ABN AMRO Bank NV, Singapore Branch *v* CWT Commodities (SEA) Pte Ltd [2011] SGHC 13

Case Number : Suit No 275 of 2009

Decision Date : 17 January 2011

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Herman Jeremiah, Joseph Lee, Zhulkarnian Abdul Rahim and Ross Tan (Rodyk & Davidson LLP) for the plaintiff; Kenneth Tan, SC and Soh Wei Chi (Kenneth Tan Partnership) for the defendant.

Parties : ABN AMRO Bank NV, Singapore Branch — CWT Commodities (SEA) Pte Ltd

Contract

17 January 2011 Judgment reserved.

Woo Bih Li J:

Introduction

1 The present dispute involves a claim by a bank against a warehouseman arising from a fraud perpetrated on the bank by a borrower in respect of collateral which the warehouseman had custody over. It raises the question of the scope and extent of a collateral manager's duties to his principal, as well as issues of causation and remoteness.

The facts

Background

2 The plaintiff, ABN AMRO Bank N.V., Singapore Branch ("the Bank"), provided trade financing to a company called Singapore Tin Industries Pte Ltd ("STI"), which was engaged in the business of tin refining and tin trading. Pursuant to a facilities agreement ("the Facilities Agreement") dated 27 August 2007, the Bank made advances to STI for the purchase of tin in various forms, such as tin concentrate and crude tin ingots. These advances were secured, *inter alia*, by STI pledging the purchased tin products (and refined tin ingots produced from its refinery) to the Bank as collateral. The present claim revolves around a substance known as tin dross, which formed part of the collateral pledged to the Bank by STI.

3 Tin dross is a by-product of the tin refining process. Crude tin is refined by being placed (in the form of ingots) into a large kettle and heated above the melting point of tin to produce molten tin. Certain processes are then applied causing the impurities in the molten tin to rise to the surface as a solid mixture, which is then skimmed off. This solid mixture of impurities is then placed into a liquation furnace and heated until any excess tin in the mixture melts and is extracted to be put back into the kettle. What is left is a dry form of tin dross which is then taken out of the liquation furnace. Tin dross is not a homogenous substance; it can consist of fine particles as well as solid lumps in various shapes and sizes. The fine particles generally consist of tin oxide while the lumps consist of iron-tin compounds and bits of tin metal. As is obvious from the above description, tin dross contains residual amounts of tin from the refining process.

4 The goods pledged by STI were not managed by the Bank directly. Instead, STI and the Bank entered into a collateral management agreement ("CMA") dated 24 August 2007 with the defendant, CWT Commodities (SEA) Pte Ltd ("CWT"), a company that provided general warehousing services, to supervise the receipt, storage and release of the pledged goods. CWT was previously known as C&P Asia (S.E.A.) Pte Ltd ("C&P") at the time of the CMA.

5 The CMA incorporated CWT's standard Forwarding Conditions and standard Warehousing Conditions insofar as they were not inconsistent with the principal terms of the CMA. These two sets of standard conditions were collectively referred to as "the FWC" in the CMA and I will adopt the same term accordingly. CWT's obligations under the CMA were, *inter alia*, to issue warehouse receipts ("WRs") and certificates of quality ("CQs") to the Bank in respect of goods brought into its custody. The WRs served as an account to the Bank that a certain type and quantity of goods had been received by CWT to be held as the Bank's collateral. The CQs were supposed to confirm that the goods conformed to the Bank's quality criteria in terms of having a minimum tin content. For any batch of goods brought into CWT's custody, the Bank would require a WR and a CQ to be issued before it would permit STI to make a drawdown under the Facilities Agreement to finance that particular batch of goods. CWT was also not permitted under the CMA to release any stored goods unless the Bank had issued release instructions to CWT. In consideration for its services, CWT charged a monthly management fee of US$4,000 which was payable by STI.

6 For the purposes of fulfilling its obligations under the CMA, CWT leased a warehouse ("the Warehouse") from STI within STI's own premises at 61 Tuas Crescent and another warehouse at 1 Tuas Avenue 3 from a related company, C&P Asia (S) Pte Ltd. The latter warehouse is not relevant for present purposes. CWT had sole management and control of the Warehouse and STI personnel had no access to it. All goods pledged by STI to the Bank were stored by CWT in the Warehouse.

The Bank's financing of tin dross

7 During the period of the CMA, CWT issued WRs and CQs in respect of goods delivered by STI into its custody. The collateral received by CWT consisted of tin ingots (both refined and unrefined), tin concentrate, tin slag and tin dross. With regard to tin dross in particular, CWT issued WRs and CQs in respect of seven batches of tin dross pledged by STI to the Bank, the details of which are set out as follows:

WR Number	**Date of WR**	**Weight of tin dross (metric tons)**	**Tin content as indicated by CQ (%)**
WRC20070901363	10 September 2007	136.686	94
WRC20071202088	6 December 2007	205.8775	85.9
WRC20080100126	18 January 2008	240.2005	91.86
WRC20080200442	21 February 2008	276.7615	86.69
WRC20080300882	28 March 2008	327.2105	81.96
WRC20080601868	10 June 2008	290.6495	87.45
WRC20080601881	11 June 2008	69.7050	87.45

8 For the purpose of issuing the CQs, CWT did not itself analyse the tin dross. The first batch (*ie*, WRC20070901363) was analysed by Singapore Test Services Pte Ltd ("STS"). The first batch of tin dross had actually been pledged by STI to its previous financier, the Development Bank of Singapore Ltd ("DBS") and held by CWT under a collateral management agreement with DBS similar to the present CMA. Although the analysis was carried out by STS, CWT issued its own CQ for DBS under its letterhead repeating the result of STS' analysis. [note: 1] When the Bank took over from DBS as STI's banker, CWT issued a fresh WR to the Bank for this batch of tin dross while using the same results from the original by STS to issue a fresh CQ for the Bank. [note: 2]

9 The subsequent batches of tin dross were analysed by Alex Stewart Assayers (S) Pte Ltd ("Alex Stewart"). Alex Stewart would analyse samples and issue certificates of analysis indicating only the percentage of tin content measured. Thereafter, CWT issued its own CQs to the Bank under its letterhead repeating the results of Alex Stewart's analyses, but stating that the analyses were conducted by Alex Stewart. CWT also attached the original certificates of analysis issued by Alex Stewart to its own CQs.

10 Based on the WRs and CQs issued by CWT for tin dross, the Bank advanced the following sums to STI:

Date of loan	**Amount**	**Repaid by STI?**
7 September 2007	US$2,443,230.18	Yes
10 December 2007	US$1,572,625.50	Yes
31 December 2007	US$846,798.34	Yes
21 January 2008	US$3,047,702.98	Yes
26 February 2008	US$3,538,287.22	Yes
2 April 2008	US$2,291,036.08	No
4 April 2008	US$2,336,439.60	No
17 June 2008	US$4,850,256.04	No
18 June 2008	US$1,124,352.28	No

STI's fraud

11 Unfortunately for the Bank, STI had been perpetrating a fraud on it. This fraud essentially consisted of the round-tripping of tin dross inventory. The seven batches of tin dross stored by CWT (referred to at [7] above) were purportedly purchased by STI from third parties and sold to other third parties and the Bank advanced money to STI in the belief that it was financing such purchases. The Bank subsequently issued release instructions to CWT to deliver the tin dross to STI, who was then supposed to deliver it to the third party buyer. Out of the seven batches of tin dross, the Bank issued release instructions to CWT for the first five batches. No release instructions were given for the remaining two batches, *ie*, WRC20080601868 and WRC20080601881. The release instructions were given on the following dates:

(a) WRC20070901363 – 29 November 2007

(b) WRC20071202088 – 14 and 15 January 2008

(c) WRC20080100126 – 18 and 19 February 2008

(d) WRC20080200442 – 25 March 2008

(e) WRC20080300882 – 6 June 2008

12 However, apparently, no actual sale of tin dross was made and the released stocks of tin dross were never physically removed from the Warehouse. This was because STI chose not to take physical delivery of the tin dross from CWT, but instead signed to acknowledge receipt of the same and gave instructions for the same to be retained in the Warehouse. CWT thus held onto the released batches of tin dross but placed them apart from the collateral that was still held for the Bank.

13 The tin dross that was released from the Bank's security (but which physically remained in the Warehouse) was subsequently combined with additional tin dross which STI delivered to the Warehouse from outside to obtain an additional advance from the Bank. This additional dross had been generated by STI itself from its refining process. CWT would then issue a fresh WR and CQ to the Bank in respect of the combined tin dross. The tin dross that was previously released (and placed apart from the Bank's remaining collateral) and the additional tin dross would then be placed together with the remaining collateral. From CWT's perspective, this was done on the basis that STI had re-pledged the released batch of tin dross to the Bank as fresh security together with the additional dross brought into the Warehouse. The Bank did not know that the tin dross being pledged included those previously released as it had thought that the released tin dross had been sent to the third party buyer. It believed instead that the tin dross was purchased entirely from a third party by STI.

