IN THE MATTER OF THE COMMERCIAL ARBITRATION ACT 2010 (NSW) AND
IN THE MATTER OF AN ARBITRATION
UNDER THE RULES OF GRAIN TRADE AUSTRALIA LTD

GTA Arbitration No. 333

Claimant
(Seller)

and

Respondent
(Buyer)

Final Award

INTRODUCTION

This is a Final Award in an arbitration conducted pursuant to the Dispute Resolution Rules of Grain Trade Australia Ltd **(GTA).** The dispute concerns an alleged default under a contract for the sale and purchase of almond hulls.

There is no dispute as to jurisdiction. The contract was evidenced by a Broker Contract dated 4 February 2020 (to which we refer in more detail below) which contained on its face the following clause;

Any dispute, controversy or claim arising out of, relating to or in connection with this contract, including any questions regarding its existence, validity or termination, shall be resolved by arbitration in accordance with GTA Dispute Resolution Rules in force at the time of the contract.

We find therefore that we are a validly constituted Tribunal under the *Commercial Arbitration Act 2010* (NSW) and with jurisdiction to determine all issues in dispute between the parties.

This Tribunal is comprised of:

1. Mr Ron Storey, nominated by the Claimant;
2. Mr Peter Howard, nominated by the Respondent; and
3. Mr David Syme, Chair nominated by GTA.

The parties have not opted to conduct a hearing and this reference has proceeded on documents.

The parties have exchanged;

(a) Points of Claim dated 25 November 2020;

(b) Submissions on Points of Claim dated 26 November 2020;

(c) Affidavit of Mr C sworn 25 November 2020 **(First Affidavit);**

(d) Points of Defence dated 21 December 2020;

(e) Reply to Points of Defence dated 18 January 2021;

(f) Affidavit of Mr C sworn 18 January 2021 **(Second Affidavit);** and

(g) Respondent's Points of Reply dated 5 February 2021.

We have carefully considered these submissions, affidavits and supporting documents and base our decision on the facts and circumstances thereby adduced.

BACKGROUND TO THE DISPUTE

1. The Claimant and Respondent are both commodity traders.

2. Pursuant to a contract evidenced by a Broker Contract No. XXXX dated 4 February 2020 issued by Broker A, the Claimant contracted to sell the Respondent 500 tonnes of unmilled almond hulls at a price of $205 per tonne, delivered.

3. Though nothing turns on it, the Claimant produced its own Contract of Sale in the same terms (though dated 4 January 2020).

4. Both documents evidenced the sale of 500 tonnes of 2020 crop almond hulls, unmilled, for delivery commencing March-April as available then even spread to end September 2020. Both documents stipulated delivery FOT (Free on Truck) Location A (seller's option).

5. It is common ground that the Respondent took delivery of 20.86mt on 13 May 2020, but otherwise failed to take delivery of any hulls under the contract.

6. It is also common ground that the market price for hulls dropped substantially. According to the Claimant, the price fell from $205 per tonne to below $30 per tonne (though the Respondent challenges that price).

7. It is the Claimant's case that following discussions with Mr D, the principal of the Respondent, it became apparent to the Claimant that the Respondent did not intend to take up any further product and on 2 July the Claimant issued a wash-out invoice for the sum of $83,849.50 based on the entire undelivered tonnage at a market price of $30 per tonne.

8. This effectively held the Respondent in repudiatory breach of the contract, and liable for the tonnage it should have taken up to 2 July, as well as the balance of the contract tonnes.

9. For its part, while the Respondent accepts and admits that as at 2 July 2020 it was in default, it says that it was only in default of the tonnage it should have collected as at that date and it was not open to the Claimant to call it in default in respect of the tonnage due to be delivered (that is between 2 July and 30 September 2020 being the end of the contractual delivery period).

10. It relies on Trade Rule 17.5 which states

17.5 Default by either party in performance of the contract in accordance with the contract terms shall entitle the other party to damages in respect of and/or reject only the actual defaulted portion.

The Trade Rules

11. Trade Rule 17 applies to defaults under contracts governed by the GTA Trade Rules.

12. It contains a framework or process to be followed depending on whether a party declares itself in default, or when a party declares its counterparty in default.

13. While this was not the subject of submissions by either party, it is well established law and practice that faced with a contract default by way of non-performance or defective performance, a party does not have to wait for its remedy until the end of the contract period. If a party by its words or deeds clearly and unambiguously expresses its intention no longer to be bound by the contract, the other party has an election to affirm the contract, and call for performance, or to accept the words or conduct as repudiatory, terminate contract and claim any damages.

14. This process is similar to the process described in Trade Rules 17.3 and 17.4.

15. It is the Respondent's submission however that the effect of Trade Rule 17.5 (set out above) is to prevent a party declaring repudiatory breach and limiting any claim for damages to the 'actual defaulted portion.'

16. It is worth also considering section 34(2) of the *Sale of Goods Act 1923* NSW which states
Where there is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, ***it is a question in each case depending on the terms of the contract and the circumstances of the case*** *whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.*

17. Even if the Claimant is entitled under the Trade Rules to declare a repudiatory breach, that must be triggered by evidence of a clear and unambiguous intention on the part of the Respondent, by words and/or deeds, no longer to be bound by the contract.

