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. 370

[redacted]
(Claimant)

and

[redacted]
(Respondent)

FINAL AWARD

INTRODUCTION

1. This is a Final Award in an arbitration conducted pursuant to the Dispute Resolution Rules of Grain Trade Australia Ltd (**GTA**). The dispute concerns alleged default by the seller in failing to deliver contracted grain, and alleged repudiatory breach by the buyer in failing to accept deliveries, under a contract for the sale and purchase of wheat. There is no dispute as to jurisdiction.

2. The contract was evidenced by a Broker Contract dated 2 February 2022 (to which we refer in more detail below) which included the following clause:

   This contract expressly incorporates GTA Trade Rules in force at the time of this contract and the Dispute Resolution Rules in force at the commencement of the arbitration under which any dispute, controversy or claim arising out of, relating to or in connection with this contract, including any question regarding its existence, validity or termination, shall be resolved by arbitration.

3. 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.

4. This Tribunal is comprised of:

   (a) Mr Anthony Furse, nominated by the Claimant;

   (b) Mr Andrew Mead, nominated by the Respondent; and

   (c) Mr Greg Carroll, Chair, nominated by GTA.

5. The parties have exchanged:

   (a) Points of Claim received by GTA on 14 September 2022;

   (b) Points of Defence and Counterclaim received by GTA on 17 October 2022;

   (c) Claimant's Points of Reply received by GTA on 31 October 2022;

   (d) Respondent's Points of Reply received by GTA on 23 November 2022; and

   (e) Claimant's submission in response to the inclusion of Exhibit 1 to Respondent's Points of Reply received by GTA on 1 December 2022.

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

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

7. The Claimant and Respondent are both commodity traders.

8. Pursuant to a contract evidenced by a Broker Contract No. [redacted] dated 2 February 2022 issued by the Broker, the Claimant contracted to sell the Respondent 2,000 tonnes of H2 Australian wheat at a price of $447 per tonne with the option to deliver APW1 at a $20 per tonne discount. The contact stipulates:

   (a) [redacted] that being the premises of Delivery Point, as the delivery point;

   (b) 15 February 2022 to 31 March 2022 as the delivery period; and

   (c) 'even spread' as the basis of delivery.

9. The contract expressly incorporates the terms and conditions of GTA Contract No. 3.

10. Execution and management of the contract was, to say the least, sub-optimal from its inception. It is common ground that, as at 14 April 2022, 802.25 tonnes remained undelivered the contract.

11. As to the events of 14 April 2022, the following facts are not disputed:

   (a) at or around 3:19 pm Mr R of the Respondent sent an email to Mr C of the Claimant, stating amongst other things that:
   "after a number of requests and timely orders we've once again been let down and your letting down a major flour mill. Over the past six weeks you have poorly performed and not accurately communicated and as a result have continually stressed the contract. The Claimant, and also the Delivery Point, have both been lient week after week over the past six weeks but I want to reiterate that there is no more flexibility and we don't have ability to help any further as our own and the mills stocks are exhausted and there is a formal contract place and real requirement for the grain being a flour mill.

As discussed on the phone at 2:55pm I require your bookings with registration / origin and booking time to [redacted] *by 3:30pm that day. If we don't receive ill will go to the market to field an offer at 3:45pm to ensure the mill is supplied next week."*

(b) at or around 3:34 pm Mr C of the Claimant sent an email to Mr R and Ms T of the Respondent stating that:

"As discussed on the phone and after your message
"Let's call it a day on that [redacted] *job if your happy to", you are unable to give a washout number.*
There is 600mt booked into [redacted] *with Ms B for next week. Let me know if you want to cancel these.*
I can't get trucks to the mill if we continually have 3-5hr wait times after they meet their slot. Every truck that delivers there won't go back.
If you want to washout please advise within the next 15mins.
Also so everyone is aware we recieved no orders or delivery numbers to deliver during the first 3 weeks of delivery period for this evenspread contract."

