant for the extension.[1] The Claimant further submits that this was confirmed in an email from Person X to Person Y on or about 15 September 2008. The Claimant submits that the Respondent was delivered and accepted 28.66 metric tonnes of wheat on or about 18 September 2008 and 31.32 metric tonnes of wheat on or about 24 September 2008, leaving 511.69 metric tonnes remaining.[2]

The Claimant submits that as a result of a conversation between Person B, an agent for the Claimant and Person Y on or about 30 November 2008, the Respondent ordered 2 further loads of wheat for delivery on 12 and 18 December 2008.[3]

Alleged fulfilment of contract/ breach of contract

The Claimant submits that on 22 December 2008 Person Y telephoned Person A, an agent for the Claimant, advising Person A that he believed the parties had completed the Contract[4].

The Claimant submits that on 23 December 2008 Person A advised Person Y that the last correspondence between the parties had attached an amended contract advising of outstanding tonnages and carrying over the Contract and that Person Y advised that he had not received the correspondence.[5] The Claimant submits that at the time of the discussions, there was still 425.65 metric tons to be delivered under the Contract.[6]

The Claimant submits that Person C, an agent for the Claimant, advised the Respondent of the remaining tonnage on or about 29 December 2008 and that Person Y advised that he believed the Contract to be filled and only took December loads until the Respondent had "fully investigated what had occurred", and further that the Respondent believed only the barley contract were being carried forward in the 14 September 2008 discussion with Person X.[7]

The Claimant submits that it attempted to vary the Contract with the Respondent, proposing to continue the Contract and spread the deliveries out over 3-5 months which would enable the Respondent to purchase market grain at a lower than average monthly cost, or the Claimant could re-sell the balance portion of the Contract quantifying the loss caused by the Respondent for which the Respondent would be invoiced.[8] The Claimant submits that on or about 20 January 2008 the Respondent informed the Claimant that it would not accept further delivered under the Contract.

For its part, the Respondent says that during a telephone conversation with Person B of the Claimant on 17 September 2008 the Claimant represented that the Respondent had

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1 Claimant, *Points of Claim*, page 6 at 2.3(a).
2 Claimant, *Points of Claim*, page 6 at 2.3(c)-(e).
3 Claimant, *Points of Claim*, page 7 at 2.3(h).
4 Claimant, *Points of Claim*, page 7 at 2.4(a)(i).
5 Claimant, *Points of Claim*, page 7 at 2.4(b)(i) and (ii).
6 Claimant, *Points of Claim*, page 7 at 2.4(c).
7 Claimant, *Points of Claim*, page 8 at 2.4(d).
8 Claimant, *Points of Claim*, page 8 at 2.4(e)-(g).

ordered its final load under the Contract. The Respondent says that this conduct was a representation giving rise to an estoppel; alternatively a waiver, or alternatively evidenced an agreement to terminate or washout any remaining tonnage.[9]

The only evidence of this alleged representation is found in Person Y's statement dated 2 November 2009. He says that in response to his question to Person B, "if the order would bring the contract to an end" Person B paused and said "Yes". Person Y annexes a diary note of the conversation. It appears to come from his day-book. The entry appears to be

"Claimant wheat Monday [struck through] maybe [illegible]"

The parties elected not to have an oral hearing and neither Person Y nor Person B were cross-examined.

Person B in his statement (which appears to be a statutory declaration) dated 27 November 2009 says that he has "no recollection" of discussing the Contract with Person Y on 17 September. He goes on to say that

"I was fully aware during our conversation that this order would not complete the Contract as there were outstanding tonnages under the Contract".

This Contract was Buyer's Call. In our view, when Buyers control the timing and quantity of delivery they should also keep proper records of the amounts remaining to be delivered. In circumstances where a party wishes to depart from its contractual obligations in reliance on the conduct of the other party, the conduct and evidence of that conduct must in our view be compelling and unequivocal. There is no such evidence in this case.

4. DAMAGES

The Claimant claims $60,442.30 in damages in accordance with GTA Trade Rules 17.5.[10] In reliance on that rule, the Claimant calculated that the undelivered quantity of the commodity is to be multiplied by the contract sale price and subtracted from the fair market price for the calculation of the damages.[11]

The Claimant claims interest from 22 January 2008 to 2 October 2009 in the amount of $7,481.60 for late payment in accordance with Clause 13 of GTA Contract No. 2 calculated at a rate of 1.5% per calendar month multiplied by the 251 days the amount has been overdue, and by the amount of damages claimed, $60,442.30. [12]

While that rate may be appropriate for late payments, this is a claim for damages resulting from a default and accordingly we consider a rate of 9% per annum to be more appropriate as it is in line with Supreme Court interest rates.

The Claimant also claims a storage fee in the amount of $2,046.76 for the carry over period from 30 September 2008 into October 2008 calculated at the agreed $4.00 per metric tonnes, multiplied by 511.69 metric tonnes outstanding under the Contract as at 30 September 2008.

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[9] Respondent, *Points of Defence*, page 1-2.
[10] Claimant, *Points of Claim*¸ page 12 at 6(a)(i).
[11] Claimant, *Points of Claim*¸ page 12 at 6(a)(i).
[12] Claimant, *Points of Claim*¸ page 12 at 6(a)(ii).

There was however no evidence of any agreement to charge or pay carry fees beyond the expiry of the contract delivery period, as extended.

The Claimant also claims the GTA arbitration fee of $4,700 and legal costs in the amount of $4,400.00. We note that those fees appear to be fees included up to the filing of Points of Claim though we have no evidence supporting that claim. We assume that further fees were incurred in responding to the Points of Defence and these reasonable fees should also be recoverable.

5. FINDINGS

Accordingly, we find:

- That the Respondent had an obligation under the terms of the "Buyer's Call" contract to manage the contract delivery tonnage and call for the delivery of the entire contracted tonnage within the delivery period.

- That the Respondent failed to substantiate its defences based on the alleged representation that the Contract had been fulfilled or that the parties had agreed to waive the balance of the tonnage deliverable under the Contract.

- Therefore the Respondent was in default for failing to take delivery of the contracted tonnage within the contract period as extended.

- That the Respondent shall pay the Claimant the damages claimed of $60,422.30 and interest at a rate of 9% per annum.

- That the Respondent shall pay the Claimant's costs on a party and party basis and indemnify the Claimant for all GTA fees paid by the Claimant.

6. AWARD

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

1. The Claim is allowed.

2. The Respondent shall pay the Claimant damages in the amount of $60,422.30.

3. The Respondent shall pay interest on the damages at the rate of 9% per annum from 22 January 2009.

4. The Respondent shall pay the Claimant's costs of on a party and party basis, and expenses including relevant fees paid and payable to GTA. We note that fees incurred up to the service of Points of Claim were approximately $4400 but it is unclear whether this figure includes unrecoverable GST. 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*.