GRAIN TRADE AUSTRALIA

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Arbitration No. 132

Notice to Members

Date of Issue: **April 2011**

Claimant: **Grain Buyer**
&
Respondent: **Grain Seller**

Arbitration Committee (AC)

- Mr Mark Lewis, nominated by the Claimant;
- Mr Adrian McDonald, nominated by the Respondent;
- Mr Lloyd George, Chairman appointed by GTA.

This arbitration resulted in a majority award and a minority award.

1 Dispute

The substance of this dispute is straightforward. Unfortunately its resolution was not.

The Claimant says that as a result of a discussion on 15 April 2008 between Mr BM for the Claimant, and RP for the Respondent, the Claimant contracted to sell, and the Respondent to buy, 500 tonnes of tapioca pellets/meal at the price of $380 pmt, delivered. The Claimant says it confirmed this agreement in a fax sent to the Respondent that same day. It made deliveries against the contract of approximately 35 mt on 22 April 2008 and 23 May 2008 for which invoices were issued and paid.

2 Facts & damages – majority award (Mark Lewis & Lloyd George)

The result may be in some respects be unsatisfactory as neither party can be said to be at fault, the Tribunal has to resolve this dispute based on objectively ascertainable evidence. For that reason, the majority view was in favour of the Claimant finding that the parties concluded a contract for 500 tonnes of tapioca

It follows that the Claimant is entitled to damages. However the Tribunal was not satisfied with the formulation set out in the Points of Claim and recalculated damages based on commercial principles.

3 Facts & damages - minority award (Adrian McDonald)

The arbitrator could not agree that the parties contracted to buy and sell 500 tonnes of tapioca on the terms asserted by the Claimant. In his view of the evidence, the Claimant simply misunderstood what it had agreed with the Respondent during the discussions on 15 April 2008.

Therefore the Respondent is not in default and that the Claimant is not entitled to damages.

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. 132

Grain buyer
(Claimant)

and

Grain seller
(Respondent)

Final (Majority) Award

1. Introduction

This is an arbitration pursuant to the Dispute Resolution Rules of Grain Trade Australia Ltd ("GTA").

At issue in this dispute is the question of contract formation, and default.

The Arbitration Committee comprises:

- Mr Mark Lewis, nominated by the Claimant;
- Mr Adrian McDonald, nominated by the Respondent;
- Mr Lloyd George, Chairman appointed by GTA.

The matter has been subject of an earlier Interim Award dated 31/8/2010, as to jurisdiction.

In that Interim Award we found that we had jurisdiction and that we were a properly constituted Tribunal.

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

1. Claimant's Points of Claim dated 4 October 2010;
2. Respondent's Defence to Points of Claim dated 19 November 2010;
3. Claimant's Reply dated 21 January 2011;
4. Respondent's Reply to the Claimant's Reply, dated 9 February 2011.

2. Facts

The substance of this dispute is straightforward. Unfortunately its resolution is not.

The Claimant says that as a result of a discussion on 15 April 2008 between Mr BM for the Claimant, and RP for the Respondent, the Claimant contracted to sell, and the Respondent to

buy, 500 tonnes of tapioca pellets/meal at the price of $380 pmt, delivered. The Claimant says it confirmed this agreement in a fax sent to the Respondent that same day. It made deliveries against the contract of approximately 35 mt on 22 April 2008 and 23 May 2008 for which invoices were issued and paid.

It made a third delivery on or about 21 October 2008, invoiced and paid, but thereafter (according to the Claimant) the Respondent fell into default and failed to take the balance under the contract of 394.76 mt, in respect of which the Claimant now claims against the Respondent.

For its part, the Respondent agrees that it received, was invoiced and paid for 3 loads of tapioca, but denies the existence of a contract for 500 tonnes. It say that the deliveries were part of a trial; had the product proved to be satisfactory (which, according to the Respondent it was not) it may then have contracted to purchase 500 tonnes.

The situation is in many respects unsatisfactory, in that it is clear to us that both the Claimant and Respondent believe the version and construction of events they advance. The parties genuinely appear to have been operating at cross-purposes.

While we may have sympathy with the subjective position of the parties, our task is to establish what objectively the parties agreed to.

Central to the dispute is the fax alleged to have been sent by the Claimant to the Respondent on 15 April 2008. In summary, it is a contract form confirming the sale of 500 tonnes of tapioca. The Claimant believes that it was transmitted and produces the fax plus a fax transmission record to that effect. The Respondent says it did not receive the fax. There was some debate between the parties about the significance of the letters "ECM" which did not appear on the transmission report in respect of this fax, as they did for others. However given the letters "OK" appeared in the "Result" column it seems to us self evident that the Claimant was entitled to believe that the contract form had been successfully dispatched.

There is some issue about what was faxed. The Respondent points out the Claimant appears to have produced different versions of the contract it says was faxed, variously signed and endorsed. There appears to be no doubt however that the Claimant faxed something to the Respondent on 15 April and we find that it is more likely than not that it was contract substantially in the form produced and appearing at Attachment 1 to the Claimant's Points of Claim, there being no suggestion that it was any other materially different document.

The faxed contract bore the number SO11812. That number was included on the 3 invoices issued to and paid by Respondent.