(c) at or around 3:58 pm Mr R of the Respondent sent an email to Mr C of the Claimant, stating amongst other things that

"Your details here arnt accurate and this is causing you to further stress the contract. "
Also so everyone is aware we recieved no orders or delivery numbers to deliver during the first 3 weeks of delivery period for this evenspread contract"
Your communication hasn't been accurate through this entire contract to myself / Respondent or [redacted] *staff. If your unable to show your bookings we will go to the market and find a party who can operate per what they agree to.*
As requested please send through what ive asked for very clearly.
Rego / Origin / Booking Day and Time."

(d) at or around 4:10 pm [redacted] of the Broker sent an email (**Broker Email**) to Mr C of the Claimant and Mr R and Ms T of the Respondent stating that:

"Regos as follows on rotation sent on text to me from Mr C as he is travelling now with his young family during easter.

I understand truck turnaround times at the mills with wait times of 3-4 hours is a concern and I will speak to the Respondent about it. I will continue to assist Mr R/the Respondent in washing out if you fail to perform."

(e) at or around 4:46 pm Mr R of the Respondent sent an email (**Default Notice**) to Mr C of the Claimant, stating that:

"After all the communication and your promises of your commitment to rectify the issue you have delivered one load this week against a 400mt order. The situation now has become urgent after eight straight weeks of either zero or under deliveries and no plans of delivery next week. Please accept this as our notice of default in this regard, in line with our obligations under GTA Trade Rule 17.

With this in mind, we will now elect to buy in order, as is permitted under Trade Rule 17.3b. As soon as practical we will advise you of what costs are incurred."

12. Over 20 and 21 April 2022 the Claimant delivered a total of 251.3 tonnes of wheat to [redacted] purportedly in part performance of the contract (**Last Deliveries**). The Respondent contends that it did not receive prior notice of these deliveries whereas the Claimant submits that the Respondent did directly, or indirectly via Delivery Point, receive prior notice.

13. It not disputed that:

(a) in a series of emails to the Respondent on the afternoon of 21 April 2022 Mr C of the Claimant sought to finalise arrangements to deliver the balance of the contracted wheat over the following week;

(b) in response, Mr R of the Respondent advised Mr C of the Claimant by email at or around 4:20 pm on 21 April 2022 as follows:
"Once again this week we've had under deliveries on verbal plans and again today your not contactable by phone. My email below on the 14th of April for order number [redacted] stated there was only one load delivered against the 400mt order for W/C 11th;

Correction to this; there was zero deliveries against a 600mt order. After multiple weeks of re ordering and weeks of flexibility.

As mentioned on Thursday 14th of April we have elected to buy in for non deliveries week commencing 11th April. I sourced a number of sellers and received two offers to cover this. One at $600 and the second at $625. Accordingly I will be covering your non-delivery against this 600mt at $600/mt. The difference between this and the contract price will be per the current contract 30 days.

Order number [redacted] will be closed for any deliveries post today with other suppliers now meeting the balance obligation."

(c) at approximately the same time Delivery Point notified Mr C of the Claimant by email, copying Mr R and others to cancel all future deliveries against contract [redacted];

(d) in prompt response to that email, Mr C asked why the deliveries has been cancelled. Mr R in turn advised Mr C by further email in the evening of 21 April 2022 that the cancellation as advised by Delivery Point was '*the cancellation of a Respondent order*' rather than a Delivery Point request and that:
"as communicated by email on April 14, with the Respondent electing to buy in for sale non-deliveries for the week commencing 11 April and previous. Electing to buy and results in the contract being reduced by the unfulfilled consignment only and the Respondent commitment is now not able to fit the original contract amount from the Claimant, wheat from ourselves and our suppliers."