14 The following is an illustration of how the round-tripping of tin dross worked. CWT issued a WR and CQ for 136.686 metric tons of tin dross on 10 September 2007. This was the first batch of tin dross stored in the Warehouse which the Bank had taken over from DBS. This batch of tin dross was released for sale on 29 November 2007 and STI would have signed to acknowledge receipt of the tin dross although the tin dross did not leave the Warehouse physically. Subsequently, STI delivered 69.1915 metric tons of tin dross to the Warehouse from its own refinery. This additional tin dross was combined with the released batch of tin dross to form a new batch of tin dross totalling 205.8775 metric tons. This became the second batch of tin dross and CWT accordingly issued a fresh WR and CQ for it on 6 December 2007. The process then repeated itself with STI adding new quantities of tin dross produced from its refinery each time round. This was the reason for the increasing quantity of tin dross in each subsequent batch pledged as collateral.

15 The effect of these transactions was that the Bank ended up advancing money to STI in the belief that STI's existing stocks of tin dross were being sold for value, and that it was financing the purchase of new batches of tin dross. The reality was that the Bank was advancing money on the security of tin dross produced entirely by STI and left to accumulate in the Warehouse.

STI's default and the Bank's attempt to realise its security

16 STI defaulted on its loans in early July 2008. On 20 October 2008, the Bank appointed one Timothy Reid ("the Receiver"), a partner of Ferrier Hodgson Pte Ltd, as receiver and manager of the goods stored by CWT. STI's fraud was subsequently uncovered through the Receiver's investigations. The Receiver then attempted to dispose of the remaining tin inventory in the Warehouse.

17 Around the same time, CWT on the instructions of the Bank had appointed a company called Inspectorate (Singapore) Pte Ltd ("Inspectorate") to take samples of and analyse tin dross in the Warehouse. On 17 October 2008, Inspectorate took samples to do the analysis. The results from the analysis showed that the tin content in the dross varied considerably and, more importantly, was lower than what was represented in the CQs.

18 On or about 28 November 2008, Inspectorate took samples of tin dross to conduct a second analysis, this time on the instructions of the Receiver. The results of this second analysis were similar to the first in that the tin content in the drums of tin dross tested was lower than what the CQs represented and contained a large degree of variance.

19 To make matters worse, the Bank said that it was not even able to sell the tin dross to recoup a part of the monies it had advanced to STI because the dross was contaminated. The Receiver alleged that a prospective third party buyer had offered to purchase the Bank's stock of tin dross and tin concentrate, and to dispose of the tin slag in the Warehouse, for US$10,000. Apparently, the buyer was unable to offer more because the tin dross contained toxic substances. The Receiver informed the Bank of this matter and the Bank decided to dispose of the tin dross rather than risk a breach of any environmental regulations. On or about 6 August 2009, the Receiver appointed a waste management company, ECO Special Waste Management Pte Ltd ("ECO"), to dispose of the tin dross and tin concentrate. Prior to disposal, ECO conducted random tests on two samples of the dross. The results showed that the samples tested had very low tin content and lead was also detected. The Receiver understood from relevant environmental regulations that once lead was detected in waste material, it was classified as toxic waste which required solidification and stabilisation treatment before it could be disposed of. The Receiver ended up incurring $104,860 in fees to ECO to treat and dispose of the contaminated tin dross.

20 The Bank managed to recover part of STI's overall outstanding loans by looking to its other forms of security. Through the efforts of the Receiver, the Bank managed to sell the remaining goods in the Warehouse (consisting of tin ingots and tin concentrate), as well as STI's premises at 61 Tuas Crescent and the machinery contained therein. The Receiver also applied for and obtained a winding-up order on 17 July 2009 against a company called KJP International (S) Pte Ltd ("KJP"), which was one of STI's major debtors. KJP played a role in the round-tripping of tin dross inventory by STI and this will be elaborated on below.

21 The Bank also issued a request under a standby offtake contract dated 2 October 2007 between the Bank and a Chinese company called Yunnan Tin Co Ltd ("Yunnan Tin"). This standby offtake contract was part of the Bank's security under the Facilities Agreement and essentially obligated Yunnan Tin to purchase, upon the Bank's request, STI's tin inventory in such quantity and upon such terms as the Bank may specify in its request. However, Yunnan Tin refused to comply with the Bank's request to purchase the tin dross (before it was disposed of by the Receiver) apparently on the basis that tin dross was not within the scope of the standby offtake contract. The Bank commenced arbitration proceedings against Yunnan Tin on 16 April 2009. Those proceedings are ongoing.

22 Lastly, the Bank called on the personal guarantees given by STI's directors pursuant to the Facilities Agreement and eventually obtained bankruptcy orders against them. STI itself was wound

up on 18 December 2009 upon the application of the Bank.

23 Despite the Bank's efforts to realise its security, there was still an outstanding amount of more than US$50m. The Bank accordingly brought this action against CWT in early 2009 in respect of the unpaid part of its advances which was used to finance the purchase of tin dross, alleging that CWT had breached its contractual obligations to the Bank or had fraudulently or negligently made representations to it which caused it to continue advancing money to STI based on, *inter alia*, the security of the tin dross.

The Bank's claim

24 The Bank's complaint against CWT rests on two main grounds. First, CWT was contractually obliged to release tin dross (when authorised by the Bank) by physically delivering the tin dross out of the Warehouse to the party designated by the Bank *ie*, STI. It was not to allow a notional delivery and retain tin dross in the Warehouse, whether or not the tin dross was segregated from the remaining collateral. Likewise, CWT was contractually obliged to accept tin dross only if it was physically delivered into the Warehouse and not if the tin dross was already in the Warehouse.

25 The Bank further contended that it was an implied term of the CMA that CWT would inform the Bank if the released tin dross was not in fact delivered out of the Warehouse and also if the tin dross for which WRs and CQs were issued was not in fact tin dross delivered into the Warehouse, but was part of the dross retained in the Warehouse, although segregated from the remaining collateral. In omitting to inform the Bank, CWT had falsely represented that the released tin dross was physically delivered out of the Warehouse and that tin dross for which WRs and CQs were issued was physically delivered into the Warehouse.

26 The Bank's second complaint against CWT was that CWT had issued false or misleading CQs which represented that the tin dross in the Warehouse contained a higher percentage of tin than was actually the case.

27 The Bank alleged that by reason of CWT's wrongs as described above, it advanced money to STI to finance alleged purchases of tin dross which it otherwise would not have done. The total outstanding amount of these advances (referred to at [10] above) is US$10,602,084. The Bank has also claimed the additional $104,860 incurred in treating and disposing of the tin dross.

CWT's defence and counterclaim

28 CWT raised a number of defences to the Bank's claim. First, it contended that tin dross was not even covered by the CMA.

29 Secondly, even if tin dross was covered by the CMA, CWT contended that:

(a) it was allowed to keep released tin dross in the Warehouse so long as they were segregated from the remaining collateral and to issue WRs and CQs for tin dross which included those retained and segregated in the Warehouse;

(b) it was under no duty to inform the Bank that released tin dross was not physically delivered out of the Warehouse or that tin dross for which WRs and CQs were issued included those retained and segregated in the Warehouse; and

(c) it assumed no responsibility for the analyses for tin dross which were carried out by Alex

Stewart; and, in any event, the Bank did not establish that the level of tin stated in such analyses was incorrect.

30 Thirdly, CWT contended that even if it had breached the CMA or its duty of care to the Bank, the Bank's loss was not caused by such breach, but rather by its own failure to properly assess the creditworthiness of STI and to note red flags in the course of its dealing with STI. Fourthly, the loss suffered by the Bank was too remote in any event.

31 CWT was also relying on a number of exclusion and limitation clauses contained in the CMA. It has since abandoned its reliance on these clauses.

32 Finally, CWT is also counterclaiming against the Bank for the sum of US$8,000 as two months' outstanding management fees under the CMA.

Whether tin dross was covered by the CMA

CWT's case

33 Counsel for CWT, Mr Kenneth Tan, submitted that tin dross was not covered by the CMA. The term "Goods" was defined in Clause 1.1 of the CMA to mean "all tin ingots (whether in the form of SN or SN+) and work in progress from time to time delivered to C&P by or on behalf of BORROWER". [note: 3] SN and SN+ were in turn defined to mean unrefined raw material and refined tin ingots of London Metal Exchange ("LME") grade respectively, while "Work In Progress" was defined as "the period in which and process of, the Goods being converted from SN to SN+". [note: 4] Mr Tan thus argued that "Goods" under the CMA referred to tin ingots, whether they were being stored in the Warehouse or in the process of being refined. Tin dross, as a by-product of the refining process, could not conceivably be work in progress as it cannot be put back into the refinery to obtain refined tin of LME grade. Thus, CWT's obligations to the Bank in relation to tin dross were governed instead by the FWC referred to at [5] above. There were therefore two separate regimes. The first was for tin ingots and Clauses 1 to 17 of the CMA (*ie*, all the clauses of the CMA) applied to that. The second regime was for tin dross, for which none of the clauses in the CMA applied and only the FWC applied.

34 Mr Tan supported his argument by pointing out that Appendix IV of the CMA expressly set out a process for CWT to conduct analyses on samples of tin ingots under its custody using an instrument called an ARC/Spark Optical Emission Spectrometer for the purposes of issuing CQs for tin ingots. [note: 5] In contrast, the CMA did not stipulate any process for the analysis of tin dross and the ARC/Spark Optical Emission Spectrometer used to analyse tin ingots was not suitable for analysing tin dross.

35 Mr Tan also sought to rely on Clauses 16.5 and 16.6 of the CMA which stated that any waiver or amendment (respectively) of the CMA would only be effective if it was made in writing. [note: 6] As there was neither a waiver nor an amendment, the Bank could not contend now that tin dross was covered by the CMA.

