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. 312

Grain Buyer (Trader)
(Claimant)

and

Grain Seller (Trader)
(Respondent)

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 concerns the validity of the purported assignment of 2 contracts for the purchase of cotton seed from the Respondent by a third party, All Commodities Pty Ltd to the Claimant.

There is no dispute as to jurisdiction. The contracts clearly provide for the referral of disputes to arbitration to be administered by Grain Trade Australia Ltd (GTA) pursuant to GTA's Dispute Resolution Rules.

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.

Consistent with the practice of the GTA Dispute Resolution process, 2 separate arbitrations were commenced (GTA reference numbers 310 and 311), one in relation to each contract in dispute. By consent of the parties, those references were consolidated into the current reference 312 by order of this Tribunal made by the Chair on 11 September 2019.

This Tribunal is comprised of:

1. Mr Mark O'Brien, George Weston Foods, nominated by the Claimant;

2. Mr Ole Houe, IKON Commodities Pty Ltd, nominated by the Respondent; and

3. Mr Andrew Wilsdon, Glencore Agriculture, Chair nominated by GTA.

In addition to the written submissions and documents described below, an oral hearing was conducted on Tuesday 12 May 2020 at which counsel for the parties made detailed submissions and

Mr A was made available by the Claimant and cross-examined under oath by the Respondent.

The parties have exchanged;

(a) Consolidated Points of Claim dated 2 October 2019;

(b) Points of Defence dated 19 December 2019;

(c) Points in Reply dated 23 January 2020;

(d) Points of Reply dated 2 March 2020;

(e) Claimants Points of Response (Surrejoinder) dated 30 March 2020;

(f) Respondent Rebutter dated 27 April 2020;

(g) Claimant's Outline of Argument, dated 7 May 2020;

(h) Respondent's Outline of Argument dated 7 May 2020;

(i) Affidavit of **Mr B** affirmed 4 June 2019;

(j) Affidavit of **Mr A** sworn 12 June 2019;

(k) Affidavit of **Mr C** sworn 13 June 2019;

(l) Affidavit of **Mr D** affirmed 27 June 2019;

(m) Affidavit of **Mr E** affirmed 28 June 2019;

(n) Affidavit of **Mr B** affirmed 12 July 2019;

(o) Affidavit of **Mr A** sworn 12 July 2019;

(p) Affidavit of **Mr F** sworn 1 October 2019;

(q) Affidavit of **Mr G** sworn 2 October 2019;

(r) Affidavit of **Mr A** sworn 30 March 2020;

(s) Witness statement of **Ms H** made 24 April 2020;

(t) Witness statement of **Mr I** made 27 April 2020.

We have carefully considered these submissions, statements and supporting documents as well as the evidence adduced and submissions made at the hearing and base our decision on the facts and circumstances thereby adduced.

BACKGROUND TO THE DISPUTE

1. The Claimant is a grain trader. The principals of the Claimant are [redacted]. The Claimant was incorporated on 24 January 2019.

2. **Mr A** was the sole director of (**Company**) from 25 February 2014. That company was placed in voluntary liquidation on 5 February 2019.

3. The Respondent is an agri-marketing business with a focus on cotton and cotton products including cotton seed. It is part of the [redacted] Group of companies of which another agri-marketing business, [redacted] (Business) is also part. For present purposes, it is

sufficient to say that the Company had a history of purchasing cotton seed from **Mr E** of the Respondent, and almond products from **Mr D** from (Business) and that (subject to what we say below) the 'back-office' or execution for both the Respondent and (Business) was (at the relevant time) handled by **Ms H**.

4. On 30 October and 21 November 2018 the Company and the Respondent entered contracts (**Contracts**) for the sale and purchase of cotton seed. As is reasonably common in the grain trade, these contracts were each evidenced by 2 documents, namely a Purchase Contract Confirmation generated by the Company and a Seed Sales Contract generated by the Respondent, the material terms of which were as follows;

   (a) Contract No. [redacted] dated 30 October 2018

   4000mt cotton seed

   $383 per metric tonne, FOT [redacted]

   Delivery Period: 1 April 2019 to 30 November 2019/Start of ginning – October 2019.

   Payment terms: 30 days from end of week of delivery.

   (b) Contract No. [redacted] dated 21 November 2018

   1500mt cotton seed

   $390 per metric tonne, FOT [redacted]

   Delivery Period: 1 April 2019 to 31 December 2019/Apr-Dec 2019.

   Payment terms: 30 days from end of week of delivery.

5. On 25 January 2019 the Company by **Mr A** purported to assign the Contracts to the Claimant.

6. On 18 February 2019 the Respondent purported to terminate the Contracts on the basis of the insolvency of the Company, pursuant to clause 8 of the Respondent's terms and conditions.

