# RBG Resources plc (in liquidation) v Banque Cantonale Vaudoise and Others [2004] SGHC 123

**Case Number** : Suit 1175/2002

**Decision Date** : 11 June 2004

**Tribunal/Court** : High Court

**Coram** : Woo Bih Li J

**Counsel Name(s)** : Sarjit Singh Gill SC and David Chan (Shook Lin and Bok), Quek Mong Hua, Matthew Saw, Mervyn Foo and Koh Kia Jeng (Lee and Lee) for plaintiff; Lawrence Teh and Loh Jen Wei (Rodyk and Davidson) for second defendant

**Parties** : RBG Resources plc (in liquidation) — Banque Cantonale Vaudoise; Credit Lyonnais; Westdeutsche Landesbank Girozentrale; BNP Paribas (Suisse) S.A.; Ing Bank N.V.; Banque Bruxelles Lambert; GMAC Commercial Finance PLC

*Commercial Transactions – Sale of goods – Sale and purchase of metals stored in warehouses in Singapore – Whether metals ascertained by appropriation to each contract of purchase – Whether appropriation achieved by way of warehouse accounting system – Whether metals wrongfully commingled with other metals*

*Commercial Transactions – Sale of goods – Sale and purchase of metals stored in warehouses in Singapore – Whether metals sold forming part of bulk identified by subsequent agreement between the parties – Section 20A Sale of Goods Act (Cap 393, 1999 Rev Ed)*

*Insolvency Law – Winding up – Liquidator – Whether liquidator could be estopped by representations made by company*

*Tort – Conversion – Claim in conversion – Whether plaintiff had converted defendant's metals*

11 June 2004 *Judgment reserved.*

**Woo Bih Li J:**

**Introduction**

1 The plaintiff, RBG Resources plc ("RBG"), is a public limited company incorporated in England. It was placed in compulsory liquidation in England on 12 June 2002. The present action involves a claim by the second defendant, Credit Lyonnais ("CL"), a bank incorporated in England, to various metals stored in warehouses in Singapore. CL's claim is resisted by the liquidators of RBG who, in turn, have made a claim against CL for conversion of metals owned by RBG.

2 RBG was known by the name of Impactworld plc on incorporation. It changed its name to Allied Deals plc on 17 July 1996 and then to RBG Resources plc on 17 September 2001.

3 RBG (then known as Allied Deals plc) became a customer of Credit Lyonnais Rouse Ltd ("CLR") in 1998. CLR was at all material times a wholly-owned subsidiary of CL and a ring-dealing member of the London Metal Exchange ("LME"). Subsequently, from October 2001, RBG entered into metal trading with a division of CL called Credit Lyonnais Rouse Derivatives ("CLRD"). This division trades in various commodities, including metal. The transactions between RBG and CLRD were between October 2001 to April 2002. During this period, there were 158 transactions between CLRD and RBG regarding the purchase of metals in various locations around the world. These 158 transactions included 45 purchase transactions relating to metals in warehouses supposedly operated by Fujitrans (Singapore) Pte Ltd ("Fujitrans").

4 The parties have referred to these warehouses as Fujitrans or Rong De warehouses. I should clarify that the warehouses were leased from PSA Corporation Limited ("PSA") by a company known as Rong De Distribution Pte Ltd ("Rong De"). Rong De was in the warehousing and transhipment business. From January 2000, Rong De operated a warehouse at Block 513, Keppel Distripark, #02-108, at Kampong Bahru, Singapore. In late 2000, one Lim Tau Hee ("Lim"), a warehouse manager of Fujitrans, approached Rong De to provide packing, unpacking and storage services for Fujitrans. Rong De agreed. Block 513, however, was also used to store cargo from other entities. As the cargo stored for Fujitrans was increasing, Rong De was concerned about the weight thereof on the second storey of Block 513. Therefore, in March 2002, it leased another warehouse from PSA, namely, Block 519, #01-105 in the same Keppel Distripark. This warehouse was on the first floor or ground floor, as it was sometimes called, and was used exclusively for Fujitrans. For easy reference, I will also refer to these warehouses as "Fujitrans warehouses".