The Bank's case

36 Counsel for the Bank, Mr Herman Jeremiah, submitted on the other hand that tin dross was covered under the CMA because it could be classified as either work in progress forming part of the "Goods" under Clause 1.1 of the CMA, or tin concentrate which was undefined. Mr Jeremiah pointed out that the phrase "work in progress" in the definition of "Goods" was not capitalised and should not

be taken to refer to "Work In Progress" which was defined elsewhere in Clause 1.1 to refer to a period of time instead of physical goods. Mr Jeremiah thus argued that tin dross could constitute work in progress because it was a product that had not reached its end stage and could be further treated to extract its tin content.

37 Mr Jeremiah submitted in the alternative that tin dross could be considered as a form of tin concentrate. As tin concentrate was not defined in the CMA, Mr Jeremiah contended that it should be taken to refer to anything containing a high percentage of tin. This interpretation was supported by the evidence of one of the Bank's witnesses, Clement Tan, who was a relationship manager of the Bank and who was part of the Bank's deal team in the negotiations leading to the Facilities Agreement and CMA. Clement Tan testified that when these agreements were negotiated, no one had an expert knowledge of tin products and the Bank's paramount concern at the time in relation to the collateral pledged by STI was whether it contained a high level of tin. [note: 7] Thus, the Bank had not intended to restrict the scope of the Facilities Agreement and CMA to limited, specific types of tin products only.

38 Mr Jeremiah lastly submitted that in any event, CWT was estopped by convention from denying that tin dross was covered by the CMA because both it and the Bank had always acted under such an assumption. Clause 5.6 of the CMA stated that CWT shall not issue WRs in respect of "Goods" that did not conform to the Bank's quality criteria. [note: 8] Since CWT had issued WRs in respect of tin dross, it must have regarded tin dross as falling within the scope of the CMA. The same reasoning applied when CWT issued CQs in respect of tin dross as there was no requirement for CQs to be issued if only the FWC applied.

39 Mr Jeremiah also pointed out that CWT had originally conceded in its pleadings that tin dross was treated by the parties as being covered under the CMA. In its Defence and Counterclaim filed on 15 June 2009, CWT stated at para 7:

> Paragraph 5 of the Statement of Claim is admitted to the extent that Tin Dross was also treated by the parties as being covered under the CMA, save that the Quality Certificates to be issued in respect of the Tin Dross under the CMA were based on quality analyses carried out by Messrs Alex Stewart Assayers (S) Pte Ltd.

It was only from 9 June 2010 when CWT filed its Defence and Counterclaim (Amendment No 3) that it took the position, for the first time, that tin dross was not covered by the CMA. Mr Jeremiah thus contended that CWT's change in position was a clear afterthought.

The court's decision

40 I am of the view that it is not necessary for me to rule whether, as a matter of contractual interpretation, tin dross fell within the scope of the CMA. The evidence shows quite clearly that both the Bank and CWT had operated on the assumption that it did. In coming to this finding, I took the following factors into account.

41 First, there was only one regime under the CMA. Goods either came within the CMA or they did not. The recitals to the CMA referred only to "the Goods" as defined therein. If a particular type of goods came within the CMA, then the CMA applied together with the FWC except to the extent of any inconsistency between the two documents, in which case the terms of the CMA prevailed. The FWC was part of the CMA and did not apply separately and independently of the CMA as Mr Tan had submitted.

42 Secondly, while the FWC might also suggest the issuance of WRs, there was no requirement thereunder for the issuance of CQs. I agree with Mr Jeremiah that there was no reason for CWT to issue CQs for tin dross unless it had regarded tin dross as falling under the CMA. Mr Tan argued that although CWT had no obligation to issue CQs for tin dross if it was not covered by the CMA, CWT was not precluded from doing so. In other words, CWT could do more than it was obligated to do. However, this really begs the question why CWT bothered to issue CQs for tin dross (which also involved obtaining analyses from Alex Stewart) in the first place. Although CWT's director and main witness, Glen Creighton ("Creighton") testified in cross-examination that CWT issued CQs for tin dross to the Bank at STI's request, [note: 9] he did not explain why STI would have made such a request if tin dross was not covered by the CMA. He also did not explain why CWT issued CQs for tin dross under its own letterhead instead of simply forwarding the original certificates of analysis by Alex Stewart to the Bank, if he believed that tin dross was not covered by the CMA.

43 This brings me to a third point: tin dross was not even supposed to be stored in the Warehouse if it was not covered by the CMA. Clause 9.2 of the CMA provided that STI "shall not allow or attempt to store or place any other goods in the Warehouse Facilities without the prior written consent of ABN AMRO and C&P." [note: 10] As will be seen below, Creighton was fully aware of this provision. At no time did he consider STI to be in breach of it when tin dross was stored in the Warehouse. I have already rejected Mr Tan's submission that there were two regimes, one of which was purportedly separate from the CMA.

44 Finally, I come to arguably the most damning evidence against CWT on this point. I agree with Mr Jeremiah that the initial position taken by CWT in its pleadings was further evidence that the parties had acted on the basis that tin dross was covered by the CMA. Creighton claimed in cross-examination that CWT had actually clarified instead of changed its position when it amended its Defence and Counterclaim in 9 June 2010 to contend that tin dross was not covered by the CMA. [note: 11] I do not accept his evidence because it is clear that CWT had made a complete U-turn in its defence. Creighton's evidence about clarification reflected poorly on his credibility.

45 The law on estoppel by convention is settled. In *Travista Development Pte Ltd v Tan Kim Swee Augustine* [2008] 2 SLR(R) 474 ("*Travista Development*"), the Court of Appeal held at [31] that the following elements must be present to found an estoppel by convention:

(a) The parties must have acted on an assumed and incorrect state of fact or law in their course or dealing.

(b) The assumption must be either shared by both parties pursuant to an agreement or something akin to an agreement, or made by one party and acquiesced to by the other.

(c) It must be unjust or unconscionable to allow the parties (or one of them) to go back on that assumption.

46 As regards the first element, I do not read the Court of Appeal's judgment in *Travista Development* as laying down a rule that the party seeking to invoke the estoppel also has to *prove* that the assumed state of fact or law is incorrect. The doctrine of estoppel by convention operates to preclude a party from denying the truth of an assumed state of affairs if it would be unjust or unconscionable to allow him to go back on it: *Singapore Telecommunications Ltd v Starhub Cable Vision Ltd* [2006] 2 SLR(R) 195 at [28]. Although the assumed state of affairs would usually turn out to be incorrect in most cases, the actual veracity or falsity of the assumption is irrelevant because the estopped party is simply barred from putting it in issue. The parties' rights are regulated "not by

the real state of facts, but by that conventional state of facts which the two parties agree to make the basis of their action": per Lord Blackburn in *Burkinshaw v Nicolls* (1878) 3 App Cas 1004 at 1026. There is thus no need for the Bank to prove that the assumption in this case was false in order to invoke estoppel by convention.

47 On the facts, both CWT and the Bank had acted on the basis that tin dross fell within the CMA and this assumption was shared by both parties pursuant to the CMA. It would be unjust in the circumstances to allow CWT to go back on this assumption because it knew that the Bank would be acting on the basis that tin dross came within the CMA and advance money on the security of the tin dross even though CWT was not aware of the exact details of the financing arrangement between the Bank and STI. Thus, CWT is estopped from contending that tin dross did not fall under the CMA.

48 I also reject Mr Tan's reliance on Clauses 16.5 and 16.6 of the CMA. The parties had assumed that tin dross was covered by the CMA and thus the question of waiver or amendment did not arise.

Whether CWT was under a duty to inform the Bank that tin dross was not physically leaving and entering the Warehouse and whether it had breached that duty

The Bank's case

49 Mr Jeremiah submitted that CWT was obligated under the CMA to ensure that batches of tin dross released pursuant to the Bank's release instructions were physically delivered out of the Warehouse. CWT was also obligated not to issue any WRs or CQs for new batches of tin dross that were not physically received into the Warehouse from outside. In this regard, Mr Jeremiah relied on Clauses 5.3 and 6.5 of the CMA. Clause 5.3 stated: [note: 12]

> C&P represents and warrants that any Warehouse Receipts issued by C&P are on the basis of quantity of the Goods *actually received into* the Warehouse Facilities in accordance with the terms of this Agreement.
>
> [emphasis added]

50 Clause 6.5 of the CMA stated: [note: 13]

> (a) C&P shall at all times ensure that releases are carried out on a tonnage basis, with no separation or segregation by type or by grade of the goods; and in accordance with the provisions of this Agreement.
>
> (b) In the case of Goods released for the purpose of being refined into SN+, all tin ingots released shall be delivered directly into the Refinery and signed for by BORROWER, unless otherwise directed by ABN AMRO.
>
> (c) *In all other cases, all Goods released shall be delivered out of the relevant Warehouse Facility and signed for by ABN AMRO's nominee*.
>
> (d) ...
>
> [emphasis added]

51 Mr Jeremiah also relied on Clause 9.2 of the CMA which, as mentioned above at [43], stipulated that STI shall not allow or attempt to store or place any other goods in the Warehouse without the

prior written consent of the Bank and CWT. He submitted that Clause 9.2 precluded the storage of released tin dross with remaining tin dross still held as the Bank's collateral.

52 By reason of the above obligations, Mr Jeremiah submitted that it was an implied term of the CMA that CWT would inform the Bank if these physical movements were not taking place. This was because such an implied term was necessary to give business efficacy to the CMA.

