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

GTA Arbitration No. 395

[redacted] **(ACN** [redacted]
(Claimant)

and

[redacted] **(ACN** [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 (**DR Rules**). The proceedings were commenced on 19 March 2024 pursuant to a Notice of Arbitration prepared by the Claimant.

2. While the Claimant appeared to be self-represented during the proceeding, the Claimant was in fact provided with legal support by [redacted]

3. The Respondent is represented by [redacted].

4. This reference relates to a dispute concerning a contract between the Claimant Seller ([redacted] and **Seller**) and the Respondent Buyer ([redacted] and **Buyer**). In summary, [redacted] contracted with [redacted] for the sale of canola oil the full contract quantity of which was ultimately not delivered. The default is accepted by both parties and is not in dispute. The dispute relates solely to the timing of the default and the assessment of fair market price consequent on that default.

5. For present purposes the particulars of that contract are as follows:

Contract No.	Broker	Date	Commodity	Tonnes	Base Price	Delivery
[redacted]	n/a	30/11/2022	Canola oil, AOF Specification CSOF-6	4000mt	$2380mt plus GST	Even spread, [redacted], 9/01/23 – 31/12/23

6. The contract is evidenced by a [redacted] Sales Contract document, number [redacted] dated 30 November 2022 (**Contract Document**). The Contract Document was signed by Mr [redacted] on behalf of [redacted]. While it was not signed by [redacted], there does not appear to be any dispute that the Contract Document evidenced the terms of the agreement between the Parties.

7. The Contract Document contains on its face the following clause:

> *This contract expressly incorporates the GTA Trade Rules in force at the time of this contract and 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.*

8. The version of the Trade Rules current 30 November 2022 is applicable to the contract. The version of the Rules in effect from 1 March 2021 to 30 November 2022 is the version applicable to this dispute.

9. Pursuant to Article 13 of the DR Rules (headed 'Governing Legislation'), the provisions of the *Commercial Arbitration Act 2010* (NSW) (**CAA**) shall apply. The Parties having chosen the NSW legislation to govern this arbitration and we find that NSW and specifically Sydney is the seat of this Arbitration as that term is defined in Article 38(1)(a) of the DR Rules.

10. We are listed on the GTA list of arbitrators under Article 6.1 of the DR Rules.

11. We have been appointed to this Tribunal as follows:

    a. John Orr – Chair appointed by GTA;

    b. Simon Clancy – nominated by the Respondent; and

    c. Mark Lewis – nominated by the Claimant.

12. For the reasons set out above, we find therefore that this is a validly constituted Tribunal under the CAA with jurisdiction to determine all issues in dispute between the Parties.

13. As neither party has requested a hearing we have proceeded on documents alone.

Procedural History

14. By way of background and procedural history:

    (a) As observed above, this matter was commenced by way of Notice of Arbitration dated 19 March 2024.

(b) In accordance with GTA practice, a Notice of Dispute was mailed to the Parties dated 21 March 2024 which included, among other things, a Contract for Full Arbitration.

(c) [redacted] of [redacted] signed and returned the Contract for Full Arbitration and dated it 25 March 2024 October 2022. [redacted] of [redacted] signed and returned the Contract for Full Arbitration and dated it 8 April 2024.

(d) The Parties have exchanged the following submissions and evidence:

a. Claimant's Points of Claim dated 9 May 2024, including supporting documents;

b. Respondent's Points of Defence dated 3 June 2024 including supporting documents;

c. Claimant's Points of Reply dated 5 June 2024, including supporting documents;

d. Respondent's Points of Reply dated 3 July 2024,

e. Witness Statement of [redacted] dated 4 July 2024,

f. Claimant's Further Points of Reply dated 4 July 2024, and

g. Respondent's Further Points of Reply dated 5 July 2024

Facts

15. The existence and terms of the contract are not in dispute. It is evidenced by the Contract Document.

16. There is no dispute that the contract was subject to and incorporated the GTA Trade Rules.

17. Materially, within the Contract Document the 'Delivery Spread' is described as 'Even', and it was accepted by the parties that this rendered it an 'Even Spread' contract.