5 CL treated the 45 purchases mentioned above as 13 groups of transactions. Each group of transactions comprised an initial purchase of metal by CLRD, the grant of a call option to RBG to buy the metal and a subsequent exercise of the call option by RBG, followed by what has been called "rolls" or "rollovers", *ie* CLRD would then purchase the metal which RBG had exercised its option for, and grant to RBG another call option and so on. I will elaborate on the structure of the transactions later.

6 CL's claim relates to five groups of metal transactions between RBG and CLRD. The metals forming the subject matter of those transactions were stored in the Fujitrans warehouses. These were:

(a) 173.519mt of nickel cathodes,

(b) 494.987mt of nickel cathodes,

(c) 692.447mt of copper cathodes,

(d) 504.360mt of tin ingots, and

(e) 50.882mt of tin ingots.

7 RBG's claim against CL relates to 300mt of nickel briquettes which were removed from a Fujitrans warehouse, on the instructions of CL, on 9 May 2002.

8 Although RBG initially started trading with CLR back in 1998, there is no claim arising from transactions between RBG and CLR, which is a separate legal entity from CL. As can be seen, the claims involve the transactions with CLRD only. As CLRD is a division of CL, CL is the litigant against RBG.

9 I will deal with CL's claims first and then with RBG's claim. I have included, at the end of my judgment, a schedule listing the *dramatis personae* for easy reference. The list is of those I have referred to in my judgment more than once.

**The structure of the transactions between RBG and CLRD**

10 Prior to the first metal transaction between RBG and CLRD, RBG and CLRD had engaged in an exchange of e-mail in which RBG had sought financing from CLRD and CLRD agreed to provide financing. However, the eventual structure of each group of transactions is as set out below.

11 CLRD would purchase a certain quantity of a particular metal (*eg* nickel) from RBG on an over-the-counter or private contract basis. The metal was supposed to be of LME grade. The purchase was constituted or evidenced by CLRD's purchase confirmation, the terms of which required delivery documentation to be delivered to CLRD. The purchase confirmation also provided for title and risk to the metal to pass from RBG to CLRD when the delivery documentation was received by CLRD and the purchase price was paid by CLRD.

12 The purchase price was the price calculated by CLRD and agreed to by RBG. The calculation started off with a basis price from which various items were discounted or deducted. This lower price became the purchase price. The various items deducted were in respect of:

(a) warehouse rent,

(b) finance charges,

(c) CLRD's margin, and

(d) deliverability allowance.

13 It was anticipated that CLRD would enter into a concurrent LME hedging transaction with CLR for the forward sale by CLRD to CLR of a similar quantity of the same generic LME metal. The price for this forward sale formed the basis price for the initial purchase by CLRD from RBG. The period of time between the initial purchase and the forward date was the period of time over which the discounts were calculated.

14 On the same date as the purchase confirmation, CLRD would grant RBG a call option giving RBG the right, but not the obligation, to purchase a similar quantity of the same generic metal. The call option was exercisable within a stipulated period. The expiry date of the option would be a date earlier than the forward date in the hedging transaction.

15 If and when RBG exercised the call option, the hedging transaction placed by CLRD would be unwound or closed out. In the meantime, CLRD was supposed to deliver, by way of documentation, the metal to RBG and RBG would make payment.

16 However, in the groups of transactions before me, the matter did not end there. After the exercise of a call option, CLRD would enter into a similar set of transactions all over again, *ie* CLRD would purchase the metal from RBG, hedge it and issue a call option to RBG to purchase the metal during a future period. This was referred to as a "roll" or "rollover". The number of rollovers would vary depending on whether RBG exercised the call option or not and whether another set of transactions was then entered into. However, in the rollovers, no fresh delivery of delivery documentation was required of RBG.

17 In each rollover, RBG's obligation to pay for its purchase was set off against CLRD's obligation to pay for its subsequent purchase. The difference was reflected in RBG's account.

18 I should mention here that the delivery documentation I have referred to was in the form of warehouse receipts on Fujitrans' letterhead. The person involved in such delivery documentation was Fujitrans' Lim.