53 Mr Jeremiah further relied on two of CWT's own documents to support the implication of such a term. First, CWT's manual of standard operating procedures stated at Clause 8.01: [note: 14]

> If goods have been released and signed for, but have not physically left the warehouse, we are still technically responsible for their care and protection. In such cases, domestic HQ must issue a separate daily report showing details of released goods still in warehouse. This in turn must be forward by Back Office Singapore to the financing bank, until such time as the goods actually leave the warehouse.

Creighton admitted in cross-examination that these guidelines represented best practices. [note: 15]

54 Secondly, there was a page from CWT's website promoting its expertise in collateral management services for banks and financial institutions involved in trade finance. The website stated, *inter alia*, that CWT "provides banks and clients with an impartial and professional service in support of international trade", [note: 16] and contained a diagram illustrating CWT's involvement as the collateral manager in a typical trade financing arrangement. This diagram showed that goods which were the subject of trade finance would be delivered from CWT to a third party buyer. The third party buyer pays the trader for the goods, and the trader in turn repays the financing bank. Creighton admitted in cross-examination that he was familiar with this diagram. [note: 17] Mr Jeremiah submitted that CWT was thus aware that there had to be movement of goods in a trade financing arrangement in order for the financing bank to be paid.

55 Mr Jeremiah concluded that since CWT did not inform the Bank that tin dross was not physically leaving and entering the Warehouse, it had breached the implied term of the CMA.

CWT's case

56 Mr Tan submitted that when Clause 5.3 of the CMA was read in context and in accordance with commercial intent, CWT would have "actually received" tin dross when it took the tin dross into its custody, whether the tin dross came from outside the Warehouse or not.

57 As for CWT's obligation in releasing tin dross, Mr Tan relied on Clause 6.4 of the CMA which stated: [note: 18]

> C&P shall have no responsibility or liability towards BORROWER, ABN AMRO or any other party for the Goods after they have been properly released from the Warehouse Facilities in accordance with ABN AMRO's Release Instructions and signed for by BORROWER.

Due to a drafting error, there were actually two Clauses 6.4 in the CMA. Mr Tan was referring to the first Clause 6.4. Mr Tan argued that since STI had already signed to acknowledge receipt of the tin dross from CWT, the dross was considered to be properly released to STI and there was no further obligation on CWT.

58 Mr Tan thus concluded that CWT's duties to the Bank only related to keeping intact the tin dross held by it as collateral for the Bank, and that such duties ceased once the Bank had issued release instructions for the dross and STI signed to acknowledge receipt of the same. If STI subsequently chose to re-pledge the released tin dross as fresh collateral, that was its prerogative. CWT's role was that of a mere warehouseman and it was not privy to the financial arrangement between STI and the Bank, or the commercial transactions between STI and third parties. It was therefore not CWT's responsibility to enquire further if tin dross which had been released to STI for the purposes of sale to third parties was instead re-presented as fresh collateral.

59 Mr Tan further pointed out that CWT had to deliver the tin dross to STI at the same premises used by both parties (*ie*, 61 Tuas Crescent). It therefore made little difference if the released tin dross had been physically moved out of the Warehouse for a few metres and brought back in later. Creighton testified in his affidavit of evidence-in-chief ("AEIC") that it was not unusual for STI to experience delays in the physical collection of released goods and it was practical in such situations that CWT allowed STI to keep the released tin dross in the Warehouse until physical collection was required. [note: 19]

60 Similarly with regard to batches of tin dross being pledged or re-pledged, Mr Tan submitted that there was also no requirement for such goods to be physically received from outside the Warehouse before CWT could issue WRs and CQs. As long as the goods did not already form part of the existing stock of collateral, CWT could receive it. Mr Tan argued that because there was no obligation on CWT to ensure that tin dross was physically leaving and entering the Warehouse, it would therefore have no duty to inform the Bank that any dross which was released had in fact remained in the Warehouse.

61 Finally, Mr Tan sought to rely on Clause 9.1 of the CMA which stipulated that CWT was to demarcate and designate a separate area in the Workshop for storage of "the Goods exclusively". [note: 20] He argued that this meant that CWT could store released tin dross in a different part of the Warehouse.

62 As for Clause 9.2 of the CMA, Mr Tan suggested in his opening statement that it imposed an obligation on STI but not CWT not to store other tin dross with tin dross still held as collateral.

The court's decision

63 I am of the view that when Clauses 5.3 and 6.5 are read together, it is clear that they related to the physical movement of pledged goods into and out of the Warehouse. Indeed, the words used in Clause 5.3 are "actually received into". In my view this means physical receipt of goods into the Warehouse.

64 The reference in Clause 6.5(c) that released goods shall be "delivered out" of the Warehouse was also self-explanatory. It clearly referred to physical delivery out of the Warehouse. Significantly, Mr Tan did not suggest any other meaning but he sought to avoid Clause 6.5(c) by relying on Clause 6.4 as I mentioned above. In my view, Clause 6.4 did not assist CWT because it proceeded on the premise that goods have been "properly released". There was no elaboration on what that phrase meant.

65 Indeed, it appears that CWT itself initially acted on the basis that released goods which were not physically delivered out of the Warehouse would still be regarded as part of the Bank's collateral. In January 2008, the Bank's officer Frank Egberts ("Egberts"), who was at the material time in charge

of approving STI's requests for drawdowns under the Facilities Agreement, asked CWT why goods that had been released by the Bank were still reflected in CWT's weekly reports as remaining in the Warehouse. CWT's officer, one Debby Subramaniam, replied in an email dated 25 January 2008 as follows: [note: 21]

> Dear Frank,
>
> With regards to your queries below, we've received & acknowledged the authorized releases for WRC20071202299 on various dates. The release authorisations were then emailed to our colleagues situated at STI premises.
>
> *However, as the goods are still physically in our warehouse, we do not deduct the stocks from our system. Thus, you'll still be able to see the balance quantity in our weekly stock report*.
>
> *It's only when the receiver comes to actually collect the goods & they are physically taken out from the warehouse, do we then deduct the stocks from the system. This is to ensure the accuracy of goods being released out of the warehouse*. Therefore, the Date Out column in the stock movement report shows the actual release date being appended.
>
> [emphasis added]

66 A draft of the above reply had been reviewed by Creighton before it was sent to Egberts. Creighton sought to explain during the trial that what Debby Subramaniam meant was that it was only if the goods had not been *signed for* by STI that they would still be regarded as part of the Bank's collateral. [note: 22] However, it is clear to me that that was not what Debby Subramaniam was saying. Creighton was again not being truthful. In my view CWT had initially acted on a certain basis *i.e*. that it would still record goods remaining in the Warehouse as part of the Bank's collateral even if they had been signed for by STI after the Bank had issued release instructions to CWT. Presumably, CWT changed this practice some time later so that the goods were no longer recorded as part of the Bank's collateral once STI had signed for them, but apparently, the Bank was not notified of the change.

67 As for Clauses 9.1 and 9.2, they must be considered together. The duty to demarcate and designate a separate area for storage of goods used as collateral must be read together with the duty not to commingle them with other goods. I accept that it might have been arguable that the reference to "other goods" in Clause 9.2 meant other types of goods *eg*, copper as opposed to tin, but that was not Mr Tan's argument. He accepted that the reference to "other goods" in Clause 9.2 referred to released tin dross as well (if tin dross came within the CMA). [note: 23] His argument instead was that Clause 9.2 imposed an obligation on STI only. In my view that cannot be right. If STI was precluded from storing released tin dross in the Warehouse then it must follow that CWT could not allow released tin dross to be retained in the Warehouse.

68 Although Creighton said in cross-examination that the provision in Clause 9.2 against commingling would only arise if there was a threat of the Bank's goods being contaminated or compromised, [note: 24] his testimony was contradicted by an email which he himself had written. In an email dated 14 November 2008 to CWT's operations assistants in charge of the Warehouse, Anson Yip and Devan Subramaniam, Creighton wrote: [note: 25]

> Dear Anson and Devan,

Tan Aik Kiat of Ferrier Hodgson just called. He wants to move some tin ingot which is currently sitting outside our warehouse at STI and put it into the warehouse managed by CWT.

Although *this would technically constitute commingling and therefore a breach of the CMA*, we will proceed to move this material into our managed warehouse on the basis that it gives the Bank and / or creditors additional security and, is therefore in the best interests of all parties.

Devan/Anson please tally and, weigh this material as it enters the warehouse and keep it in a clearly defined separate area from Bank financed material. Send us your tally reports upon completion and, we in turn will put these ingots onto our daily stock and inventory reports.

For the sake of good order, we would ask that ABN AMRO confirm their understanding and acceptance of this arrangement so that CWT does not incur any liabilities, as a result of commingling.

[emphasis added]

69 This email was followed by another email dated 17 November 2008 to the Bank's officers Tjeerd Buurma and Clement Tan, where Creighton wrote: [note: 26]

Dear Tjeerd and/or Clement,

Just for the sake of good order, can you please acknowledge and confirm acceptance of commingling status.

I inspected the cargo on Friday afternoon and can assure you that it is clearly segregated from other Bank financed material and, stored in separate identifiable lots.

70 The above email clearly showed that Creighton regarded the placing of other goods in the Warehouse to be in breach of Clause 9.2 of the CMA, notwithstanding that such goods were segregated from the Bank's collateral and there was no risk of physical commingling or contamination.