18. 'Even Spread' is defined within the GTA Trade Rules as "an equal spread of the total quantity divided by the number of weeks as defined by the term "Weekly" within the contracted delivery/shipment period." By [redacted]'s calculations, this equated to around 2 'loads' per week with each load being around 40mt[1].

19. By the middle of February 2023, the Buyer was falling behind in taking deliveries[2] based on 'even spread'.

20. As at 31 March 636.06 tonnes of oil had been delivered of the 960 tonnes contracted (assuming an even spread of deliveries)[3].

21. From May 2023, [redacted] commenced storing of 'delinquent' tonnes and rendered storage invoices to [redacted][4].

22. Two meetings between [redacted] and [redacted] then took place. We note that we have no witnesss statements from either party as to what was discussed at those meetings.

[1] Email from [redacted] dated 14 March 2023.
[2] Email from [redacted] dated 13 February 2023.
[3] Email from [redacted] dated 12 April 2023.
[4] Email from [redacted] dated 4 May 2023.

23. Quoting directly from the Claimant's Points of Claim,

    July 26 2023: Met in Melbourne with [redacted] representatives to discuss resolution strategies for the delinquent tonnes. [redacted] expressed belief in their ability to complete the contract by year-end despite ongoing issues.

    August 29 2023: A subsequent meeting in [redacted] with [redacted] to reassess the situation showed no improvement. [redacted] outlined a new plan to accelerate delivery, promising to submit this plan the next day.

24. On 30 August 2023 [redacted], managing director of the Buyer sent an email to [redacted] of the Seller. Relevantly, Mr [redacted] wrote;

    "Based on our estimates and taking in consideration your support we believe we can move 2,580MT between next week and the end of 2023 (approximately 4 loads per week).

    .....

    In principle we would ask [redacted] to supply [redacted] up to 1,750MT, most likely 1,200MT at a discounted rate of $1,900/MT from our actual contracted price of $2,380.

    .....

    Again, sorry that we are in this situation, the market has been extremely difficult, and your support will help clear the oil we have from your contract. "

25. Negotiations continued between the parties.

26. On 29 November 2023, then solicitors for [redacted], [redacted], wrote to [redacted].

27. Relevantly, those solicitors wrote;

    "6. ... [redacted] values both its ongoing relationship with [redacted] and its reputation in the industry. [redacted] is committed to working with [redacted] to identify and implement an acceptable resolution of the 2023 Contract and lay the foundation for an ongoing trading relationship.

    [redacted] makes the following, without prejudice offer, to resolve and bring to an end, the 2023 Contract."

28. [redacted] responded to the solicitor's letter by email on 18 December 2023 as follows;

    "We do not accept [redacted]'s offer as the terms are not acceptable to us. We are not interested in selling any additional oil at this stage.

    [redacted] would consider (subject to confirmation) to re-spread the current contract as follows;

    Qty:1,947.65 tonnes

    Price: $2380.00/tonne

    Delivery: 40 tonnes per week starting 01/01/2024 (49 weeks)."

29. On 24 January 2024, the Seller wrote to the Buyer giving formal notice of default ("Default Notice") and advising,

    "As the delivery period has concluded, we note that [redacted] has taken delivery of only 2052.35 tonnes of the contracted Canola Oil, resulting in a shortfall of

1947.65 tonnes. This failure to take delivery of the remaining Canola Oil within the specified timeframe is a breach of Contract No. [redacted]."

30. [redacted] subsequently wrote to [redacted] on 30 January 2024, advancing a total claim of AUD 2,291,753.17 (plus interest and costs) consisting of

    a. AUD 2,115,634.81 being the (alleged) difference between the contract price and market price in respect of the defaulted tonnes; and

    b. AUD 176.118.36, being for storage and carry.

The Parties' Submissions

31. [redacted]'s position is relatively simple.

32. It says that the relevant date of default was 24 January 2024, when it gave the Default Notice, in accordance with Trade Rule 17.4.

33. It says the defaulted tonnes were 1947.65 MT as stated in the Default Notice and the Fair Market Price for the purposes of Trade Rule 17.6 was AUD 1,293.75 MT as advised by further notice given on 30 January 2024.