**Background leading to the dispute between RBG and CL**

19 In early March 2002, CL received information that RBG's auditors had resigned on the ground that certain transactions undertaken by RBG could not be substantiated. CL then decided to have a visual inspection of the metals it believed it had purchased from RBG. The inspection of metals in Fujitrans warehouses was done on 12 March 2002 by CLRD's William John Harris ("Harris"), also known as Bill Harris, the person who had been dealing with RBG's representatives on the metal transactions. After this inspection various events occurred:

(a) On 2 May 2002, the English court ordered RBG to be placed in provisional liquidation with effect from 3 May 2002.

(b) On 6 May 2002, Darryl John Kennard ("Kennard"), an English solicitor representing another bank, Banque Cantonale Vaudoise ("BCV"), spoke to and also met with Lim about the metals in the Fujitrans warehouses. Lim told Kennard that all such metals belonged to RBG.

(c) On 7 May 2002, Harris had a telephone discussion with Lim. As a result of the discussion, another warehouseman, C Steinweg Warehousing (FE) Pte Ltd ("Steinweg"), was allowed to take delivery of 300mt of nickel briquettes out of a Fujitrans warehouse, on behalf of CL on 9 May 2002. This is the subject of RBG's conversion claim.

(d) On 9 May 2002, BCV commenced an action in Singapore against RBG and Fujitrans. BCV also obtained, on the same day, an interim injunction restraining RBG and Fujitrans from dealing with or disposing of all metals which were the property of RBG.

(e) On 11 May 2002, CL commenced an action in Singapore against Fujitrans. CL also obtained, on the same day, an interim injunction to restrain Fujitrans from dealing with or disposing of all metals held by Fujitrans for CL.

(f) Between 16 May and 20 May 2002, Fujitrans joined Lim and others as parties to the BCV action and obtained, *inter alia*, Anton Piller orders against them.

(g) On 18 June 2002, Fujitrans applied in the BCV action for interpleader relief, citing the claims against Fujitrans made by BCV and CL, and the demands from various other bank creditors of RBG.

(h) Lim was found dead on or about 25 June 2002. He had apparently committed suicide.

(i) On 10 July 2002, RBG obtained an order in the BCV action giving RBG discovery of all documents obtained by Fujitrans under Fujitrans' Anton Piller orders and all affidavits filed by Lim and documents produced by Lim in the BCV action. The order also allowed RBG to use any of the documents discovered, as a result of the order, for the protection or determination of RBG's rights whether in Singapore or otherwise.

(j) On 2 August 2002, interpleader relief was granted in the BCV action, in which Fujitrans was ordered to issue an interpleader summons to all known claimants to the metals in any Fujitrans warehouse, and for each claimant to set out the basis of its claim on affidavit.

(k) On 7 August 2002, RBG filed a petition in Singapore in Companies Winding Up No 60 of 2002. On 8 and 13 August 2002, various orders were made appointing Singapore provisional liquidators over RBG and allowing them to survey and sell metals in various warehouses, including Fujitrans warehouses, without prejudice to the claimants' rights and to hold the proceeds of sale of the metal goods pending further order. The survey was done by SGS Testing & Control

Services Singapore Pte Ltd ("SGS"). On 7 October 2002, RBG was ordered to be wound up by the Singapore court and the persons previously appointed as provisional liquidators in Singapore were appointed its liquidators in Singapore. After the survey, the metals were sold and the sale proceeds of the disputed metals are being held pending the court's determination of the disputes.

(l) In the meantime, on 6 September 2002, after considering the claims of various claimants pursuant to the orders given for interpleader relief in the BCV action, I directed RBG to commence a fresh action as plaintiff and to name the claimants as defendants. I also gave directions on various matters including the exchange of pleadings and discovery of documents.

(m) On 4 October 2002, RBG commenced the present action and served its writ of summons on various defendants. Thereafter this action proceeded to trial. However, before the trial commenced, RBG reached a settlement with the first, third, fifth, sixth and seventh defendants. There was no settlement with the fourth defendant which did not even enter a defence to RBG's action. A judgment in default of defence was entered against the fourth defendant. CL, the second defendant, was the only remaining claimant to metals in the Fujitrans warehouses.