71 In my view, it is clear from Clauses 5.3, 6.5(c) and 9.2 of the CMA that CWT was to physically deliver tin dross out of the Warehouse after its release by the Bank, and to issue WRs and CQs only in respect of tin dross physically received into the Warehouse. I am also of the view that such an obligation was mandated not only by a plain reading of the above clauses, but by a contextual interpretation of the CMA.

72 It must be remembered that the CMA was not an ordinary warehousing contract for the storage of goods, but a contract for the storage and management of goods as part of a trade finance arrangement. In such arrangements, the financing bank pays for goods which the borrower purchases from a third party seller and then pledges to the bank as security. When the borrower sells the goods to another third party, the bank will release the goods from its custody and get repaid when the third party buyer pays the borrower.

73 In other words, goods pledged in the context of a trade finance arrangement should not be physically remaining in the custody of the financing bank or its collateral manager once they are released by the bank. Similarly, goods which the bank decides to finance should not be coming from goods physically within the bank's or its collateral manager's custody since they are supposed to have been purchased from a third party. This was something CWT must have known generally (even if it did not know the exact details of the financing arrangement between STI and the Bank), as was

evidenced by the diagram displayed on its website (see [54] above). In addition, CWT's own manual of standard operating procedures directed CWT to inform the financing bank if released goods did not physically leave its warehouse (see [53] above).

74 I am of the view, from a plain and contextual reading of the provisions of the CMA that there was an implied term for CWT to inform the Bank if tin dross was not physically leaving and entering the Warehouse.

75 The law governing the implication of terms into a contract was comprehensively stated in *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927, where Andrew Phang Boon Leong J held that a term would be implied into a contract in fact if it passed the complementary "business efficacy" and "officious bystander" tests. In reviewing the authorities, Phang J cited with approval the following passage from Scrutton LJ's judgment in *Reigate v Union Manufacturing Company (Ramsbottom), Limited and Elton Copdyeing Company, Limited* [1918] 1 KB 592 at 605:

> A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, "what will happen in such a case," they would both have replied, "Of course, so and so will happen; we did not trouble to say that; it is too clear." Unless the Court comes to such conclusion as that, it ought not to imply a term which the parties themselves have not expressed.

76 In my judgment, it was necessary for the efficacy of the CMA to imply a term that CWT would inform the Bank if the pledged goods including tin dross were not physically leaving and entering the Warehouse after they were released by the Bank and re-pledged by STI respectively.

77 I should mention another point. Email between Creighton and CWT's staff indicated that the danger of double financing was brought to Creighton's attention but he was of the view that STI was not engaged in double financing but repeat financing and he saw nothing wrong with the latter. In other words, STI was not obtaining financing from two lenders at the same time on the same batch of goods, *ie*, double financing. It had obtained the Bank's release of one batch of goods which was used (with an additional quantity) to obtain financing again, *ie*, repeat financing. In his view, there was nothing wrong with STI obtaining repeat financing if the Bank was prepared to release the goods from its collateral and then advance money on the same goods again. While there is some merit in Creighton's view, it is important to note that the Bank was not aware that it was advancing money on the same batch of goods.

78 It is also important to remember that each time the Bank released its collateral it was for the purpose of allowing that batch of goods to be delivered to a purchaser thereof. In other words, the Bank believed that the tin dross could be sold and was being sold to third party purchasers. CWT must have known that much because although the Bank's release instructions to CWT designated STI as the receiving party, the name of the third party purchaser was usually also mentioned therein. It seemed to me that Creighton had overlooked these facts.

79 So even if CWT did not know that the Bank had believed that STI was purchasing the tin dross initially, CWT knew, at the least, that the Bank was acting on the basis that the released tin dross was being sold.

80 As for Mr Tan's argument that there would not have been much practical difference if the tin dross had been delivered out of the Warehouse after their release by the Bank, and then brought

back in again by STI when they were re-pledged as fresh collateral, this was a separate point that was not relevant here.

81 If the released tin dross had been physically delivered out of the Warehouse to STI and if CWT knew that STI was using it as fresh collateral by re-delivering it to the Warehouse, it is arguable whether CWT would still be under a duty to inform the Bank that the tin dross was not in fact delivered to a third party buyer. However, this question did not arise on the facts before me. I am satisfied that CWT was in breach of the implied provision in the CMA requiring it to inform the Bank if tin dross was not physically leaving or entering the Warehouse.

Whether CWT had assumed responsibility for the analyses of tin dross conducted by Alex Stewart

82 The Bank's second complaint against CWT relates to the CQs the latter issued in respect of tin dross. As shown from the table above at [7], the CQs represented the tin dross to be of a generally high tin content, with 81.96% being the lowest and 94% being the highest. The Bank contended that in reality, the tin content found in the dross was much lower and varied significantly. CWT had thus breached the CMA by issuing false or misleading CQs for tin dross.

CWT's case

83 Mr Tan submitted that even if tin dross was covered by the CMA, CWT should not be responsible for the analyses of tin dross for the second and subsequent batches for which the analyses were conducted by Alex Stewart.

84 Creighton had testified in his AEIC that CWT had no expertise in analysing tin dross. [note: 27] That was why the tin dross was analysed by another party. In this regard, Mr Tan relied on Clause 6.3 of CWT's standard Warehousing Conditions which formed part of the FWC. It stated:

> The Company [meaning CWT] shall not act as an expert in relation to the nature or quality of the Goods and shall not be required or be obliged to provide any notification to any party whatsoever in relation to the state, nature or quality of the Goods.

85 Creighton also said that because CWT was not assuming responsibility for the analyses done by Alex Stewart, CWT had varied the content of the CQs it issued for tin dross from the sample CQ found in Appendix III of the CMA which was a sample CQ for tin ingots. The sample CQ contained the following two sentences: [note: 28]

> This certificate reflects our findings at time and place of analysis. We confirm that the tin ingots sampled comply with ABN AMRO Bank N.V., Singapore Branch's minimum quality criteria under the Collateral Management Agreement dated _____ between Singapore Tin Industries Pte. Ltd., ABN AMRO Bank N.V., Singapore Branch and C & P Asia (S.E.A.) Pte Ltd.

86 In contrast, the CQs issued by CWT in respect of tin dross analysed by Alex Stewart did not contain the sentences reproduced in the above paragraph. Instead, each CQ stated: [note: 29]

> Quality analysis carried out by Messrs Alex Stewart Assayers (S) Pte Ltd and, commissioned by Singapore Tin Industries. Copy of original Certificate of Analysis attached.

87 Egberts testified for the Bank in cross-examination that he noticed that the sentences referred to (at [85] above) were not included in the CQ issued by CWT for tin dross, but acted on the basis

that it was still a CQ required of and issued by CWT under the CMA. [note: 30] The basic format of each CQ for tin dross was similar to that provided in the sample CQ in Appendix III of the CMA.

The Bank's case

88 Mr Jeremiah relied on the following to support his submission that CWT was responsible for the results of the analysis of tin dross by Alex Stewart:

(a) the CQs were issued on CWT's letterhead;

(b) each CQ mentioned the WR which it related to;

(c) each CQ mentioned the percentage of the tin content in the tin dross which was the subject matter of the WR referred to in the CQ;

(d) the CQs resembled the format of the sample CQ prescribed in Appendix III of the CMA; and

(e) the CQs were signed by a director of CWT.

89 Mr Jeremiah also submitted that the fact that Alex Stewart was used was not unusual as Clause 3.1 of the CMA provided that CWT "may render the services described in this Agreement through its agent, but, notwithstanding anything to the contrary in the FWC, shall at all times remain wholly responsible for the due performance of its obligations and liabilities under this Agreement". [note: 31]

The court's decision

90 Clause 6.3 of the Warehousing Conditions (see [84] above) was subject to the provisions of the CMA. CWT and the Bank had acted on the basis that under the CMA, CWT was supposed to issue CQs for tin dross and accept responsibility for their contents. Under Clause 3.1 of the CMA (see [89] above), CWT could perform its obligations through another party but would remain liable for the same. Indeed, CWT accepted that it was responsible for the analysis for the first batch of tin dross carried out by STS. I am of the view that the mere fact that the analysis was done by a third party was neither here nor there.

91 As for the argument that CWT's CQs based on the analyses by Alex Stewart did not contain the said two sentences in the sample CQ, I note that CWT's CQs based on the analysis by STS also did not contain the second of the said two sentences, *ie*, the sentence confirming that the tin dross complied with the Bank's minimum quality criteria. Yet, CWT agreed that it had accepted responsibility for the CQs it had issued based on STS' analysis.

92 So, CWT's CQs based on STS' analysis did contain the first of the said two sentences "This certificate reflects our findings at time and place of analysis" whereas CWT's CQs based on Alex Stewart's analyses did not. Did this difference mean that CWT did not accept responsibility for Alex Stewart's analyses?

93 In my view, CWT was trying to have its cake and eat it. On the one hand, it did not want to be responsible for the analyses done by Alex Stewart but, on the other hand, it did not want to tell the Bank this openly. It knew that under the CMA, a CQ had to be issued by it for each WR it issued. If an analysis was done by a third party, CWT must have known that it had to adopt the analysis otherwise the Bank would not accept the tin dross, for which the analysis was made, as collateral.

So, CWT issued CQs under its own letterhead but, as mentioned, it deleted the said two sentences from the CQs which were based on Alex Stewart's analyses.