7. The Claimant's case is that the assignment was proper and valid and that the Respondent's purported termination was invalid and therefore a wrongful repudiation. It claims substantial damages.

8. In answer the Respondent says that because of the personal nature of the contracts, they could not be assigned and even if they could, the purported assignment was ineffective.

9. We will deal with this second question first because it disposes of the matter.

WAS THE PURPORTED ASSIGNMENT EFFECTIVE?

10. Both parties agree that for these assignments to be effective they must comply with section 199 of the *Property Law Act 1974* (Qld). That section provides that;

   (1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in

law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice—

(a) *the legal right to such debt or thing in action; and*

(b) *all legal and other remedies for the same; and*

(c) *the power to give a good discharge for the same without the concurrence of the assignor.*

(2) If the debtor, trustee or other person liable in respect of such debt or thing in action has notice—

(a) that the assignment is disputed by the assignor or any person claiming under the assignor; or

(b) of any other opposing or conflicting claims to such debt or thing in action;
the debtor may, if the debtor thinks fit, either call upon the persons making claim to the debt or other thing in action to interplead concerning the same, or pay the debt or other thing in action into court under and in conformity with the provisions of the Acts relating to relief of trustees.

11. The parties agree that for an assignment under section 199 to be effective, there must be;

(a) an 'absolute assignment by writing';

(b) under the hand of the assignor;

(c) of a debt or legal chose in action; and

(d) notified expressly in writing to the debtor, trustee or other person from whom the assignor would have been able to claim such debt or thing in action.

12. The Claimant says that the "assignment by writing under the hand of the assignor" is to be found in the diary of **Mr A**. It is not suggested by the Claimant that any other document or instrument recorded the assignment. Because of the significance of this document we have reproduced it as Annexure A to this Award.

13. In **Mr A's** affidavit sworn 12 June 2019, he deposes at paragraph 19 that
*On 25 January 2019, I (on behalf of **Company**) agreed to assign and transfer all its right title and interest in the **Company** Contracts to the **Claimant**. As was my practice, I took a diary note recording the assignments once they were made on 25 January 2019.*

14. It is perhaps unclear from this statement whether the entry in the diary is intended to be the instrument of assignment (as section 199 appears to require) or whether **Mr A** intended it to be a record of an earlier agreement (with himself) to make the assignment.

15. **Mr A** was cross-examined at the hearing in respect of this entry. Counsel for the Respondent challenged various aspects of the entry, including where the entries were placed on the page, the timing of the entries and the alleged inclusion of **Mr A's** initial.

16. At the top of the page headed Friday 25 January 2019 is an entry which appears to read *Spoke to **Mr D** about assigning contracts from '**Company**' to '**Claimant**' He agreed*

17. The balance of that page appears to contain notes of contracts entered into that day. At the base of the page there are what appear to be two sets of initials.

18. At the top of the page headed Saturday 26 January 2019 are 2 more records of contracts.

19. Below that is what appears to be a list of 12 purchase numbers, followed by the relevant counterparty, 2 of which relate to the contracts in issue in this matter. Ticks appear beside five of the entries, including the contracts in issue in this matter.

20. Above the list appears "ASSIGN CAKS" and between those words appears a marking in the shape of a capital "P" which **Mr A** has deposed is his initial.

21. To the right of the list is written "ASSIGNED AND SENT/EMAILED 25/1/19".

22. **Mr A** also deposed that with the exception of the entries referred to at paragraph [18] above, the balance of entries on the 26 January page were in fact written on 25 January but were written on the 26 January page because he anticipated running out of room on the 25 January page.

23. We have no difficulty with the scattered arrangement of the diary entries on the pages. The members of this Tribunal have considerable personal professional experience of keeping diaries or daybooks to record events and transactions (though having said that, it was usual practice for our notes to be transcribed subsequently into a formal contract document).

24. We also accept that there is no stipulation in section 199 as to a particularly form of assignment, or formality of assignment. However in this case, we cannot agree that the diary entries can be considered an instrument effecting an 'absolute assignment' when they simply do not clearly and objectively identify the assignor and assignee or the date from which the assignment is intended to be effective.

25. We are also troubled by the mark, or initial, referred to in paragraph [20] above. **Mr A** deposes that it is his initial, consciously applied to satisfy the requirement under [11(b)] above. **Mr A** was cross-examined forcefully on this issue at the hearing. Even if we accept **Mr A's** evidence at face value, without his personal explanation the mark is meaningless. Put another way, objectively the mark is meaningless. Even if there is no requirement under section 199 for a formal instrument, it seems to us that any instrument meeting the requirements of section 199 must be capable of objective interpretation, on its face. Otherwise it would be unenforceable.

26. At most, the entries may have served as a reminder to **Mr A** that he needed to formally assign the contracts, but the diary entry on its own lacks sufficient clarity in our view to be considered to be the instrument of assignment itself and for this reason the claim must fail.