(n) The trial of the action was between the period 8 January 2004 to 10 February 2004, after which I gave directions for the exchange of closing submissions and reply submissions.

20 CL made its claim to the metal in each group transaction on three bases:

(a) That CL had purchased generic metal from RBG in each purchase transaction which metal was subsequently ascertained by appropriation to each contract of purchase. Hence title therein passed to CL ("the Ascertainment Claim").

(b) Alternatively, that after the metal had been ascertained, it was wrongfully commingled by Fujitrans with other metal in the Fujitrans warehouses and no longer became capable of ascertainment. Accordingly, the metal in each category of metals corresponding to the metal purchased by CL and remaining in the Fujitrans warehouses was held for RBG and CL as tenants in common ("the Commingling Claim").

(c) Alternatively, that each of CL's contracts for the purchase of metal was of a specific quantity of unascertained metal that formed part of a bulk which bulk was identified not in the purchase confirmation but by subsequent agreement between RBG and CL. Accordingly, CL was owner in common with RBG of the metal to the extent of the quantity purchased by CL pursuant to s 20A of the Sale of Goods Act (Cap 393, 1999 Rev Ed) ("the Bulk Claim"). I will refer to the Sale of Goods Act as "the Act".

**Claim by RBG to ownership of metal in Fujitrans warehouses**

21 Before I deal with the various claims, there is one other point I should deal with first.

22 There was a long discourse by CL in its closing submissions that because RBG was claiming to be the owner of the metals in Fujitrans warehouses, it was incumbent on RBG to prove that assertion. I do not agree that RBG has to do so for the reasons set out below.

23 CL, and the other defendants, are the substantive plaintiffs as CL, and the other defendants, derive their alleged title or interests from RBG. For example, CL is claiming as purchaser from RBG. Its claim must be premised on RBG's ownership of the metal goods just prior to the purchase. Indeed, para 4(1) of CL's reply and rejoinder states that RBG's ownership of the metal claimed by CL and its

ability to give absolute title is admitted by RBG and/or is not in issue and proof of the same is not necessary. If it is for RBG to prove its ownership prior to CL's purchase, then where would CL stand if RBG failed to do so? After the purchase, CL's claim to title as purchaser depends on whether CL is able to establish its claim. If CL fails to do so, then by default, title to the metal remains with RBG *vis-à-vis* CL. Whether other claimants should subsequently surface is another matter which does not concern CL's claim.

24 As for RBG filing the present action as plaintiff, this was pursuant to a direction from me when Fujitrans was seeking interpleader relief. I have alluded to this above. As there were various claimants at the time, I was of the view that it would be neater for RBG to be the plaintiff and the various claimants to be the defendants. There would then be one action and several defendants instead of several actions, one by each claimant, and with only RBG as defendant. Also, with RBG as plaintiff in the same and one action, it would be in a better position to lead and co-ordinate the various interlocutory steps leading to the trial. However, CL and the other claimants remain the substantive plaintiffs except, of course, in relation to RBG's claim for conversion where RBG is the substantive plaintiff.

**The Ascertainment Claim**

25 It was common ground that at the time of each contract of purchase by CL, CL was purchasing a certain metal (*eg* nickel). The quantity was stated in round numbers (*eg* 400mt of nickel) but the metal was not yet ascertained.

26 As I have stated, under the terms of each purchase confirmation, title to and the right to possess the goods would pass from RBG to CL upon receipt of delivery documentation by CL and payment of the purchase price to RBG.

27 CL's position was that for each of its purchases, delivery documentation was received by it and payment made to RBG accordingly. The delivery documentation was sent by fax and was in the form of a warehouse receipt on a Fujitrans letterhead certifying that Fujitrans was holding a specific quantity of goods for the account of and to the order of CL. The original was later received by CL.