94 In my view, if CWT did not wish to accept responsibility for such analyses, it should not have issued CQs on its letterhead which repeated the results of the analyses. Indeed, Mr Tan had some difficulty explaining why it did so, if not to adopt responsibility for the analyses.

95 I therefore find that CWT was responsible for the contents of the CQs it issued for tin dross, notwithstanding that the analyses were carried out by Alex Stewart.

Whether the CQs were false or misleading

96 Although CWT was responsible for the CQs it issued for tin dross, the burden still lies on the Bank to establish that the substance of the CQs was false or misleading.

97 Neither side called Alex Stewart to give evidence. As stated earlier (see [17]–[19] above), the quality analyses conducted by Inspectorate and ECO suggested that the tin content in the dross was actually very low and varied considerably.

98 However, as regards the second analysis by Inspectorate, there was a question as to whether samples were taken from the relevant drums of tin dross or not. Hence the Bank no longer relied on that analysis.

99 As for the first analysis by Inspectorate and the one by ECO, according to the evidence of CWT's expert witness, Choong Phak Leng ("Choong"), there was a certain method to ensure that the taking of samples of tin dross was accurately done. This was because tin dross is not a homogenous substance (as mentioned above at [3]). However, apparently, that was not the method used to take samples of the tin dross for analysis by Inspectorate and by ECO. This meant that the results from the analyses by Inspectorate and ECO themselves were unreliable. As such, the Bank did not place much reliance on these results in its closing submissions. Instead, it contended that it was mathematically impossible for the tin dross in the Warehouse to have an average tin content of more than 80%.

100 Mr Jeremiah's mathematical argument was founded on Clause 4 of Appendix I to the CMA, which stated as follows: [note: 32]

> Subject to the limits and conditions set out in clause 6 of the Agreement, SN tin ingots shall be released by ABN AMRO for refining purposes and thereafter, converted to SN+ which shall be of LME grade and quality (minimum 99.90% tin content). BORROWER shall ensure that for every one metric tonne of SN released for refining, a minimum of 0.9985 metric tonne of SN+ is returned to C&P's custody and control after the WIP process. ... C&P shall also promptly notify ABN AMRO in the event that the quantity of SN released for processing is not returned to C&P as SN+ within a reasonable time or if the quantity of SN+ returned is less than that to be returned in accordance with ABN AMRO's conversion formula.

101 Mr Jeremiah explained Clause 4 of Appendix I to mean that the Bank and STI had agreed on a conversion formula stipulating that for every one ton of crude tin released to STI for purposes of refining, STI would return 0.9985 tons of refined tin back to the Bank's custody and CWT was to notify the Bank if this formula was not adhered to. Since Creighton confirmed in cross-examination that CWT had never once informed the Bank that the formula was not observed, [note: 33] Mr Jeremiah submitted that it had been adhered to. Mr Jeremiah therefore submitted that nearly all

the tin content in the crude tin released for refining was converted into refined tin, which implied that the actual amount of tin lost through the refining process and found in the tin dross was extremely small. Since it is not disputed that all the tin dross in the Warehouse in fact came from STI's refinery and not from outside sources, it was mathematically impossible for the dross to contain 80% or more tin content if the formula agreed on between the parties was adhered to.

102 The difficulty with this line of argument is that it assumed that the formula agreed on by the parties was in fact observed. Although Creighton was not aware of any notification by CWT to the Bank that the formula had not been observed, it is not clear if he was even the person who was checking to ensure that the formula was observed. What the formula demanded, in essence, was a near-perfect rate of conversion of crude tin into refined tin which might well depend on the quality of the crude tin ingots and the efficiency of STI's refining process on which no evidence was given.

103 Mr Jeremiah also attempted to rely on an admission given by Choong at the end of cross-examination in which he appeared to agree that if crude tin ingots of 99.85% tin content were put into the refinery, then the tin content in the tin dross which came out of the refining process was going to be much, much less. [note: 34] However, Choong's answer must be seen in the context of his entire cross-examination. Mr Jeremiah had earlier asked Choong to make three assumptions: (1) that STI had a state of the art refinery; (2) that the formula given was workable; and (3) that CWT had not notified the Bank that the formula had been deviated from. [note: 35] It was on these assumptions that Mr Jeremiah asked Choong at the end of cross-examination whether refining crude tin of 99.85% tin content would end up producing tin dross of low tin content and Choong agreed. This admission does not assist the Bank's case because it has failed to produce any real evidence to show that the assumptions, which its mathematical calculations were based on, were correct.

104 The problem for the Bank was that it was initially relying on the results from Inspectorate and ECO to prove that the CQs issued for tin dross were inaccurate. When it appeared that these results were not reliable, the Bank then switched tactics and sought to rely on the mathematical formula. Except for Creighton's evidence that he was not aware of any notification from CWT to the Bank that the formula had not been observed, there was no other evidence on this point.

105 I will briefly address Mr Jeremiah's remaining arguments on this issue. First, Mr Jeremiah submitted that CWT had misrepresented the tin content in the tin dross in the CQs simply by mentioning a single percentage figure for each batch of tin dross, whereas CWT had admitted in its own pleadings and through Choong that tin dross is not uniform and that the tin content in dross is likely to vary from drum to drum.

106 However, I find that the Bank's concern related more to the allegedly low tin content of the tin dross rather than the fact that the tin content was not uniform. If the average tin content was not lower than that stated in each CQ, the Bank would not be complaining.

107 Mr Jeremiah also pointed out that the samples of tin dross given to Alex Stewart for analyses were taken by STI's and not CWT's staff. While this may suggest a lax attitude by CWT, it was actually irrelevant because neither side relied on the analyses by Alex Stewart for the trial.

108 Mr Jeremiah also submitted that the fact that the Receiver was offered only US$10,000 for the entire stock of tin dross and tin concentrate, and to dispose of the tin slag, was evidence that the tin content in the dross was very low. I cannot accept this submission. I have noted earlier (at [19] above) that the prospective buyer of the tin dross had apparently informed the Receiver that it was unable to offer a higher price because the dross was contaminated with toxic substances, not because the tin dross had a low tin content. By the way, it was also not clear how the buyer had

concluded that the dross was contaminated with toxic substances, and why and how and when this contamination had accrued.

109 As for the analysis conducted by ECO (see [19] above), aside from the fact that it had not used the correct method to take samples of tin dross, there was also no elaboration as to whether lead is necessarily or frequently found in tin dross, and whether only a certain amount of lead would lead to a conclusion that the tin dross is contaminated. There was also no elaboration as to how the presence of lead would affect the value of tin dross. This would affect the quantum of the Bank's loss which I will come to later.

110 Although the evidence of Choong suggested that tin dross normally contains tin content of between 50% and 70%, neither side relied much on this evidence. This was presumably because Choong stated in his AEIC that his experience with tin products came from his work with one specific company, Escoy Smelting Pte Ltd ("Escoy"), where he had worked for over 30 years. [note: 36] He further explained during cross-examination that he had arrived at the figure of 50%–70% based on samples of tin dross he had taken during his entire career with Escoy. [note: 37] In other words, while Choong was familiar with tin products and tin refining processes in general, he was not in a position to give specific evidence about STI's particular tin refining process and the quality of the material used in its refining.

111 I therefore find that the Bank has failed to prove on a balance of probabilities that the CQs issued by CWT for tin dross were false or misleading.

Whether CWT's breach of the CMA by failing to inform the Bank that tin dross was not physically leaving and entering the Warehouse caused the Bank's losses

The Bank's case

112 Mr Jeremiah submitted that the Bank would not have suffered losses of US$10,602,084 and $104,860 but for CWT's breach of the CMA. He referred to the case of *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782 ("*Sunny Metal*") where the Court of Appeal held (at [63]) that the "but for" test in tort also applied in contract cases to determine whether a defendant's breach had, as a matter of fact, caused the plaintiff's loss.

113 Applying this test to the present facts, Mr Jeremiah submitted that if CWT had informed the Bank of the non-movement of tin dross in and out of the Warehouse, the Bank would have discovered that the dross was being round-tripped and consequently would not have advanced money to STI based on the security of the tin dross. This was evidenced by the testimony of Clement Tan and Egberts. Clement Tan elaborated that the Bank would have demanded an explanation from STI and terminated the Facilities Agreement if it had known about the round-tripping of tin dross, [note: 38] while Egberts said that he would not have approved STI's requests for drawdowns if he had known of the same. [note: 39] Since the Bank would not have financed the tin dross if it had known about the round-tripping, it would follow that the Bank would also not have incurred the treatment and disposal costs of $104,860 when it discovered that the tin dross was contaminated with lead.

CWT's case

114 Mr Tan, on the other hand, argued that the Bank had caused its own loss by extending loans to STI without heeding various red flags that had been raised.

115 First, all the tin dross that was purportedly being sold to STI had come from KJP (whom I referred to above at [20]). The various invoices KJP issued [note: 40] to STI in respect of these purported sales showed that both companies shared the same address *ie*, 61 Tuas Crescent. The invoices were also signed on behalf of KJP by Janice Ku, who was one of STI's main directors.

116 Secondly, STI had purportedly sold tin dross to third party companies by the names of Penggerang Pte Ltd, Rich Achieve Enterprise Ltd, and River Bright Industrial Co. However, the SWIFT advices in respect of the payments for some of these alleged sales showed that it was KJP who had been making the payments to STI. [note: 41] Thus the alleged vendor of tin dross to STI was also the paymaster for STI's sales.

