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 Nos 231-249, 251-257, 259-262, 265-276

Grain Sellers (Producers)
(Claimants)

and

Grain Buyer (Trader)
(Respondent)

Interim Award

INTRODUCTION

This is an interlocutory or procedural Award in arbitrations conducted pursuant to the Dispute Resolution Rules of Grain Trade Australia Ltd (**GTA**). The disputes concern the performance of one of the Respondent's grain pools operated in 2011/12 to which the Claimants had committed grain.

Procedural Orders were made on 2 May 2018 pursuant to which on 4 July 2018 the Claimant made Applications Pursuant to Article 3 Rule 1 of the Rules for Extensions of Time for Commencement of Arbitrations.

The Applications were the subject of a hearing conducted in Perth on 4 October 2018 at which the parties were represented by Counsel, and at the conclusion of which we reserved our decision.

In the event we have decided to grant the Applications and now set out our reasons for doing so.

THE APPLICATIONS

In addition to the submissions made during the hearing, the parties have exchanged and relied on;

1. The Claimant's Outline of Submissions in Support of Claimants' Application for Extensions of Time for Commencement of Arbitration dated September 2018;
2. Affidavit of (**Mr A**) sworn 27 June 2018;
3. The Respondent's Submissions in Opposition to Claimants' Applications for an Extension of Time dated 25 September 2018;

4. Affidavit of (**Mr B**) affirmed 10 August 2018.

In addition to these submissions and evidence the Applicants each filed a affidavit in similar form annexing the relevant (Respondent) 2011/12 WHEAT Pool Contract Confirmation (**Pool Contract**).

Fortunately the parties were in substantial agreement as to the principles underlying the application.

Rule 3(1) of the GTA Dispute Resolution Rules provides;

A Request must be lodged with GTA and the filing fee paid by the Claimant, on or before twelve (12) months after the expiration date for performance of the contract(s) otherwise any claim is deemed to be waived and absolutely barred unless a GTA Arbitration Tribunal extends the time for commenced of arbitration (Rule 16.2 of the GTA Trade Rules).

The parties accept that we have a wide but not unfettered discretion whether to extend time.

It is not an unfettered discretion in the sense that we cannot act on a whim, but must apply our discretion according to a consideration of the following factors, namely;

1. The length and reasons for the delay;
2. Whether the Respondent caused or contributed to the delay;
3. Prejudice occasioned by allowing, or disallowing the Application, and
4. The merits of the underlying claims.

We accept that these are all relevant factors and questions to be taken into account and we have taken these factors into account in reaching our decision.

Reasons for the Delay

It appears to be common ground that the events giving rise to the claims occurred in or about April 2013 and so the 12-month period prescribed under the Rules expired on or about 20 March 2014.

The Claimants lodged their requests for arbitration with GTA on 16 October 2017.

Since first being instructed in 2012, it appears that the Claimants and their advisors have prevaricated in relation to the appropriate course.

Having been instructed the Claimants' solicitors spent considerable time in administration, in the sense that they took steps to engage with other potential claimants, and instructed advisors to prepare reports which among other things, were designed to elucidate the sorts of evidence and documentation that the Claimants might need to determine the reasons for the alleged underpayment and support a claim against the Respondent.

The solicitors for the Claimants first wrote to the Respondent on 6 March 2014. That and following correspondence revolved around asking the Respondent to provide documentation for understanding the reasons for the alleged underpayment.

The Claimants do not suggest that they were unaware of the existence of the GTA arbitration agreement in the Pool Contract. The Claimant first approached GTA in relation to commencing an arbitration in November 2015. They then appear to have changed strategies following receipt of Senior Counsel's advice that they could commence Supreme Court proceedings, which they did, but which were subject to a successful stay application made by the Respondent[1]. We note that in

[1] *(Claimant) v (Respondent)* [2017] XXXX XXX

giving judgment the Chief Justice made reference (at [27]) to Rule 3(1) but that Rule was not further addressed in His Honour's reasons.

The Claimant's submission was to the effect that while they may have prevaricated, they were never idle, and were engaged with the Respondent at all times, or at least significant periods. In no sense was the Respondent taken by surprise by the commencement of this proceeding or given to believe that the Claimants may have given up and gone away.

The Respondent says that the Claimants are damned by their conduct, in making a deliberate choice not to proceed with arbitration.

Did the Respondent cause or contribute to the delay?

We don't believe that the Respondent caused or contributed to the delay in any material sense. While the Respondent engaged, at times, with the Claimants its conduct could not be construed objectively as leading the Claimant's down the path of litigation without regard to the time bar in Rule 3.1. To the extent that the Respondent had any obligation to correct the Claimants, it wrote expressly on 20 November 2015 that the claims were subject to arbitration and apparently time-barred. Nevertheless, the Claimants elected (apparently on advice) to continue on the litigation course.

The highest the Claimants can put the Respondent's conduct is that it acquiesced in the Claimant's course of conduct.

Prejudice

The prejudice to the Claimant if we don't grant the Application is patent.

(Mr C), senior counsel for (Respondent) made powerful submissions in relation to the prejudice his client would suffer if the Application was granted and took us to a number of authorities. As an arbitration Tribunal we're perhaps not bound by those authorities in the same way a court might be, but nevertheless they are persuasive and must be considered.

