IN THE MATTER OF THE COMMERCIAL ARBITRATION ACT 1984 (NSW) AND IN THE MATTER OF AN ARBITRATION UNDER THE RULES OF THE NATIONAL AGRICULTURAL COMMODITIES MARKETING ASSOCIATION LTD

NACMA Arb No. 120303 of 2003

Whitty Produce Pty Ltd

Claimant

and

Kevin & June Shields

Respondent

Arbitration Award

Introduction

By a contract dated 21/5/02 ("the Contract") incorporating the NACMA Trade Rules, the Claimant agreed to take delivery of Swan Oats to be grown by the Respondent from seed supplied by the Claimant. The seed was to be sown over 180 acres. Delivery was December 2002.

The respondent did not deliver any grain to the Claimant.

The Claimant referred disputes arising under the Contract between itself and the Respondent to NACMA to be subject of a Full Arbitration process.

The Arbitration Committee consisted of:

- Mr Gerard Langtry, appointed by Whitty Produce Pty Ltd
- Mr. Greg Carroll, appointed by Kevin & June Shields
- Mr Peter Flottman - Chairman NACMA

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

1. Undated Claims Submissions from the Claimant;

2. Respondent's Defence Submissions under cover of a fax from Cater & Blumer, solicitors, dated 25 August 2003;

3. Claimant's Rebuttal of Defence under cover a fax from BJT Legal dated 16 September 2003;

4. Respondents Surrebuttal under cover of a fax from Cater & Blumer dated 3 October 2003.

Facts

Both parties agree there was a contract dated 21/5/02 signed by both parties. Major points of the contract include:

- Commodity – Swan Oats
- Grade – as per the specification sheet attached to the contract
- Quantity – acreage contract, being production from 180 acres
- Price - $165 per mt
- Price Basing Point – farm
- Delivery – December 2002
- NACMA Trade Rules to apply

The seed to produce the commodity was supplied by Whitty Produce, such seed to be used to sow 180 acres of crop.

Shields subsequently used the seed to sow 287 acres.

There is agreement that the Respondent subsequently harvested 150 mt of Swann Oats

The initial sample of oats did not meet the quality specified in the contract, however Whitty agreed by letter dated 29 November 2002 to accept the grain.

Whitty offered to increase the purchase price from $165 to $215 mt, confirmed by telephone call with the solicitors acting for Shields, Noyce Salmon & D'Aquino, on 16 December 2002.

No grain has been supplied against this contract.

Disagreement on the facts

There are material matters on which the parties do not agree.

(1) Conversation between the Claimant and Respondent
There was a conversation between the parties around 20th November 2002 where it is stated that Gerard Whitty commented that Shields would be "off the hook" if the grain did not meet specification.

The grain did not meet specification and therefore the Respondent claims that the contract is rescinded.

The Claimant contends that the comment indicated only that the Respondent may not have been required to deliver against the contract if Southern Cross Grains (to whom the Claimant had on-sold the oats) rejected the sample. In the event, Southern Cross did not reject the sample.

The Committee finds that the Claimant would have rights over the grain even if it does not meet the original specification. The failure to meet specification gives the option to the innocent party, in this case, the Claimant who confirmed in writing on 29th November 2002 that he was prepared to accept the grain although it did not meet specification.

It is also fanciful to expect that in a time of rapidly rising grain prices due to the drought conditions, a grain buyer would cancel a contract, just prior to harvest, knowing the cost of replacement grain would be substantially higher than the contracted price.

The Committee therefore rejects the assertion that the comment 'off the hook", would lead to the contract being rescinded.

(2) Tonnage to be delivered.

There is agreement between both parties that the Respondent did harvest 150 tonnes of Swan Oats from the seed supplied by the Claimant.

The Committee considered the original intention of the contract. To that end, it is the Committee's belief that the Claimant intended to supply seed to enable the Respondent to sow 180 acres of country and that the total production from that 180 acres would be the delivered against the contract. This is backed by Para. 1 of the Respondent's defence.

The Respondent subsequently used the seed to sow 286.89 acres. The Committee believes that if the Claimant had been made aware that the seed would be used to sow a larger area then the contract would have been written to cover the larger area.

Therefore, the Committee believes the Claimant is entitled to claim for the production from the total area sown, i.e. 286.89 acres or 150 mt.

Also, it is agreed by both parties that the respondent when asked by the Claimant "have you finished harvest yet?" replied "No. We had harvested around 124 ton. The crop was too green but we expected to harvest 150 ton." Quite clearly the Claimant was interested in the production that they could expect to take delivery of and the Respondents comments could reasonably be taken to infer that the Respondent at this time intended to deliver 150 tonnes against the contract.

(3) Course of Conduct

The Respondent has made a submission that the Claimant has on prior occasions rejected the Respondent's grain when it did not meet specification. The submission suggests that by a course of conduct, the Claimant was bound to reject product not to specification, and the Respondent was legitimately entitled to expect that rejection would occur.

As we have stated above, a breach of contract (such as failure to meet specification) gives the innocent party an election to affirm and proceed with the contract, or to terminate the contract. If it suited the Claimant on prior occasions to terminate the contract, it cannot be

said that the Claimant is now bound to do so, or that the Respondent was entitled to a legitimate expectation that the Claimant would do so.

We reject any submission based on a course of conduct.

Award

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

That the claim made by the Claimant is successful; and that the Respondent is liable to pay damages as follows,

1. Loss of profit of $1,500 being the difference between the contract price of $165 per tonne on farm and the sale price to Southern Cross of $210 delivered, which amounts to 150mt x $45, less the reasonable freight costs which we fix at $35 per metric tonne;

2. an indemnity in respect of its liability to Southern Cross, namely 150mt($395-$210)=$27,750.00

3. the Claimant's arbitration fees, being $8,800.

And we so publish our Award.

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Greg Carroll

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Gerard Langtry

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Peter Flottman