117 Thirdly, there was a letter dated 25 February 2008 from STI to the Bank where STI's address was displayed as "10 Ubi Crescent, #05-27 (Lobby B) Ubi Techpark". [note: 42] This address was identical to that of Penggerang Pte Ltd, one of the third party "purchasers" of tin dross.

118 Mr Tan thus argued that the Bank had access to all this information and was in a position to make further enquiries. Had it probed further, it would have realised that STI was actually buying and selling tin dross from itself and could have stopped the fraud in its tracks.

119 Mr Tan further contended that at the very least, the Bank should have closely scrutinised the price KJP charged STI for the purported purchases of tin dross since it knew STI and KJP were closely related companies.

120 Mr Tan concluded that on the whole, the Bank had been rather lax in its dealings with STI and this was further evidenced by the fact that the Bank had not taken steps to monitor the movement of the released tin dross to ensure that it was delivered to its purchasers. Mr Tan concluded that this lax attitude was the effective cause of the Bank's losses, not CWT's breaches of the CMA.

The court's decision

Preliminary issue – Lack of particulars in CWT's pleadings

121 I will first address a preliminary objection taken by Mr Jeremiah. CWT in its Defence and Counterclaim (Amendment No 3) had pleaded at para 40(b):

> Any alleged loss or damage allegedly suffered by the Plaintiff is a consequence of its own assessment of the financial creditworthiness of STI and/or a result of its own financial interactions or further dealings with STI (and possibly others) with regard to or in relation to the financing of the goods, which the Defendant is not privy to.

122 Mr Jeremiah submitted that CWT's pleadings were too vague and lacked sufficient particulars to give the Bank any notice of the case it would have to meet. CWT had in fact taken advantage of this vagueness to fish for evidence during the trial to support its contentions on causation. As a result, the Bank had been embarrassed and prejudiced and CWT should thus not be allowed to pursue its above arguments on causation. In this regard Mr Jeremiah referred to the case of *Thomas & Betts (S.E. Asia) Pte Ltd v Ou Tin Joon* [1998] SGHC 57 ("*Thomas & Betts*") where Lai Siu Chiu J held (at [23]):

> It is a clear rule of pleading that 'every pleading must contain the necessary particulars of any claim' (O 18 r 12(1) of the RSC). In the absence of providing adequate particulars, and in the

> absence of any explanation as to why these particulars were inadequate, I was constrained in finding that there were insufficient facts in the pleadings to support the cause of action. I did not think it fair that a plaintiff should be allowed to allege first, and then through the process of discovery or interrogatories, hope to substantiate those allegations later – that would be tantamount to 'fishing' which any court would vigilantly guard against in balancing the interests and rights of the parties concerned.

123 It bears noting that Lai J's decision in *Thomas & Betts* was one involving the striking out of a statement of claim at the interlocutory stage. It was not a case where a party had proceeded all the way to trial without giving sufficient particulars in his pleadings and was subsequently precluded from relying on them, despite no earlier objection being taken by the other side. If the Bank felt prejudiced by the vagueness of CWT's pleadings, it should have applied for further and better particulars and/or to strike out that part of CWT's defence at the outset. Having come all the way to trial without any objection, the Bank cannot be heard to complain now about the lack of particularisation.

124 Mr Jeremiah argued that the onus of particularisation should be on CWT and that the Bank has no duty to assist CWT in pointing out inadequacies in its case. With respect, Mr Jeremiah's argument misses the point. It is one thing to assist the other side by pointing out the inadequacies in its case, and another thing to *object* to being prejudiced by such inadequacies.

125 In any event, CWT did plead the following in paragraph 40(c) of its Defence and Counterclaim (Amendment No 3):

> It is denied that the performance of the duties undertaken by the Defendant pursuant to the CMA caused any alleged loss or damage allegedly suffered by the Plaintiff. Further, the Defendant is not liable for any such alleged loss or damage as they are too remote and the Defendant further cannot reasonably be regarded as having undertaken responsibility for such alleged loss or damage.

In my view, it was still for the Bank to establish that CWT's failure to inform it of the movement of tin dross caused it to continue to finance the tin dross and the subsequent cost of treating and disposing of the tin dross.

Whether CWT's failure to inform the Bank of the non-movement of tin dross caused the Bank's losses

126 I accept Mr Tan's submission that there had been red flags relating to KJP and the third party purchasers of tin dross which the Bank could have picked up on, but did not. What would have happened if CWT had informed the Bank about the non-movement of the tin dross? It was likely that the Bank would have asked STI for an explanation as Clement Tan himself alluded to in his AEIC, but it seems to me that it does not necessarily follow that the Bank would have terminated the Facilities Agreement. This was a quantum leap. In my view the likely scenario was that STI would have given some sort of explanation to the Bank. The Bank might have accepted the explanation or STI and the Bank might have reached some other arrangement.

127 I would add that Clement Tan had probably exaggerated when he said that the Bank would have terminated the entire Facilities Agreement. That was a comment made with the benefit of hindsight. The Bank might have terminated the financing of the tin dross if it was not satisfied with any explanation given by STI, but not necessarily the entire Facilities Agreement. Indeed, Egberts said in his AEIC that he would not have approved drawdowns in respect of the purchases of tin dross if he had known about the round-tripping of the same. [note: 43] He did not say the Bank would have terminated the Facilities Agreement.

128 However, in the circumstances, I do not conclude that the Bank would necessarily have terminated the financing of the tin dross had it been informed by CWT about the non-movement of the same.

129 It seems to me that the omission to tell the Bank about the non-movement of tin dross meant that the Bank had lost the chance of seeking an explanation from STI and reviewing its own position, with the possibility of terminating the financing of the tin dross. This "loss of a chance" analysis was mentioned as a possible approach on the question of causation in *Sunny Metal* at [74]. Unfortunately for the Bank, it has not claimed for the loss of a chance here.

130 Therefore, I reject the Bank's allegation that it would necessarily have terminated the Facilities Agreement or even the financing for tin dross if CWT had informed it that tin dross was not leaving and entering the Warehouse.

Whether the CQs caused the Bank's losses if they were false or misleading

131 I have already found above that the Bank has failed to prove that the CQs issued by CWT for tin dross were false or misleading. However, for the sake of completeness, I would add that even if the Bank had proven that the tin content in the dross was lower than what was reflected in the CQs, it did not necessarily follow that the Bank would have terminated the financing of the tin dross.

132 Egberts alluded to the figure of 70% in cross-examination as being the minimum required tin content for any tin product before the Bank would finance that particular product. [note: 44] This figure was presumably derived from the CMA which stipulated a minimum required tin content of 70% for "Tin Concentrates". [note: 45] However, it is unclear whether the figure of 70% automatically applied to tin dross.

133 Even if I accept Egberts' evidence that 70% was the minimum required tin content for tin dross, what that means is that the Bank has to prove not only that the tin content in the CQs was incorrect, but that it was less than 70%. If the tin content in the tin dross was still over 70%, the Bank would still have advanced money to STI, albeit of a lesser amount.

Whether the Bank's losses are too remote

134 I next consider whether the Bank's losses of US$10,602,084 in unpaid advances and $104,860 incurred in treating and disposing of the tin dross are too remote in any event. The law on remoteness of damage in Singapore contract law was definitively settled in the recent Court of Appeal decision in *MFM Restaurants Pte Ltd v Fish & Co Restaurant Pte Ltd* [2010] SGCA 36 ("*MFM Restaurants*"). The court affirmed the continued application of the principles laid down in *Hadley v Baxendale* (1854) 9 Exch 341 and elaborated upon in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR(R) 623, in that a plaintiff claiming for breach of contract may only recover in respect of damages which (1) were reasonably contemplated as liable to result from the breach, or (2) which the defendant had actual knowledge of. The court in *MFM Restaurants* expressly rejected the additional legal criterion of assumption of responsibility introduced by Lord Hoffmann in *Transfield Shipping Inc v Mercator Shipping Inc, The Achilleas* [2009] 1 AC 61.

135 I am of the opinion that the Bank's loss in financing tin dross is not too remote as a *type* of damage if causation had been established. It was reasonably contemplated that the Bank would finance the tin dross based on the security of the WRs and CQs issued by CWT.

136 If CWT had also breached the CMA in issuing false or misleading CQs, the Bank's loss would

likewise be reasonably contemplated in relation to such a breach.

137 I reject Mr Tan's argument that the only losses by the Bank which were reasonably contemplated were those relating to any damage or loss to the security itself. Mr Tan's argument assumes that CWT's only responsibility was to safeguard the Bank's security but, as I have said above (at [71]–[74]), CWT also had obligations as a collateral manager within the context of a trade finance arrangement and these obligations extended to informing the Bank if there was no physical movement of the goods it was financing.

138 As for the $104,860 which the Bank incurred in the treatment and disposal of the tin dross, I am of the view that such loss is too remote to be recoverable by the Bank in any event, whether or not CWT's fault consists of the failure to inform it about the non-movement of tin dross and/or the issuance of inaccurate CQs. The Bank's loss here resulted from the tin dross being contaminated with lead, which was not something that was reasonably contemplated. It seems that the scope of CWT's duties to the Bank in respect of tin dross was only to determine the tin content therein and did not extend to testing the tin dross for lead. That is why the Bank accepted the CQs even when they reflected the tin content only.