28 In view of the importance which CL has placed on the warehouse receipts, I set out below the terms of one warehouse receipt as an example. The others were in similar terms:

> WAREHOUSE RECEIPT
>
> January 10, 2002
>
> To: Credit Lyonnais Rouse Derivatives a Division of Credit Lyonnais
>
> Attn : Mr Bill Harris
>
> Cc : RBG Resources plc.
>
> Attn : Mr Sanjay Agarwal
>
> Subject : 401.791 Mt of Zinc Ingots
>
> Dear Sir,
>
> We hereby certify that we are holding the A.M. cargo for your account as per details given

below, in terms of Inwarehouse Singapore to the Order of Credit Lyonnais Rouse Derivatives a division of Credit Lyonnais. The above material will be further released only with your written instruction.

Commodity: Zinc Ingots

Brand : Chelyabinsk

Origin : Russia

Qty. : 401.791 MT

Lot references:

| REF.NO. | WEIGHTS G.WT | N.WT | PACKING | |
|---|---|---|---|---|
| Z-2310 | 25.056 | 25.031 | 25 | BUNDLES |
| Z-2311 | 25.150 | 25.124 | 25 | BUNDLES |
| Z-2312 | 25.158 | 25.134 | 25 | BUNDLES |
| [other references and weights were also listed.] | | | | |
| Total | 402.190 | 401.791 | 400 | BUNDLES |

Thanks.

[stamp and illegible signature.]

Authorized Signatory

29 It was also common ground that property, *ie* title to the metal, would not pass to CL notwithstanding its receipt of delivery documentation unless and until the metal was ascertained in view of s 16 of the Act. The most common way of ascertainment is by appropriation but that is not the only way. For example, there can be ascertainment by exhaustion, see *Benjamin's Sale of Goods* (6th Ed, 2002) at para 5-062.

30 In the present case, however, the issue under the Ascertainment Claim was whether the goods had been ascertained by appropriation. On this point, it was also common ground that appropriation need not be by way of physical segregation of the goods but could be by way of a warehousing accounting system.

31 CL's position was that the appropriation was achieved by each warehouse receipt it received which contained references to lot numbers. While CL accepted that the Fujitrans warehouses did not actually have such lot numbers, CL's position was that the lot numbers were part of a warehouse accounting system operated by Fujitrans or by Lim. However, Fujitrans was not called to give evidence of such an accounting system, presumably because Fujitrans was disavowing Lim's actions. Also, Harris had admitted that CL had no direct evidence of a Fujitrans warehouse accounting system

in which the lot numbers played a role in the appropriation. CL therefore relied on a number of indirect factors to establish appropriation by way of a warehouse accounting system:[1]

(a) the Tinfos transaction, where 401.791mt of zinc was purchased by CL, released by CL and shipped out of Singapore by Tinfos using lot reference numbers in a Fujitrans warehouse receipt;

(b) conscientious amendments to errors in faxed Fujitrans warehouse receipts (as seen in the case of the 300mt of nickel briquettes);

(c) returns given by Fujitrans to CL's request for monthly confirmations by reference to metals held by Fujitrans for CL under lot reference numbers;

(d) Lim's identification of metals in the Fujitrans warehouses as metals held by Fujitrans for CL when Harris visited the Fujitrans warehouses on 12 March 2002;

(e) instructions by CL to Fujitrans for the release of metal to various banks, using the lot reference numbers in the relevant Fujitrans warehouse receipts; and

(f) the fact that Lim had no problem storing, maintaining, identifying and delivering 300mt of nickel briquettes to CL when instructed to do so.

32 As regards the lot numbers in the warehouse receipts, I am of the view that they were neither here nor there. They could have been genuine references from a warehouse accounting system or numbers which Lim or RBG had plucked out of the air to give the appearance of physical lot numbers or of lot numbers as part of a warehouse accounting system.

33 The monthly summaries sent by CL for Fujitrans' confirmation and the subsequent confirmations also referred to the same reference numbers but were likewise neither here nor there.

34 As for conscientious amendments to errors in faxed warehouse receipts, those amendments were again neither here nor there. If they were part of a sham, the sham had to be maintained by correcting errors in lot numbers.

35 In so far as CL also relied on what was referred to as the Tinfos transaction, this did not carry CL's case further. The Tinfos transaction was a matter in which CL had purchased 401.791mt of zinc from RBG on or about 10 January 2002. As was in the other instances of purchase, CL received a Fujitrans warehouse receipt. On or about 24 April 2002, CL sold the zinc to RBG. CL was then informed by RBG that it had sold the zinc to Tinfos Nizi SA.