There is also some evidence that during a meeting on 30 January 2009 between B D and B McK for the Claimant, and R P for the Respondent, Mr P rejected the allegation that there was a contract for 500mt, nevertheless offered the Claimant $40 per tonne to "put it behind us and move on."

As we have said above, while the result may be in some respects unsatisfactory as neither party can be said to be at fault, we have to resolve this dispute based on objectively ascertainable evidence.

For that reason, we agree with the Claimant and find that the parties concluded a contract for 500 tonnes of tapioca, in the form of the contract document at Annexure 1 to the Claimant's Points of Claim.

For that reason, we also find that the Respondent is in default of the contract in failing to take delivery of the balance under the contract of 394.76 tonnes.

3. Damages

It follows that the Claimant is entitled to damages. We are not however satisfied with the formulation set out at paragraph 27 of the Points of Claim. By this formulation, damages are established based on priced achieved by the Claimant many months after the completion date for performance under the contract.

We note in particular the Claimant's evidence that on 28 April 2009 it offered the Respondent 3 options for resolving this dispute. The obligation to mitigate loss rests on the Claimant. It could and should have done what was necessary to reduce its losses as at that date and not wait for the Respondent to elect, particularly where the Respondent was denying the existence of the contract.

We believe that the appropriate option was option 1, that is the difference between the contract price and then current market price of $300 per tonne. We do not however believe that the Claimant is entitled to claim carry charges.

4. Findings

Accordingly, we find:

- The parties contracted for the sale of 500 tonnes tapioca pellets/meal substantially in the form of the contract document appearing at Attachment 1 of the Claimant's Points of Claim;

- The Respondent has defaulted under that contract in failing to take delivery of the balance of the contract tonnage of 394.76 tonnes;

- That the Claimant is therefore entitled to damages in the amount of $31,580.80.

5. FINAL (Majority) AWARD

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

1. The Claim is allowed in part.

2. The Respondent to pay damages to the Claimant in the sum of $31,580.80.

3. The Respondent shall pay interest on the damages at the rate of 8.75% per annum from 28 April 2009.

4. The Respondent shall indemnify the Claimant in respect of any fees paid by the Claimant to GTA in relation to this arbitration.

5. The Respondent shall pay the Claimant’s legal costs on a party and party basis. 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 Final (Majority) Award.

……...**Date: …...../…...../2011**

Lloyd George, Arbitrator nominated by GTA and Tribunal Chairman.

……...**Date: ……..../…...../2011**

Mark Lewis, Arbitrator nominated by the Claimant.

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. 132

Grain buyer)
(Claimant)

and

Grain seller
(Respondent)

Final (Minority) Award

6. Introduction

This is an arbitration pursuant to the Dispute Resolution Rules of Grain Trade Australia Ltd ("GTA").

At issue in this dispute is the question of contract formation, and default.

The Arbitration Committee comprises:

- Mr Mark Lewis, nominated by the Claimant;
- Mr Adrian McDonald, nominated by the Respondent;
- Mr Lloyd George, Chairman appointed by GTA.

The matter has been subject of an earlier Interim Award dated 31/8/2010, as to jurisdiction.

In that Interim Award we found that we had jurisdiction and that we were a properly constituted Tribunal.

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

5. Claimant's Points of Claim dated 4 October 2010;
6. Respondent's Defence to Points of Claim dated 19 November 2010;
7. Claimant's Reply dated 21 January 2011;
8. Respondent's Reply to the Claimant's Reply, dated 9 February 2011.

7. Facts

I refer to the Final Majority Award published by my colleagues.

I must with respect disagree with their findings.

In particular, I cannot agree that the parties contracted to buy and sell 500 tonnes of tapioca on the terms asserted by the Claimant. In my view of the evidence, the Claimant simply misunderstood what it had agreed with the Respondent during the discussions on 15 April 2008.

The Respondent is a very experienced dairy farmer and regularly contracts for the supply of feed. It does not appear to be disputed that the Respondent had not previously purchased tapioca as a feed supplement for its dairy herd.

Based on the evidence, particularly Mr P's affidavit sworn 16 November 2010, and my knowledge of the trade, it seems to me unlikely that Mr P and the Respondent would have contracted to purchase 500 tonnes of a product they had never previously used, without even seeing a sample of the product.

It seems then to me irrelevant whether the Claimant subsequently sent the fax at Attachment 1 to the Points of Claim as even if it did, it did not reflect the terms of the agreement reached earlier that day.

I am satisfied that the quality of the product did not meet the Respondent's expectations and accordingly the Respondent did not choose to purchase additional product. I note that it took the Claimant several months to dispose of the product to other buyers, at prices substantially lower than the alleged contract price being the same price actually paid by the Respondent, which may have been due to the quality of the product.

8. Damages

It follows from what I have said that the Respondent is not in default and that the Claimant is not entitled to damages.

9. Findings

Accordingly, I find that the claim fails.

10. FINAL (Minority) AWARD

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

6. The claim fails.

7. The Claimant shall indemnify the Respondent in respect of any fees paid by the Respondent to GTA in relation to this arbitration.

8. The Claimant shall pay the Respondent's legal costs on a party and party basis. 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 I so publish my Final Award.

……...**Date: …...../…...../2011**

Adrian McDonald, Arbitrator nominated by the Respondent.