139 Indeed, it was also not made clear to me why a potential purchaser would offer US$10,000 for the tin dross and tin concentrate when it would cost $104,860 to treat and dispose of the tin dross. There was no elaboration as to how much the tin concentrate was worth. I was not satisfied that the Bank had reasonably incurred such a cost in the circumstances.

The appropriate quantum of loss

140 Even though the Bank's financing of tin dross was not too remote a type of damage, this does not mean that CWT would be liable to compensate the Bank for the full US$10,602,084 (assuming the other elements of the Bank's claim are made out). The Bank would still have to prove that it was reasonable for it to advance US$10,602,084 on the security of tin dross based on the formula agreed between the Bank and STI. This is an issue not of remoteness, but quantum.

141 For example, suppose it was established that the objective value of the tin dross at the time of the advances (based on the tin content reflected in the CQs) was US$1m, it would be reasonable for the Bank to advance an equivalent amount, minus a margin, to STI. Would it then be reasonable for the Bank to have advanced US$10m based on the security of the US$1m tin dross, and expect CWT to indemnify it for the full sum it had advanced? The answer clearly is "no". Although it was reasonably contemplated that the Bank would lend money on the security of the WRs and CQs issued by CWT, this does not mean that CWT should be held liable for any amount of money that the Bank chose to advance to STI. Therefore, it was incumbent on the Bank to show that its formula to determine the quantum advanced was reasonable and that the amount it advanced, on the assumption that the tin content as stated in the CQs for tin dross was accurate, was reasonable.

142 In this regard, some consideration of the Facilities Agreement between the Bank and STI is required. Clause 1 of the Facilities Agreement provided the following definitions: [note: 46]

> **Advance Rate** shall be as described in Clause 4(2)(b);
>
> **Borrowing Base** means the aggregate value of the Eligible Assets secured to the Bank calculated by reference to the Advance Rate for the relevant Eligible Assets, as further described in Clause 4(2);

Eligible Assets means collectively the Eligible Inventory, Eligible Receivables and the Cash & Proceeds in Collection Account;

Eligible Inventory means collectively:

(a) Raw Materials (concentrate and slag) and Work-in Progress, fully owned by the Borrower and stored in an approved warehouse in Bangka, Indonesia, managed by the Collateral Manager and supported by warehouse receipt(s) issued by the Collateral Manager;

(b) Crude Tin Ingot, fully owned by the Borrower and stored in an approved warehouse in Bangka, Indonesia, managed by the Collateral Manager and supported by warehouse receipt(s) issued by the Collateral Manager;

(c) Crude Tin Ingot in-transit from Indonesia to Singapore, fully owned by the Borrower, together with a full set of 3/3 original bills of lading consigned to the Bank or blank endorsed and presented to the Bank;

(d) Crude Tin Ingot and Work-in-Progress, fully owned by the Borrower stored in an approved warehouse in Singapore managed by the Collateral Manager and supported by warehouse receipt(s) issued by the Collateral Manager;

(e) Tin Ingot fully owned by the Borrower stored in an approved warehouse in Singapore managed by the Collateral Manager and supported by warehouse receipt(s) issued by the Collateral Manager;

(f) LME Warehouse Receipt, held by the Bank and/or its duly appointed agent and/or the Collateral Manager for and on behalf of the Bank; and

(g) Tin Ingot in transit to the buyers from the Borrowers, fully owned by the Borrower, together with a full set of 3/3 original bills of lading consigned to the Bank or blank endorsed and presented to the Bank;

143 Clause 4(2)(b) of the Facilities Agreement stated: [note: 47]

The Borrowing Base shall be determined based on the Eligible Assets secured to the Bank, calculated as follows:

Borrowing Base Category	**Advance Rate**
Eligible Inventory (a), (b) & (c)	80% of Invoice Price or Market Price, whichever is lower
Eligible Inventory (d), (e), (f) & (g)	85% of Invoice Price or Market Price, whichever is lower

...

144 Finally, Clause 4(2)(c) of the Facilities Agreement stated: [note: 48]

For purposes of calculating the Borrowing Base, the relevant Market Price of the respective Eligible Inventory shall be calculated based on the prevailing LME price determined as follows or

on such other basis as the Bank may in its absolute discretion deems fit:

Eligible Inventory	**Market Price**
Eligible inventory (a)	
• For concentrates:	LME price × concentration × 88%
• For slag:	LME price × concentration × 65%
Eligible inventory (b), (c) and (d)	LME price – USD100
Eligible inventory (e), (f) and (g)	LME price

145 Mr Tan proceeded on the basis that the percentages of 88% and 65% for tin concentrates and tin slag respectively were used by the Bank to factor in the cost of extracting pure tin from these two products, and transportation costs. This was accepted by Clement Tan in cross-examination, but actually, there was no other evidence that the Bank had applied its mind to the cost of extracting tin from these two products or the transportation costs. Indeed, Clement Tan also said that these were arbitrary formulae inherited from the previous financing arrangement that STI had obtained. [note: 49]

146 As for tin dross, there was no prescribed formula in the Facilities Agreement as to how much money the Bank would advance to finance the dross. Apparently, the Bank and STI eventually agreed that the Market Price for tin dross would be calculated as: (LME price – US$100) multiplied by the percentage of tin content stated in the CQs. This was also the price which KJP "charged" STI for each batch of tin dross. The Bank would then finance 85% of the Market Price under Clause 4(2)(b) of the Facilities Agreement.

147 What all this meant, basically, was that the Bank was financing 85% of each batch of tin dross which STI "purchased" from KJP based on KJP's invoice price, which was in turn based on the Market Price agreed upon between the Bank and STI for tin dross. However, the Bank did not establish that at the time of the advances the formula of (LME price – US$100) multiplied by the percentage of tin content stated in the CQs, used to calculate the Market Price of tin dross, was reasonable. Neither did it establish that it was reasonable to lend 85% of such Market Price.

148 Furthermore, if indeed tin dross can be contaminated because of the presence of lead as the Bank was suggesting after the event, there was no evidence as to how often lead is found in tin dross and what amount of lead would constitute contamination and how this would affect the value of the tin dross and the computation of the amount to be advanced.

149 The truth of the matter is that the Bank did not know what it was doing especially when it came to tin dross. It simply agreed to an arbitrary formula to determine the amount to be advanced on the security of tin dross (in addition to the other security it had), without even establishing the objective value of tin dross with such tin content as stated in the CQs.

150 In the circumstances, I find that the Bank has also not established that it was reasonable for it to advance what it did and accordingly it has not established the quantum of its loss.

The Bank's alternative claims

151 In light of my above findings, it is not necessary for me to deal with the Bank's alternative claims for fraudulent or negligent misrepresentation as it would encounter the same problems relating

to causation and quantification of loss.

CWT's counterclaim

152 CWT's counterclaim clearly has no merit. Clause 11.1 of the CMA states that STI was to pay CWT's fees and charges. Clause 11.3 further states that if STI does not pay any fee or charge, CWT's only remedy shall be a claim against STI for damages. [note: 50] The Bank has no liability to CWT under the CMA.

Conclusion

153 For the foregoing reasons, I dismiss both the claim and counterclaim. I will hear the parties on costs.

[note: 1] Glen Creighton's AEIC at p 179.

[note: 2] Glen Creighton's AEIC at p 182.

[note: 3] Plaintiff's Core Bundle of Documents ("PCB") 18.

[note: 4] PCB 18–19.

[note: 5] PCB 43.

[note: 6] PCB 31–32.

[note: 7] Notes of Evidence ("NE") 16/8/10 at pp 58, 61, 82.

[note: 8] PCB 23.

[note: 9] NE 28/9/10 at pp 6–7.

[note: 10] PCB 27.

[note: 11] NE 28/9/10 at p 28.

[note: 12] PCB 22.

[note: 13] PCB 24.

[note: 14] PCB 595.

[note: 15] NE 28/9/10 at p 70.

[note: 16] PCB 664.

[note: 17] NE 27/9/10 at pp 129–130.

[note: 18] PCB 24.

[note: 19] AEIC of Glen Creighton at para 43.

[note: 20] PCB 27.

[note: 21] PBD 37.

[note: 22] NE 29/9/10 at p 56.

[note: 23] NE 27/9/10 at pp 8-9.

[note: 24] NE 28/9/10 at pp 62–63.

[note: 25] PCB 512.

[note: 26] PCB 517.

[note: 27] AEIC of Glen Creighton at para 26.

[note: 28] PCB 42.

[note: 29] PCB 192.

[note: 30] NE 19/8/10 at p 38.

[note: 31] PCB 20.

[note: 32] PCB 36.

[note: 33] NE 28/9/10 at pp 73–74.

[note: 34] NE 27/9/10 at p 93.

[note: 35] NE 27/9/10 at pp 49–50.

[note: 36] AEIC of Choong Phak Leng at paras 3–4.

[note: 37] NE 27/9/10 at p 66.

[note: 38] AEIC of Clement Tan at para 28.

[note: 39] AEIC of Frank Egberts at para 32.

[note: 40] PCB 189, 206, 228, 284, 341, 349, 432, 440.

[note: 41] PBD 261–267.

[note: 42] PCB 283.

[note: 43] AEIC of Frank Egberts at para 32.

[note: 44] NE 19/8/10 at p 34.

[note: 45] PCB 35.

[note: 46] PCB 86–87.

[note: 47] PCB 97.

[note: 48] PCB 98.

[note: 49] NE 16/8/10 at p 67.

[note: 50] PCB 28.