18. We must be provided with evidence of that intention which could be manifest by a consideration of all of the facts. Again, those facts must be presented to us either in the form of documents or evidence of conversations. In the absence (as here) of express words to that effect, can the intention be implied by other words or conduct, clearly and unambiguously?

19. The Claimant has adduced evidence in two affidavits of Mr C. At paragraph 14 of his First Affidavit Mr C deposes that "Because of the drop in the trading price, it became evident to the Claimant that The Respondent was not going to honour their contract."

20. At paragraph 20, Mr C deposes that "the Respondent refused to pay the wash-out invoice and proceeded to deny the existence of a contract with the Claimant."

21. While we accept that GTA arbitration is a relatively informal process, Mr C's assertions are not evidence of his conclusions and the documents annexed to the First Affidavit are not evidence either. If the Claimant had evidence that the Respondent 'denied the existence' of the contract, it did not produce it.

22. In Mr C's Second Affidavit he deposes that (at paragraph 14)

It was apparent by 2 July 2020 that Mr Dfor the Respondent had walked awayfrom the contract with the Claimant....[11].

23. We do not doubt that Mr C and Mr E both believed that the Respondent would not perform the balance of the contract. This belief was apparently based on the following facts;

(a) The significant difference between the contract and prevailing market price rendering performance of the contract commercially prohibitive for the Respondent;

(b) The actual defaults of the Respondent, namely that as at 2 July 2020, the Respondent had taken delivery of only 20.86 tonnes of product when it should have taken delivery of approximately 264.39 tonnes;

(c) The failure of the Respondent to place orders for further deliveries as required under the terms of the contract;

(d) The failure of the Respondent, despite repeated requests, to give any assurance that it would remedy the actual default or perform the balance of the contract;

(e) Portentous statements (by Mr D) contained in the email correspondence forming Annexure BL-4 to the Second Affidavit including the following;

(i) "I do not like this situation any more than the next person, but as the wider industry has generally agreed there is a crisis looming, potentially not of our making";

(ii) "I do not wish to argue with any party and destroy relationships but I feel it is not proper to act one way or another at this point'';

(iii) "Consequently I cannot respond to your email today, I will give an undertaking to respond by 8.00 Monday morning the 22nd, stating my position/thoughts" (we note that neither party has produced the response promised by 8am Monday 22 June 2020.

24. In relation to the comments mentioned at paragraph [23(e)] above we specifically observe that the reference to the 'wider industry' could easily be regarded as an indication that simply performing the contract according to its terms was not in the Respondent's contemplation.

25. We also note that the only recorded response by the Respondent to the Claimant's 2 July 2020 wash-out invoice was the letter sent by the Respondent's solicitor on 26 August 2020, purporting to hold the Claimant itself in default. There is no evidence that in the period between 2 July and 26 August the Respondent made any offer or attempt to remedy the default or to continue to perform the contract.

26. We have decided based on these objective facts, taken as a whole, that as at 2 July 2020, the Respondent was in repudiatory breach of the contract and the Claimant was entitled to and did accept that breach as the basis for terminating the contract. We have based this on the terms of the contract and the circumstances of the case. While it is true that the contract still had around three months to run, the extent of the non-performance as at 2 July was substantial and there is no evidence that the Respondent said or did anything to give the Claimant hope or confidence that the situation would or could be remedied.

27. As to the quantum of the Claimant's claim, the defaulted tonnage is clear and the only dispute appears to be the relevant Fair Market Price, for the purposes of the GTA Trade Rules. There is

evidence (provided through email advices from Broker A) that the value of the commodity was dropping substantially through May, June and July with sales recorded at around $40 per tonne in June falling to around $20 per tonne later in July. The Claimant appears to have picked a 'mid-point' of A$30 per tonne as at 2 July 2020 and we accept that as an appropriate and reasonable valuation, there being no compelling evidence to the contrary.

28. In relation to the Respondent's submission that Rule 17.5 means that the Claimant can only claim damages for the actually defaulted portion, we would be surprised if Rule 17.5 had this effect. Such a submission seems to conflict with the provision of the *Sale of Goods Act* referred to at a paragraph [16] above, which recognizes that in some circumstances the relevant breach will only relate to the actually defaulted portion, but other more serious cases may warrant termination of the entire contract. We have decided that this falls into that more serious category.

29. The submission also seems at odds with the Respondent's solicitor's letter sent on 26 August 2020 which asserted that the Respondent was able to terminate the entire contract by virtue of the Claimant's alleged default, and not just the actually defaulted portion.

30. Finally, we have asked the parties to advise legal costs, and the Claimant has advised that it has incurred $8000 (ex GST) in costs. We accept that this is reasonable amount.

FINAL AWARD

31. For the reasons stated above, we make the following Final Award;

(a) Award and find in favour of the Claimant that the Respondent pay the Claimant's claim in the sum of $XX,XXX forthwith;

{b) That the Respondent indemnify the Claimant for GTA arbitration fees paid by the Claimant;

(c) That the Respondent pay the Claimant interest on the claim amount at paragraph 27{a) at the rate of 4.5% per annum from 9 July 2020 to the date of this award.

{d) That the Respondent pay the Claimant's legal costs fixed in the sum of $XXXX.

This Final Award is published at Sydney, the 23rd day of March 2021.

Mr David Syme

Mr Ron Storey

Mr Peter Howard