27. The satisfaction of other elements of section 199 was also contested, specifically the element of notice referred to in paragraph 11(d) above.

28. The Claimant says that the notice in writing was to be found in an email, sent 0823 hours on 31 January 2019 from **Mr A** to **Ms H**, copied to **Mr D**.

29. Relevantly in that email **Mr A** wrote that the Company had been 'restructured', set out the details of the Claimant, and said;
So can you please assign our contracts [redacted], [redacted] *to out (sic) new identity (sic).*

30. As we have observed above, the Respondent and (Business) are both companies within the Group. **Ms H** appears to have provided a back-office function for both.

31. **Ms H's** response to **Mr A's** email was at 0832 hours on 31 January 2019;
As this is a new company with different ABN (I assume) we will (sic) to set you up on our system again and re set-up your credit.
If you could please arrange to have the attached completed and return to me we can set up and then I can re-issue the contracts in the new company name.

32. The 'attached' **Ms H** refers to in her mail is to a credit application form.

33. For present purposes, there is no indication from **Ms H** in her email that (subject to the qualifications around credit) she was not authorized to receive notice of assignment; to the contrary, she appeared to consider herself authorized to act on it.

34. **Ms H** was not called to give evidence. We note that in her witness statement made 24 April 2020 she states that
*I would occasionally provide **Mr E** with limited administrative assistance in this manner, but I was at no point employed by the Respondent, involved in the Respondent's trade or authorized to send or received notices on the Respondent's behalf.*

35. Be that as it may, we find that if the assignment had been made in writing, under hand, notice to **Ms H** was sufficient for the purposes of section 199.

WERE THE CONTRACTS CAPABLE OF ASSIGNMENT?

36. Having disposed of the matter we do not strictly need to address this further point but given the parties have submitted over 1000 pages of material to us and conducted an oral hearing, we feel that we should.

37. Contracts may provide on their terms that they are assignable, or not assignable, as the case may be.

38. If the contract is silent, it may not be assigned at common law without novation, or consent, or under section 199.

39. The exception to that rule is that contracts which are 'personal' may only be assigned with consent, and are not capable of assignment under section 199.

40. The obvious example of a personal contract is a contract which requires a specific individual (say an actor, or singer) to perform a particular service.

41. However the cases that the parties have referred us to demonstrate that the personal nature of contracts is not limited to individuals.

42. The Respondent asserts that these contracts were 'personal' because it placed a personal confidence in the Company as its counterparty based on, among other things, the Company's credit-worthiness and refers to the credit application approved by the Respondent in 2012.

43. The Claimant says that there is nothing in the nature of these contracts which is personal. It says that they are contracts for the sale of a simple primary commodity, entered into between corporate entities.

44. We accept that if the Contracts are to be considered personal, the issue of credit is central. And we also accept that while the issue of credit may have been critical to the Respondent, that alone may not render the contracts 'personal.'

45. We were referred to several helpful legal authorities. In particular the parties referred us to *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* (2006) 149 FCR 395, and the extremely helpful statement of propositions at para [32] of that judgment where the Court said;

While the product to be derived from a contractual performance may be assigned, the right to that performance may nevertheless be unassignable because having regard to the nature of the contract and the subject matter of the contractual rights in question, that right is personal in the sense that the identity of the contractual oblige is material to the contractual relationship itself (ie it is a "personal contract").

A contractual right, though, will not be personal if, construed in its setting, "it can make no difference to the person on whom the [corresponding] obligation lies to which of two persons [ie assignor and assignee] he is to discharge it".

46. We also noted the passage from *Tolhurst v Associated Portland Cement Manufacturers* [1903] AC 415 as extracted at page 119 of *Australis Media Holdings v Telstra Corp* as follows;

There are contracts, of course, which are not to be performed vicariously, to use an expression of Knight Bruce LJ. There may be an element personal skill or an element of personal confidence to which, for the purposes of the contract, a stranger cannot make any pretensions. But no one, I suppose, would seriously argue that a contract for delivery of chalk from particular quarries for the use of a particular cement works cannot be performed by any person for the time being possessed of the quarries, or that it can make the slightest difference to anybody who the proprietors of the cement works or the actual manufacturers may be, provided they are in a position to carry out the terms of the original contract.

47. It seems to us that there were two interdependent rights or obligations at play under the Contracts.

48. First, the Respondent was *obliged* to supply the relevant commodity to the Company at the contract price within the delivery period, in return for which the Company was obliged to pay.

49. Second, the Respondent was *obliged* to grant the Company credit and the Company had the *right* to deferred payment for the commodity so supplied, that is 30 days from the end of the week of delivery. It had acquired that right through applying for credit, which had been granted, and as a result of its trading history with the Respondent.

