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. 335

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 relates to the alleged default in relation to a contract between the Claimant and Respondent.

The contract was evidenced by a Broker's Contract Note contract issued by BROKER A, dated 4 March 2020, and appearing at Attachment #1 to the Claimant's Letter of Claim. The Broker's Contract Note contains the following clause:

"Contract Conditions: Grain Trade Australia (GTA) Trade Rules and Dispute Resolution procedures and terms and conditions of GTA Contract No.3 (unless otherwise stated) are to govern this grain contract."

As is well known, Rule 23 of the GTA Trade Rules provides;

"Any dispute, controversy or claim arising out of, relating to or in connection with a contract incorporating the Rules, including any question regarding its existence, validity or termination shall be resolved by arbitration in accordance with the Dispute Resolution Rules in force at the commencement of the arbitration."

There is as a result no dispute as to jurisdiction. The contract document clearly provides for the referral of disputes to arbitration to be administered by GTA pursuant to GTA's Dispute Resolution Rules. Neither party has challenged our jurisdiction and both have freely participated.

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

This Tribunal is comprised of:

1. Mr Ian Dalgliesh, nominated by the Claimant;
2. Mr Mark Torrens, nominated by the Respondents; and
3. Mr Henry Wells, Chair nominated by GTA.

The parties have exchanged;

(a) Claimant's Letter of Claim received by GTA on 22 February 2021;

(b) Respondent's Points of Defence received by GTA on 19 March 2021;

(c) Claimant's Points of Reply received by GTA on 6 April 2021;

(d) Respondent's Points of Reply received by GTA on 26 April 2021;

These submissions were supplemented by supporting documentation and correspondence to which we shall refer as required.

The parties have chosen not to conduct a hearing in relation to this reference.

The parties do not appear to be legally represented though we should note that the Claimant has been represented (and its submissions apparently prepared) by Mr Z the principal of COMPANY B. They have prepared their own submissions and tendered to us (albeit somewhat informally) the evidence on which they base their cases.

In cases such as these we need to be mindful of the Paramount object of the Act as set out in section 1C of the Act, which for completeness provides (with our emphasis added);

1C Paramount object of Act

(1) The paramount object of this Act is to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals ***without unnecessary delay or expense****.*

(2) This Act aims to achieve its paramount object by:

(a) enabling parties to agree about how their commercial disputes are to be resolved (subject to subsection (3) and such safeguards as are necessary in the public interest), and

(b) providing arbitration procedures that enable commercial disputes to be resolved in ***a cost effective manner, informally and quickly****.*

(3) This Act must be interpreted, and the functions of an arbitral tribunal must be exercised, so that (as far as practicable) the paramount object of this Act is achieved.

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

BACKGROUND TO THE DISPUTE

1. The Claimant is a grain producer.

2. The Respondent is grain buyer, seller and transporter, sometimes referred to as a 'truckie trader' who buys grain with the intention of transporting it in its own trucks to supply its own customers such as piggeries and feedlots.

3. It is the Claimant's case that on or about 4 March 2020 it contracted to sell the Respondent 331 tonnes of F1 Barley 'Free on Truck' (FOT) LOCATION C for delivery 1 July – 30 September 2020 at $290 per tonne. As mentioned above, that contract is evidenced by a Broker's Contract Note dated 4 March 2020 generated by COMPANY B (**Contract Note**).

4. COMPANY B does not appear to have been acting as a grain broker in the sense defined in the GTA Trade Rules. While the Contract Note is titled 'Broker's Contract Note', it appears clear that COMPANY B was acting as a 'Grower Broker' or agent. Despite submissions made by the Respondent, nothing in our view turns on this distinction as there is no suggestion that the contract terms were other than as set out in the Contract Note.

5. The Claimant says, in summary, that it is owed;

   (a) payment for an outstanding invoice XX1 dated 1 October 2020 for the supply of 39.54 mt of F1 Barley on 24 September 2020, in the amount of $12,787 (inc GST) together with interest on that invoice (**Disputed Invoice**); plus;

   (b) compensation for the fact that the Respondent defaulted due to failure to take delivery of the full contract quantity of 331mt having taken delivery of only 117.6 mt leaving a balance of 213.4mt. This is detailed in the invoice number XX2 dated 13 November 2020 (**Washout Invoice**) in the amount of $26,760.36.

6. The Claimant says it agreed on 4 March 2020 to a delivery range between 1 July and 30 September, the Claimant allowed the Respondent to commence taking deliveries in June apparently to take advantage of the NSW Drought Freight Subsidy scheme. In the event, the Respondent collected two loads in June which were invoiced and paid in July.

7. The Respondent apparently failed to take any deliveries in July. According to the Respondent this was due to interstate travel restrictions due to COVID, not caused by the closure of borders but due to the fact that the Respondent's customers in NSW did not want or were reluctant to take deliveries of grain from Victoria.

8. The situation was further complicated due to the softening of price of grain due to rains and the prospect of a good harvest.

9. The Respondent contacted the Claimant in early September to arrange to collect some grain. However the bunker at the LOCATION C site was apparently closed due to forecast rain.

10. Instead of using its own vehicles, the Respondent engaged a subcontractor to collect a load of grain on 24 September 2020. Part of the load was delivered to a piggery operated by MR Y on 29 September 2020. A dispute arose as to the quality and condition of this load. The Respondent refused to pay the Disputed Invoice. Mr Z made contact directly with Mr Y and brokered a compensation payment to him.

