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. 339

CLAIMANT
(Seller)
and
RESPONDENT
(Buyer)

Award

A. Introduction

1. This is the Final Award in an arbitration conducted pursuant to the Fast Track rules of the Dispute Resolution Rules (**Rules**) of Grain Trade Australia Ltd (**GTA**).

2. Pursuant to those Rules, I have been appointed sole arbitrator by GTA.

3. The dispute concerns a contract between the parties apparently concluded in March 2020.

4. A contract document was produced by the Claimant. It incorporates the terms of the GTA Contract No.2.

5. Those terms included at clause 22, an arbitration clause, which reads (so far as is relevant);

   "ARBITRATION: Any dispute arising out of this contract, including the existence of the contract and any question of law arising in connection therewith shall be referred to arbitration in accordance with the Dispute Resolution Rules of GTA in force at the commencement of the arbitration…."

6. As a result, and as conceded by the Respondent at paragraph 9 of its Points of Defence, GTA arbitration and Trade Rules apply and I find and hold that I have been validly appointed as arbitrator pursuant to the GTA Dispute Resolution Rules and the Commercial Arbitration Act 2010 (NSW) and have jurisdiction to determine all disputes arising between the parties in relation to the contract.

7. I have read and considered the;

   (a) Claimant's Points of Claim set out in an email from the Claimant dated 9 April 2021 (**Claim**)

   (b) Respondent's Points of Defence (undated) consisting of 19 numbered paragraphs (**Defence**).

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

9. I have carefully considered these submissions, statements and supporting documents and base my decision on the facts and circumstances thereby adduced.

B. Facts

10. This arbitration has been conducted under the GTA Fast Track Rules, which support a quick and low cost process. There is no hearing and there are no formal statements of evidence. I establish the facts on which I make my decision on the balance of probability as appearing to me from the parties' submissions including admissions and concessions made by the parties.

11. The facts are relatively easily stated and unfortunately familiar.

12. By an exchange of emails on 17 March 2020, and subsequently confirmed by a contract document generated on 18 March 2020 and given the reference CONTRACT A, the Claimant contracted to sell the Respondent 400 tonnes of barley (GTA Standard 'BAR1') at $379 per tonne (plus carry) for delivery 1 April to 31 October 2020, even spread, delivered to the Respondent at LOCATION G, NSW (**Contract**).

13. This much is conceded by the Respondents at paragraph 8 of the Defence.

14. The Respondents also concedes that while they allege that the underlying agreement with the Claimant was somehow subject to the proviso that they were under no obligation to take grain if they didn't need the grain (given they had a prior open contract with the Claimant, CONTRACT B), this condition was not included in the contract document generated by the Claimant and so did not ultimately form part of the contract terms agreed by the parties.

15. One point to be noted is that the Contract document does not, on its face, incorporate the GTA Trade Rules, Dispute Resolution Rules, or any GTA Contract. The Contract document sent by the Claimant to the Respondents annexed the terms of the GTA Contract No.2, which is the 'Track' contract, rather than a 'delivered' contract as one might expect from the face of the Contract. As is well known, delivery under the Track contract is by way of title transfer, in store, rather than physical delivery as clearly contemplated under the Contract.

16. The Contract does not stipulate that it is on "Buyer's Call" terms, and accordingly the Seller has the right of conveyance as provided under Trade Rule 13.

17. Whether or not the Claimant properly executed the Contract as required under Trade Rule 13.2 by issuing notice of commencement of delivery is an issue in dispute.

18. In any event, the Respondent did not take delivery of any grain under the Contract during the delivery period, asserting reliance on the proviso referred to at para [14] above.

19. Further, the evidence presented to me does not disclose that the Respondents, at any stage, held the Claimant in default as a result of any alleged breach by the Claimant of its obligations under the Contract.

20. The Claimant held the Respondent in default in or about December 2020 and claims the washout value of $63,200 plus GST and associated arbitration/legal costs 'paid to settle this matter'.

21. For its part, the Respondent points to and relies upon the fact that while this was designated an 'even spread' contract for delivery between April 2020 and October 2020 (that is, 400 tonnes over 7 months @ approximately 51 tonnes per month), the "Comments" section of the contract

provided “32t every 8-10 days’, which (according to the submission made by the Respondent) would result in the contract being fully delivered by 4 August 2020.

22. The Respondents further contends that the Claimant failed to call upon the Respondent’s to take delivery of any grain under the Contract.

23. Finally, the Respondent’s dispute the washout value claimed.

C. Determination

24. While I agree with the Respondents’ submission (paragraph 19(a) of the Defence) that this case displays a ‘clear pattern of poor contract administration’ it does not detract from the fact that there was a contract between the parties and the Respondents accepted no deliveries under the Contract during the term of the Contract. It is possible that the Respondents’ could have held the Claimant in default in respect of one or more consignments due for delivery but they did not.

25. Further, and despite evidence of poor contract administration, the emails and text messages annexed to the Claim provide sufficient evidence to demonstrate that the Claimant was ready and willing to make deliveries of grain under the Contract and would have done so but for the repudiatory conduct of the Respondent.

26. In relation to the washout price, the Respondent asserts that the correct price is approximately $20 per tonne, based off a market price of $350 per tonne at Port Kembla in March/April 2020.

27. In fact, the Claimant formally held the Respondents in default on 11 December 2020, having provided notice by email on 8 December 2020.

28. The Claimant has produced evidence from BROKER C dated 30 November 2020 showing values for F1 barley as at 30 November 2020 of $225 Track Port Kembla.

29. As to the assessment of damages, damages are calculated as original contract value at time of default (Dec'20), less a fair market price at the date of default, times the tonnage in default.

30. With a carry of $3/mt month the original contract value at default is $403/mt.

31. Calculation of fair market price is a little problematic as there seems to be a reliance on Track values to come up with a delivered LOCATION G value. In reality the CLAIMANT should have sought indicative ‘delivered LOCATION G’ values for December 2020 from at least 2 reputable grain traders to establish a clearer washout value.

32. As there has been a reliance on Track Values I have looked at Port Kembla Track values at the time of the original contract date (March 2020, as provided by the Respondent) and there seems to be a $29 premium in the contract for delivery to LOCATION G ($379-$350).

33. The washout contract should therefore reflect a similar premium being $225 (Track) + $29 = $254 delivered LOCATION G.

34. I therefore award and assess damages as follows: ($[redacted] - $[redacted]) x 400 = $[redacted] payable to the Claimant.

35. I do not award GST as this is a calculation of damages under the GTA Rules and no barley was actually supplied by the Claimant to the Respondent.

D. Award

36. For the reasons above, my Award is;

(a) The claim is allowed;

(b) The Respondent shall pay the Claimant $[redacted];

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

This amended award is dated at Sydney, the day of June 2020.

Mr Robert Danielli