(e) the Claimant did not accept the substance of the Respondent's emails and continued to press its' position in further email correspondence. Ultimately, at or around 12:49 pm on 22 April 2022 Mr C of the Claimant sent Mr R of the Respondent and others an email which stated:
"*We have trucks at [redacted] accruing demurrage. The Claimant is calling the Respondent in default of their obligations to provide a destination for delivery of the balance of contract [redacted] [redacted] Broker ref [redacted] as ordered and agreed Thursday 14th April 2022 and reiterated on Tuesday Wednesday and Thursday this week when you accepted delivery of 7 loads on the order.*
I will be forced to resell the balance of the contract if delivery is not enabled by 1pm today 22/4/22. Delivery Point have provided a bid to accept these loads at $415 delivered. All losses incurred by the Claimant will be passed on in full including any demurrage incurred and the difference in contract price of $32/mt.
I would urge you to think rationally as the easiest and less time-consuming option for everyone would be to simply let [redacted] know to accept the trucks. No one has time to take this further which is where it inevitably goes."

(f) correspondence between the parties thereafter primarily related to the presentation by the Respondent of a washout invoice, the Claimant's rejection of that invoice and administrative matters relating to invoicing and payments.

CLAIM AND COUNTERCLAIM

14. The Claimant claims that:

(a) the contract was 'open and working' at all material times; and

(b) the Respondent's refusal to accept delivery of the undelivered portion of the contract after 21 April 2022 constituted a breach of the contract,

and seeks an award of:

(c) damages in the sum of $[redacted];

(d) payment of $[redacted] for deliveries made;

(e) interest on outstanding amounts; and

(f) an indemnity for arbitration fees.

15. As we understand the Claimant's pleadings, the Claimant raises the following arguments in support of its claim:

(a) first, that by the Claimant sending to the Respondent a release confirmation on 24 February 2022, the delivery period under the contract was extended to 17 April 2022 such there was no relevant default at the time the Default Notice was issued, rendering the Default Notice invalid and meaning that the contract remained on foot and capable of being performed in accordance with its revised terms after the time the Default Notice was issued on 14 April 2022 until 17 April 2022;

(b) second, that prior to the issuance of the Default Notice, through the exchange of emails described in paragraphs 11(a) to 11(d) (inclusive) concerning the request for and provision of truck registrations and related delivery details, and oral discussions between the parties, an agreement was reached to reschedule remaining deliveries under the contract such there was no relevant default at the time the Default Notice was issued, rendering the Default Notice invalid and meaning that the contract remained on foot and capable of being performed in accordance with its revised terms after the time the Default Notice was issued and that the Respondent's refusal to accept delivery of the undelivered portion of the contract after 21 April 2022 constituted a breach of the contract; and

(c) third, that even if Default Notice was valid at the time it was given (the Claimant does not attack the Default Notice as to its compliance with Trade Rule 17 if the default is made out), the parties reached a verbal agreement after the issuance of the Default Notice for deliveries to be continued in the following week and that this verbal agreement had the legal effect of rescinding the Default Notice such that the contract remained on foot and capable of being performed.

The Claimant has not pleased or adduced any evidence as to the terms of that verbal agreement but submits that orders 'submitted and accepted' for the following week, namely the Last Deliveries, and the Respondent's email of 22 April 2022 described in

paragraph 13(b), imply the existence of the verbal agreement and rescission of the Default Notice. In making that submission the Claimant alleges that the Respondent had notice in advance of the Last Deliveries and accepted those deliveries as further part performance under the contract.

16. The Respondent by way of defence and counterclaim denies that the contract was amended so as to extend the delivery period to 17 April 2022 and submits that:

    (a) the Claimant was in default at the time the Default Notice was given;

    (b) the Default Notice was given in accordance with Trade Rule 17 and was clear and unambiguous;

    (c) the effect of the giving of the Default Notice was to terminate of the contract and to entitle the Respondent to damages under Trade Rule 17.4;

    (d) there was no verbal or written agreement reached thereafter and that the Claimant has 'failed to point to any agreement';

    (e) 'orders' were not submitted by the Claimant nor accepted by the Respondent in the week following the issuance of the Default Notice or at all;

    (f) the Respondent only became aware of the Last Deliveries after the fact;

    (g) the Respondent accepted the Last Deliveries as a matter of commercial pragmatism and mitigation; and

    (h) its email of 22 April 2022 described in paragraph 13(b) did not confirm any oral agreement to continue or reinstate the contract but, on the contrary, that email expressly informed the Claimant that the Respondent had bought in replacement product consistent with the Default Notice.