11. Thereafter the relationship conclusively broke down. Attempts were made to resolve the matter but both sides made claims and counterclaims which the other rejected.

12. On 10 November 2020 Mr Z for the Claimant responded to a letter from the Respondent's solicitor dated 4 November 2020, holding the Respondent in default demanding payment of the Disputed Invoice, and the washout of the balance of the contract (which he calculated as 213.4 tonnes).

13. For its part, the Respondent does not dispute the invoices outstanding or the outstanding tonnage. Its defenses and cross-claims assert that;

    (a) It was prevented from taking deliveries in July and August by the impact of COVID (**COVID Ground**);

    (b) The Claimant refused to deliver grain as 'called' by the Respondent on 7 September required on or about 23 September 2020 (**Delivery Ground**);

    (c) The load collected on 24 September 2020 and delivered to Mr Y on 29 September 2020 was outside contract quality specifications (**Quality Ground**);

    (d) The Claimant (via Mr Z) engaged in fraudulent conduct by making contact with Mr Y (**Fraud Ground**).

14. Some but not all of these claims were articulated in the letter dated 4 November 2020 from the Respondent's solicitors. The Respondent claims damages resulting from the Quality Ground and Fraud Ground.

OUR DELIBERATION

COVID GROUND

15. Dealing first with the COVID Ground, the Contract Note stipulates delivery Free on Truck (FOT) LOCATION C, and "Conveyance – Sellers Option".

16. Properly understood, these terms mean that it was the Respondent's obligation to collect loads of grain from LOCATION C at times agreed with the Claimant Seller. This may be contrasted with a contract designated at "Buyers Call" under which the Seller must make the grain available when given notice by the Buyer. This is fully described at Rule 13 of the GTA Trade Rules.

17. Without more, if the Respondent's performance of the contract was prevented by restrictions associated with COVID, it should have invoked Force Majeure, again as described at Rule 21 of the GTA Trade Rules. The Respondent was right not to invoke or attempt to rely on Force Majeure as any attempt to do so would have been futile. On its own case, COVID restrictions did not prevent the Respondent collecting grain from LOCATION C. Even if COVID impacted the Respondent's ability to supply its own customers, this is not a matter falling within the terms of the Contract Note.

DELIVERY GROUND

18. As mentioned above, this contract was not 'buyers call', but expressly stipulated 'Conveyance – Sellers Option.' This is the default position as expressed in GTA Trade Rule 13. The Claimant had no obligation to make the grain available on the date nominated by the Respondent.

19. Properly construed, Trade Rule 13.2(2) would apply under which the Buyer is required to give at least 7 Business Days written notice of intention to take delivery of grain and the Seller is then required to give written delivery instructions not less than 5 business days prior to the commencement of loading. Had this Rule been observed it is likely that the dispute may not have occurred.

20. Even if the Seller was in default, this would have been categorized as a single contract and therefore a single default under Trade Rule 13.3, not a ground for avoiding or terminating the contract altogether.

QUALITY GROUND

21. There are several difficulties with the Quality Ground. Leaving to one side the lack of any proper evidence of the extent or cause of the alleged contamination, the load was collected (by the Respondent's own subcontractor) on 24th September 2020 and delivered to and unloaded at the premises of MR Y on 29 September 2020. If the subcontractor, Mr W, observed any issues with the quality of the grain on loading his vehicle, there is no report of it.

22. In an undated statement provided by Mr W (Attachment #13 to the Points of Claim) he says "I was watching at the time (of loading) and did not notice any wet or damaged grain going into my tipper trailers."

23. The grain was unloaded at LOCATION D's premises on 29th September 2020. GTA Trade Rule 15 stipulates the rules for rejection of consignments. In summary, once grain is discharged from the truck, it is too late. Moreover, Mr W says some clumps of grain came out of his truck but that the extent of the damage was relatively small.

FRAUD GROUND

24. The Respondent clearly feels strongly about the Fraud Ground and has foreshadowed a complaint to the Victorian Police. The Respondent is clearly entitled to take whatever action it wishes in this regard, but the conduct of the Claimant's agent in contacting Mr White is no basis for terminating or avoiding this contract.

OUR DETERMINATION

For the reasons give above, we find that the Claimant's claim is made out and the Respondent's grounds for defense and cross-claim are not.

As to the Claimant's various claims, we find that the Disputed Invoice and the Washout Invoice are due and payable, with interest.

We also find that the Respondent must reimburse the Claimant for the GTA arbitration fees paid by the Claimant.

The Claimant has claimed costs associated with the time spent by Mr Holt in dealing with this dispute including preparation of the submissions in this arbitration. We are not persuaded that compensation is appropriate in this case.

AWARD

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

    (a) The Claimant's claim is allowed in part;

    (b) The Respondent shall pay the Claimant $[redacted] in respect of the Disputed Invoice together with interest of 5% per annum from 2 October 2020;

    (c) The Respondent shall pay the Claimant $[redacted] in respect of the Washout Invoice together with interest of 5% per annum from 21 November 2020;

    (d) The Respondent shall indemnify the Claimant for arbitration fees paid by the Claimant to GTA.

This award is published at Sydney, the 3rd day of June 2021.

Mr Ian Dalgleish

Mr Mark Torrens

Mr Henry Wells