34. [redacted], while not denying default or the defaulted tonnage, says that the date of default was 29 August 2023, during the [redacted] meeting, when the Respondent "unequivocally repudiated the contract" and which repudiation was "accepted by the Claimant."[5]

35. It then advances 2 methods of calculation of the appropriate damages figure.

36. The first is outlined at paragraph 17(c) of the Points of Defence. In summary, it submits that the assessment should be made month by month and that if that method were adopted the appropriate cumulative damages figure would be AUD 734,708.60.

37. Alternatively it says that the damages should be assessed on the basis of fair market value as at 29 August 2023 in which case the figure would be AUD837,489.50.

38. Further, the Respondent disputes the claim for storage and handling on the basis that they are unsupported by business records.

Deliberation and Determination

39. As observed above, it is not in dispute that there was default by the Respondent in performance of the Contract and that the shortfall was 1,947.65 MT.

40. The issue is when, for the purposes of Trade Rule 17, the default occurred and how the Fair Market Price is to be assessed.

41. Trade Rule 17 reads as follows;

    Rule 17.0 DEFAULT

    1) A party in default of any of its obligations under a contract or who anticipates that it will default must serve notice on the other party as soon as practicable.

    2) The notice must state the date of default or anticipated default and the nature of and reasons for the default.

[5] See paragraphs 5 and 15 of the Respondent's Points of Defence dated 3 June 2024

3) The party in receipt of such notice must immediately, or as soon as is reasonably practical, notify the other party of its election to either;

a. affirm the contract; or

b. buy in, or sell against the defaulter; or

c. cancel all or any part of the defaulted portion.

4) In a case of actual default where no notice has been given, the liability will remain in force until the non-defaulting party, by the exercise of due diligence, can determine the default. The party not in default must then give the defaulting party notice containing the details in (2) above and as soon as is practical thereafter advise the defaulter which of the options in 3 above it elects to pursue.

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.

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, within 7 days of receipt of a demand to pay.

42. *Fair Market Price* is defined in the Trade Rules (relevantly) as follows;

***Fair Market Price** means:*

a) the price per tonne ascertained by Repurchase or Resale for a commodity which is actively trading, or

b) in the case of default, the market price on the Business Day following the receipt of the notice under Rule 17 (1) or 17(4) being:

i) In the case of Seller default, the price being offered by other sellers;

ii) In the case of Buyer default, the price being offered by other buyers.

43. It is well understood that in a contract to be performed progressively over a period of time, default may be actual, or anticipatory.

44. Certainly at the end of the express delivery period stipulated in a contract, any shortfall in delivered tonnage may be considered an actual default.

45. Equally, if during the term of the contract either party expresses a clear and unequivocal intention no longer to be bound by, or perform the contract, the 'innocent' party may accept that conduct as bringing the contract to an end.

46. But consistently with the Trade Rules, for the contract to end, there must be an actual or anticipatory breach, plus an acceptance of that breach as bringing the contract to an end.

47. To be clear, faced with an actual or anticipatory breach, the innocent party has an election to either affirm the contract (see for example Trade Rule17(3)(a)) or accept the repudiatory conduct as ending the contract (see for example Trade Rule17(3)(b) and (c)).

48. [redacted] says that it held [redacted] in actual default at the end of the contractual delivery period, on 24 January 2024, by the notice given on that date. It had not previously accepted periodic defaults and had instead been in negotiations to secure substantial performance of the contract.

49. [redacted] says that it unequivocally repudiated future performance of the contract during a meeting on 29 August 2023.

50. Even if it did repudiate future performance of the contract on that date (which is denied by [redacted]), we have no evidence of it, and the evidence we have does not support the submission.

51. First, as mentioned above, neither party has tendered or sought to rely on witness statements describing the events and statements made on 29 August 2023.

52. The Respondent's email sent on 30 August 2023 contains no statement to the effect that the contract was at an end. To the contrary, there are references to performance of the contract, albeit with variations from the original contract terms.