As is apparent from those authorities, an extension of a time-bar is not to be granted lightly or willfully[2]. It is a careful balancing exercise of the rights which would be foregone by the Claimant against the right of the Respondent to hold the Claimant to its bargain.

In particular, (Mr C) referred us to the decision of the High Court in *Brisbane* [3]. In that case, a claimant sought to commence proceedings in 1994 in respect of actions that had occurred in 1979.

But there are factors in this case which are not on all fours with the factors addressed by the authorities to which the Respondent referred.

The first is that this was a relatively short, 12-month time bar. True it is that even if the Claimants were still investigating the circumstances of the claims at the 12-month mark they could have taken steps to protect the time-bar, at least in respect of the parties for whom they acted at that time. That said, it has not been and could not be submitted that the Respondents were taken by surprise by the commencement of these proceedings and the pursuit of these claims.

Even if there were breaks in the engagement between the parties, they were sufficiently short not to give rise to a legitimate impression on the part of the Respondent that the claims were abandoned.

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[2] See for example *Salido v Nominal Defendant* 32 NSWLR 524, 535 at D.

[3] *Brisbane South Regional Health Authority v Taylor [1996]* 186 CLR 541

Another factor is that this is a contractual time-bar, and not a statutory time-bar. While neither party made a submission about the relevance of this distinction, assuming it is relevant at all, it is fair to say that none of the cases to which (Respondent) referred related to contractual time bars.

Nor did any of the cases refer to 12-month time bars. This must be a relevant factor in exercising our discretion. While we understand (Respondent's) submissions about the effect of time-bars and the onus of proving (or disproving) prejudice, the length of the time-bar must be a relevant factor.

(Mr C) analysed in oral submissions the genesis of Rule 3.1 as an attempt by GTA to encourage efficiency in the conduct of its arbitration process. This would be consistent with the Paramount object of the *Commercial Arbitration Act* to facilitate the fair and final resolution of commercial disputes without unnecessary delay or expense, informally and quickly.

The factors that a judge must weigh in deciding whether to enforce a 6-year statute of limitations must be of a different order to those we must weigh when deciding whether to enforce a 12-month contractual time bar, or exercise our power to grant an extension of time. This is reflected in the observation of McHugh J in *Brisbane* (at p555) that

"Legislatures enact limitation periods because they make a judgment, inter alia, that the chance of an unfair trial occurring after the limitation period has expired is sufficiently great to require the termination of the plaintiff's right of action at the end of that period."

We would require some persuasion that GTA, and the parties who choose to adopt its Rules, consider that at the end of 12-months the risk of an unfair arbitration proceeding is so great that the Claimant should be barred from proceeding. It is more likely, and as (Mr C) said in oral submissions, GTA intended the parties to potential disputes to move quickly. They also recognized that this won't always be possible, so left open the possibility of an extension of time.

While we accept the fact that a number of employees with knowledge of the management of the 2011/12 Pool have left the Respondent, and while that factor may have had great significance if we were looking at a 6 (or even 3) year statutory time bar, in this case it is to be balanced against the fact that this is a 12-month contractual time bar, and Respondent has been on-notice of potential claims since early 2014.

Merits

Again, (Mr C) made powerful submissions in relation to the merits of the Claimants' claim which (in his submissions) were hopeless and doomed to fail.

This assessment was shared by the Master of the WA Supreme Court who determined the application for preliminary discovery.

However while we accept that Pool returns are not guaranteed and that there will be risk associated with participation in a Pool, the performance of the (Respondent) Pool in this case appears to have been well outside what one might have considered reasonable variation for the season. It is not therefore unreasonable that the Claimants might want to know why the Pool performed so badly, and seek to hold (Respondent) to account for the extremely poor performance.

The Claimants must however be well aware of the risks associated with this exercise. It is too soon to tell whether their prospects are hopeless but their claims face a number of hurdles and if they are unsuccessful in advancing their claims they face substantial costs orders against them.

The Claimants should not confuse our granting of permission to bring their claims with encouragement to do so. The terms of the (Respondent) Pool Contract appear to provide the Respondent with considerable protections. Unless the Claimants can put their case in a way that avoids those contractual exclusions they are likely to fail.

Nevertheless we feel that it is in the interests of justice and fairness that the Claimants not be shut-out from advancing any claim and being given an opportunity to facilitate an appropriate discovery process with appropriate disclosure to be made by the parties.

Decision

We have already indicated that we have decided to grant the Applications.

In reaching that decision, we have carefully weighed each of the factors identified above. In reaching that decision it is not necessary that one party or another "win" on any or even most of these factors. We have a discretion to do what we believe is fair. While the Claimants are largely the architects of their own misfortune, to shut them out entirely from bringing their claims would be unreasonably onerous.

In closing, we would remind the parties of their confidentiality obligations under section 27 of the *Commercial Arbitration Act* 2010 (NSW).

COSTS

Even though we have allowed the Applications they have been necessitated by the Claimants' delay in proceeding with arbitration.

We accordingly reserve costs of these Applications.

This award is published at Sydney, the day of 2018.

Mr Geoff Farnsworth, Chair nominated by GTA

Mr Guy Allen, nominated by the Claimant

Mr Chris Heinjus, nominated by the Respondent