50. It is possible that even if the obligation to supply was not personal in nature, the grant of credit was personal, and could not be assigned. Given the interdependent nature of the rights and obligations, one could not be assigned without the other.

51. In the context of this case, it could perhaps be said that it probably made no difference to the Respondent who it supplied the *commodity* to.

52. However the same cannot be said in relation to the person it supplied *credit* to.

53. The Respondent had granted credit to the Company. At the time of the alleged assignment, it had not granted credit to the Claimant. It was not within the Company's power to assign that credit to the Claimant without the Respondent's consent which was never provided.

54. The Claimant relied heavily on the judgment of Slattery J in the District Court of South Australia in *Whites Hill (SA) Pty Ltd v All Commodities Pty Ltd (No.2) [2017]SADC 9.* The Company was the Defendant and **Mr A** referred to the matter during cross-examination.

55. In that case, Sapphire (SA) Pty Ltd (*Sapphire*) had sold almond hulls to the Company under contracts entered into around 5 March 2014. The hulls were supplied to the Company on about 7 and 13 March 2014.

56. Also in March 2014, Sapphire entered into formal deeds of assignment of the contracts to Whites Hill and gave notice of the assignment to the Company on 6 March, that is, shortly before the supply, and before payment fell due.

57. Sapphire was placed in external administration and NAB wrote to the Company confirming that Sapphire had assigned its debts to NAB.

58. For its part, the plaintiff argued that the contracts had been assigned before any debt accrued to Sapphire which would have been assigned to NAB.

59. The Company was therefore faced with a dilemma; should it pay the plaintiff as assignee, and face potential recourse from NAB, or should it pay NAB, and face an action (as occurred) from Whites Hill. Resolution of this question involved a detailed consideration of the nature and effect and timing of the assignments of the contracts.

60. The validity of the assignment itself was not in issue. As mentioned above and according to the judgment, formal deeds of assignment were executed.

61. However the situation is otherwise the reverse of this one. In *Whites Hill*, the assignment was of the obligation to make delivery, and the corresponding right to be paid. In this case, the purported assignment is the benefit of both the supply of the commodity, and the credit terms.

62. While the *Whites Hill* case provides a compelling example of the complex issues which can arise from the assignment of a commodity contract, it is otherwise of little direct assistance to us in this situation, even if we had not resolved the matter on another basis, in any event.

FAIR MARKET PRICE

63. While the question of damages does not arise given our findings above, we would have been troubled by the Claimant's assessment of fair market value.

64. First, there is no explanation as to why fair market value was only established in May 2019 when the event of default, that is, the Respondent's correspondence repudiating the Contracts, was dated 18 February 2019.

65. Second, the Claimant's assessment of fair market value is based solely on evidence provided by **Mr F** of [redacted], a producer and seller of cotton seed. His evidence is based solely on his own trading experience around the relevant time. We would generally expect such evidence to be provided by a broker or preferably brokers who have a broader overview of prices in particular markets.

COSTS

66. In accordance with GTA's standard practice, we have invited the parties to make submissions on costs, as if they were the successful party.

67. Both parties have made submissions which we have considered.

68. We are surprised by the amount of legal costs on both sides, which we consider to be excessive.

69. As the Respondent has been successful, it is appropriate that we make an award of costs in its favour, there being no factors raised by the Claimant which would incline us to depart from this general rule.

70. In its submissions in response dated 17 June 2020 (Response Submissions) the Claimant submits that we should award costs to be assessed. While this may have been GTA's practice in the past, GTA's current practice is to attempt to fix and award costs, to promote finality.

71. According to the Costs Schedule annexed to the Respondent's Costs Submissions dated 10 June 2020, the Respondent's total costs (including amounts paid to GTA, and GST) are $[redacted]. Profit costs, that is costs paid to their solicitors amount to $[redacted] (allowing for certain discounts).

72. In its Response Submissions, the Claimant urged us to award costs only on a 'party party' basis and allow the Respondent only 50% of its profit costs. While we are not inclined to award (in effect) indemnity costs, a 50% discount is extreme, even allowing for the Respondent's unsuccessful application for security for costs.

73. In all the circumstances, we allow $[redacted] (plus GST) as recoverable.

74. Total recoverable costs therefore are;

    (a) Profit Costs (inc GST) of $[redacted];

    (b) Disbursements (inc GST) of $[redacted];

    (c) Amounts paid to GTA of $[redacted].

    (d) Total of (a),(b) and (c) (inc GST) of $[redacted].

AWARD

75. For the reasons stated above, we make the following award;

(a) The Claimant's claim is dismissed;

(b) Fix the costs payable by the Claimant to the Respondent at $[redacted].

This award is published at Sydney, the sixth day of July 2020.

Mr Andrew Wilsdon

Mr Ole Houe

Mr Mark O'Brien