17. The Respondent seeks an award of:

    (a) damages in the sum of $[redacted];

    (b) interest on outstanding amounts; and

    (c) costs of the arbitration,

    or, alternatively, such amount as the Tribunal deems appropriate.

TRIBUNAL FINDINGS ON CLAIM AND COUNTERCLAIM

18. The Tribunal finds that the parties did not before the issuance of the Default Notice reach an agreement to amend the contract by rescheduling the remaining deliveries to the effect that there was no relevant default at the time the Default Notice was issued for the following reasons:

    (a) the Claimant has not adduced sufficient evidence to support a finding that the Respondent, through express affirmation and/or its conduct, agreed to extend the delivery period to 17 April 2022 (and the Tribunal notes that, in any event, it is not

apparent that the Claimant intended to or could have delivered the shortfall tonnage by that date); and

(b) whilst the exchange of emails described in paragraphs 11(a) to 11(d) (inclusive) concerning the request for, and provision of, truck registrations and related delivery details demonstrate that the Respondent may have been willing to entertain the rescheduling of deliveries, and that the Claimant provided proposed revised delivery details as requested by the Respondent within the required time, in the absence of other relevant evidence, this exchange falls short of constituting a bilateral agreement to amend the contract through the formation of offer and acceptance and certainty of terms. Again, in this different context, the Claimant has not adduced sufficient evidence to support a finding that the Respondent agreed to amend the contract.

In this regard, the industry should be mindful that any agreement to amend a contract should be documented in a way, whether through a combination of emails, day book entries, revised confirmations and/or more formal legal instruments which records and reflects all of the amended terms and the parties' mutual agreement to them.

19. Based on all of the materials put before it by the parties, and having due regard to the requirements of Trade Rule 17, and having reached the conclusions described in paragraph 18, the Tribunal is satisfied that the Claimant was in default at the time the Default Notice was issued and that the Default Notice was valid, the irresistible legal consequence of which is that the contract terminated at the time the Default Notice was given.

20. It is a fundamental principle of contract law that once terminated, a contract cannot be revived, reinstated or amended – it is at an end. After termination of a contract the parties to it can, of course, agree to a new contract, whether on the same terms as the terminated contract for the unperformed balance of the terminated contract or on different terms. However, applied to the present dispute, in order for Claimant to establish that a new contract between it and the Respondent was formed after the issuance of the Default Notice, the Claimant must prove, based on evidence and not mere submission, that all of the normal elements of contract formation[1] have been met. The Tribunal finds that the Claimant has not satisfied that burden.

21. In reaching these findings, it is not necessary for the Tribunal to reach a conclusion as whether the Respondent had actual or indirect or constructive (through Delivery Point) prior notice of the Last Deliveries, and the Tribunal makes no such conclusion. The Tribunal does however note that even if the Respondent did have prior actual or constructive notice of the Last Deliveries, and allowed them to proceed, such notice and allowance:

(a) could not as a matter of law result in the contract remaining on foot and capable of being performed in accordance with its revised terms after the time the Default Notice was issued; or

(b) would not, in all the circumstances, support a conclusion that either the parties reached in essence, a new replacement contract after the original contract was terminated by the issuance of the Default Notice.

The Tribunal also notes that the Respondent's email to the Claimant of 22 April 2022 described in paragraph 13(b) is of no assistance to the Claimant's case.

[1] Those elements include the making of an offer, acceptance of the offer, a manifest intent in words or by conduct to create legal relations, consideration and certainty of terms.