53. Finally, as late as 29 November 2023, the Respondent's solicitor was making proposals that would "resolve and bring to an end, the 2023 Contract", the clear implication being that as at that date, the 2023 Contract remained on foot. We note that there is no mention in that correspondence of the alleged repudiation or termination on 29 August 2023.

54. Even if [redacted] had made clear and unequivocal statements that it no longer intended to perform the contract, it was still up to the [redacted] to either accept that repudiatory conduct, or affirm the contract.

55. The evidence is that [redacted] made a number of attempts to reach some accommodation with [redacted], none of which were accepted by [redacted] who continued to affirm the contract, for example in its email on 18 December 2023 where it offered to 're-spread the current contract'.

56. [redacted] points to a statement by [redacted] in an email dated 6 September 2023 as evidence that [redacted] had accepted [redacted]'s alleged repudiation on 29 August 2023.

57. In that 6 September 2023 email Mr [redacted] wrote "We will issue a new contract which you will need to sign". Read in the context of full email of which it forms part, it cannot convey the sense [redacted] seeks to attribute to it.

58. In relation to the establishment of Fair Market Price, [redacted] has attempted to ascertain a range of prices for canola oil delivered Melbourne on or about 29 January 2024, from Just Biodiesel ($1,293.75 tonne); Wilmar Australia ($1145 tonne), Peerless Foods ($1230 tonne) and Archer Daniels Midland ($1120 tonne).

59. [redacted] has relied on different pricing, evidenced by a witness statement from [redacted] dated 4 July 2024. We note that Mr [redacted] estimates that the price for crude canola oil at the end of December 2024 would be around AUD 1690 tonne. He does not appear to indicate a price basing point. If that point was Cootamundra, then the price delivered Melbourne may not be far different from the price of $1,239.75 fixed by [redacted].

60. It is evident that the parties entered into a high price contract and that the market price for canola oil fell sharply from April 2023. There is no doubt that [redacted]'s exposure would have been considerably less had the contract come to an end in August 2023, but it did not. The parties continued to negotiate around performance for the remainder of 2023. There is no evidence that [redacted] was merely attempting to take advantage of [redacted] and maximise any potential claim.

61. We find accordingly that [redacted] is successful in its claim and that AUD$1239 is an appropriate assessment of Fair Market Price.

62. [redacted] has also claimed relocation and carry charges in the amount of $176,118.36. We note that the terms printed on the reverse of the Contract Document make provision for the payment of Storage, Charges, Demurrage and Carry Charges.

63. We also note that [redacted] progressively invoiced [redacted] for these charges and [redacted] has produced evidence that [redacted] made payment on 15 December 2023 of $250,620.26 in respect of these charges. In circumstances the contract terms expressly contemplate payment of storage and carry fees, and where those fees have been paid by [redacted], we allow this item of [redacted]'s claim.

Costs and Interest

64. Having been successful, there is no reason that we should not also award the Seller its costs.

65. As is customary, the GTA secretariat has asked the Parties to indicate recoverable legal costs incurred.

66. [redacted] has advised legal costs of A$4,620. While this appears to us to be very reasonable and proportionate to the amount in dispute most of the costs claim predate the commencement of the arbitration and so are not recoverable. We will allow [redacted]'s legal costs related to this arbitration from 16 February 2024 in the amount of $880.

67. [redacted] has claimed interest but has not stipulated an amount. The Contract Document includes a provision for interest on outstanding payments equal to 24% per annum. We will not adopt that figure and will instead exercise our discretion under section 33E(1) of the CAA and award interest at the rate of 7% from 31 January 2024 to the date of this Award.

Final Award

For the reasons stated above, we make the following Final Award:

1. The Respondent shall pay the Claimant the sum of A$[redacted] forthwith.

2. The Respondent shall pay the Claimant A$880 in respect of legal costs.

3. The Respondent shall pay Interest on A$[redacted] at 7% per annum from 31 January 2024 to the date of this Award.

4. In addition, the Respondent shall indemnify the Claimant in relation to any fees paid by the Claimant to GTA in respect of this arbitration.

This award is published and dated at Sydney, the 30th day of August 2024.

Mr John Orr, Chair

Mr Mark Lewis

Mr Simon Clancy