

**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)

Second Interim Award

A. Introduction

1. This is a Second Interim Award in now consolidated arbitrations conducted pursuant to the Dispute Resolution Rules of Grain Trade Australia Ltd (“**GTA**”).
2. On 12 September 2019 a first Interim Award was published consolidating GTA Arbitrations 310 and 311 into this reference Arbitration 312. That Award was made by the Chair.
3. In October the Respondent indicated that it wished to seek security for its costs of this arbitration. As the parties could not agree on a timetable to progress this application, on 16 October 2019 the Chair directed that;
 - (a) The Respondent’s submissions in support of the application for security for costs be served on or before 23 October;
 - (b) The Claimant’s submissions in opposition to the application be served by 30 October;
 - (c) The Respondent’s submission in reply be served by 6 November;
 - (d) The Respondent not be required to serve Points of Defence until further order.
4. In compliance with those directions, the parties have now served, and we have read and considered;
 - (a) The Respondent’s Submissions in Support of Application for Security for Costs dated 23 October 2019;
 - (b) Claimant’s Submissions in Response to Respondent’s Application for Security for Costs dated 30 October 2019; and
 - (c) The Respondent’s Submissions in Reply dated 6 November 2019 (**Reply Submissions**).
5. Also relevant is the Claimant’s Points of Claim dated 2 October 2019 (**Points of Claim**).

6. It does not appear to be in dispute that at the heart of this reference are 2 contracts as follows.
 - (a) Seed Sales Contract dated 21 November 2018 for the sale by the Respondent to (Company A) of 1500 metric tonnes of undelinted cotton seed at \$390 per metric tonne, for delivery FOT [REDACTED] Gin April-December 2019; and
 - (b) Seed Sales Contract dated 30 October 2018 for the sale by the Respondent to (Company A) of 4000 metric tonnes of undelinted cotton seed at \$383 per metric tonne, for delivery FOT [REDACTED] Gin, start of ginning 2019.

(Contracts)
7. These contracts were entered into by the Respondent as Buyer and a company called (Company A) as Seller.
8. According to the Points of Claim, the Claimant was incorporated on 24 January 2019. On or about 25 January 2019 (Company A) purported to assign the benefit of the Contracts to the Claimant. On or about 5 February 2019, (Company A) was placed into liquidation.
9. It is asserted by the Respondent that the assignments were invalid, and involved “cherry-picking” profitable contracts, such as those the subject of this arbitration, from unprofitable contracts which remained with (Company A). On 18 February 2019 the Respondent wrote to (Company A) (External Administration) advising that it elected to terminate the Contracts.
10. The validity of these assignments appears to be the central issue in dispute between the parties.
11. It is against this background the Respondent seeks security for costs.

B. Security for Costs

12. In summary, the Respondent says that it is entitled to security for costs (which it assesses at \$300,000) because the Claimant;
 - (a) Is a newly established entity with no apparent trading history;
 - (b) Has no evidence of available funding;
 - (c) Has a weak case which is destined to fail.
13. For its part, the Respondent says it;
 - (a) Has already offered reasonable security in the amount of \$25,000 by way of personal guarantee;
 - (b) Has a strong case in relation to the assignments; and
 - (c) Is not impecunious and has produced draft management accounts prepared by [REDACTED] [REDACTED] showing net assets of \$220,502.
14. The Respondent also submits that an appropriate course would be to determine the validity of the assignments as a preliminary issue. This course is opposed by the Respondent.
15. As the parties are aware, we have been invited to determine this application on documents alone. Neither party has submitted statements of evidence, sworn or otherwise. Any documents on which the parties seek to rely have been annexed to their submissions. This is efficient but means that our determination is of a summary nature.

16. We have come to the decision that the Respondent is not entitled to security for costs at this time because;
- (a) The evidence of impecuniosity, the threshold issue, is not compelling;
 - (b) It is arguable that the financial state of the Claimant has been contributed to by the Respondent's conduct (assuming of course that the assignments were valid);
 - (c) An order for substantial security as sought by the Respondent (as its primary submission) would tend to stultify the claims.

C. Preliminary Question

17. The Claimant has applied to have the question of validity of the assignments determined as a preliminary issue, and we have come to the view that the question is likely central to this dispute. It submits that this can be done on documents alone. While it may be true that a determination that the assignments are valid will not entirely resolve the dispute, a determination that they are invalid almost certainly will.
18. The Respondent opposes the application for determination as a preliminary issue including for the reasons set out at paragraph 7 of its Reply Submissions.
19. However the centrality of this issue does not mean that it suitable to be determined as a preliminary issue largely because we apprehend (without pre-judging) that if we determine that the assignments were valid, the remaining issues (including perhaps fair market value) are relatively contained and will be capable of determination relatively quickly.
20. It is also possible (again, without prejudging) that one or both of the parties may wish obtain and adduce evidence, possibly at an oral hearing.

D. Other matters

21. Submissions were exchanged in relation to an alleged default in the timing of the provision of submissions in relation to Security and/or Defence submissions.
22. These submissions were misguided and we do not feel the need to address them further.
23. As to the steps necessary to progress this matter to a final determination and the timing of those steps, we would like to allow the parties an opportunity to agree on procedural orders. They may apply to the Chair if they are unable to reach agreement.

E. Interim Award

24. For the reasons above, our Second Interim Award is;
- (a) The Respondent's application for security for costs is dismissed;
 - (b) The Claimant's application for determination of the validity of the assignments as a preliminary issue is dismissed.
 - (c) Costs of these applications is reserved.

This Second Interim Award is published at Sydney, the day of November 2019.

Mr Andrew Wilsdon, Chair nominated by GTA

Mr Ole Houe

Mr Mark O'Brien