TRIBUNAL FINDING ON DAMAGES, INTEREST AND COSTS

22. Under Trade Rule 17.6 a party in default is liable to pay damages based on the defaulted quantity multiplied by the difference between the contract price and fair market price as at the date of default.

23. In the Respondent's email to the Claimant of 22 April 2022 described in paragraph 13(b), the Respondent identified fair market price as being $600 per tonne, that being the lower of two offers obtained the Respondent obtained. The Respondent produced to the Tribunal an email from the offeror, a grain trader, substantiating that lower offer.

24. The Claimant objected to the Respondent's production of that email in its Points of Reply (as opposed to the Respondent's initial Points of Defence). The Respondent was entitled under the GTA Dispute Resolution Rules to produce this email in its Points of Reply and the Tribunal was therefore entitled to and did consider the email. In the interests of procedural fairness however Tribunal allowed the Claimant to voice its objections to the email and related matters in a further submission and the Tribunal considered that further submission.

25. The Claimant was also critical of the methodology adopted by the Respondent in seeking to establish fair market value and submitted, without adducing any supporting evidence, that fair market value was around $445 per tonne.

26. The Tribunal has undertaken its own investigations and determined fair market value to be $550 per tonne. The Tribunal arrives at that value:

    (a) based primarily on observed bids and offers from different market wires published in early April 2022 for H2 wheat delivered [redacted], applying a modest premium for prompt delivery;

    (b) by cross referencing contemporaneous publicly quoted track pricing for H2 wheat to other delivery points in [redacted] adding appropriate allowance for freight, fees and shrink and deducting the appropriate location differential to derive a [redacted] delivered equivalence; and

    (c) by cross referencing contemporaneous publicly quoted track pricing for APW wheat to other delivery points in [redacted], adding appropriate allowance for freight, fees and shrink and deducting the appropriate location differential and deducting the APW premium over H2 to derive a [redacted] delivered equivalence.

27. The Tribunal therefore awards and assesses damages payable by the Claimant to the Respondent as follows:

Fair Market Price:	$550 per tonne
Contract Price:	$447 per tonne
Undelivered quantity:	547.86 tonnes

($550 - $447) x 547.86 = $56,429.58.

28. On the basis that, as the Tribunal apprehends, the Respondent has withheld payment from the Claimant for wheat actually delivered of an amount at least equal to the sum of $56,429.58 and all GTA arbitration fees paid by the Claimant in relation to this dispute, the Tribunal declines to make an award as to interest.

29. The parties have not made, and have not been asked to make, specific submissions as to costs. The Tribunal finds that the Respondent is entitled to be indemnified in respect of

arbitration fees paid by the Claimant to GTA but that, in all the circumstances, it is appropriate that the parties bear their own legal costs.

FINAL AWARD

30. For the reasons above, we make the following Final Award:

    (a) the Tribunal finds in favour of the Respondent;

    (b) that the Claimant pay to the Respondent the sum of $[redacted];

    (c) that the Claimant indemnify the Respondent for GTA arbitration fees paid by the Claimant; and

    (d) that each party bear its own legal costs,

    (the amounts awarded to the Respondent in paragraphs 30(b) and 30(c) together comprising the '**Award Amount**').

31. As the Tribunal understands, the Respondent has withheld payment in the sum $[redacted] from the Claimant for grain delivered ('**Withheld Amount**'), purporting to set-off that amount owing to the Claimant against the amount it has claimed it is owed by the Claimant in this dispute. If at the time of publication of this Final Award the Respondent continues to withhold the Withheld Amount or any portion of it then:

    (a) insofar as the withheld portion of the Withheld Amount is greater than the Award Amount, the Respondent must pay the difference to the Claimant; and

    (b) insofar as the withheld portion of the Withheld Amount is less than the Award Amount, the Claimant must pay the difference to the Respondent.

This Final Award is published at Sydney on 24th February 2023.

_____
Mr Greg Carroll

_____
Mr Anthony Furse

_____
Mr Andrew Mead