36 It was agreed that upon receipt by CL of payment of its price, CL would procure the release of the zinc by sending an appropriate authorisation to Fujitrans to release the zinc to Tinfos. CL was also requested to give an undertaking to Tinfos that upon receipt of a certain sum, it would release the zinc to Tinfos and CL did so. Apparently, before payment was received by CL, Fujitrans had provisionally released the zinc to Tinfos by reference to the same lot numbers in its initial warehouse receipt of January 2002. When CL received payment, it sent a fax instruction to Fujitrans to release the zinc. This fax made reference to the lot numbers under the January warehouse receipt. Fujitrans then wrote to Tinfos to confirm release of the zinc by reference to the same lot numbers.

37 CL argued that the lot numbers were a point of reference and accounting. Although I accept that the lot numbers were a point of reference in communication, this did not necessarily mean that

they amounted to a warehouse accounting system of identification or appropriation. The lot numbers were consistent with the point that Lim was just using such lot numbers as he thought fit for use in Fujitrans warehouse receipts and other communication to give the impression that metals in each warehouse receipt had been appropriated to the order of CL when, in fact, this was not so. Thus, he could use the same metals again for different purchasers and lenders, so long as he used different lot numbers in his documentation for the metals transacted with these purchasers and lenders.

38 In the absence of any further evidence to suggest otherwise, I am of the view that that was what Lim did and the lot numbers were not a means of appropriation by way of a warehouse accounting system. That Tinfos had also referred to the same lot numbers in its communication with Fujitrans was also neither here nor there because Tinfos had, in my view, simply used the same lot numbers as must have been given to it by RBG or CL or Lim.

39 Likewise, the fact that CL gave instructions to Fujitrans to release metals to various banks, using lot reference numbers from warehouse receipts, did not establish the warehouse accounting system which CL was relying on.

40 The fact that Lim could deliver another quantity of metal, *ie* 300mt of nickel briquettes, to CL when asked to do so also did not advance CL's position further. I will say more later about the release of the 300mt of nickel when I deal with RBG's conversion claim.

41 I come now to the visit by Harris on 12 March 2002. The background to this is as follows.

42 As I have mentioned, prior to 12 March 2002, CL had received information that RBG's auditors had resigned on the ground that certain transactions of RBG could not be substantiated. Harris then decided to come to Singapore to do an inspection to establish that what was believed to be held by Fujitrans to the order of CL was, in fact, in the warehouses.

43 When Harris arrived in Singapore, he went to Centennial Tower where Fujitrans' administrative office was located. There, Harris received directions to the warehouse facility and went to meet Lim.

44 Harris said he had brought copies of all warehouse receipts issued by Fujitrans to CL. He presented them to Lim and although Lim did not make copies, Lim did refer to them during the inspection. Lim then pointed out various locations where metals were stored and purportedly kept to the order of CL. This included the metals which are the subject of the present action. Subsequently, Harris made a report of this visit, although the report contains an error about the date of the visit being 11 March 2002. I would add that the trip report was written only on or about 31 May 2002, more than one and a half months after the visit on 12 March 2002. Harris said that he wrote this report based on his contemporaneous notes and his recollection.

45 In any event, Harris accepted that there were no lot reference numbers in the locations which Lim pointed to, as were found in the warehouse receipts. Furthermore, the metals which Lim pointed to were part of larger bulks as I elaborate on below, when I cite Harris' affidavit of evidence-in-chief.

46 For completeness, I add that Harris also made a second visit to the warehouses on 29 July 2002, after CL had commenced action against Fujitrans. By 29 July 2002, Lim had passed away and this inspection was done by Harris together with CL's Singapore and English solicitors. They were accompanied by one Gordev Singh, who was the warehouse manager of Rong De. The summary of Harris' inspection of 29 July 2002 is set out in his statutory declaration of 31 July 2002 wherein he said (at para 40):

The metal goods in the Rong De/Fujitrans Warehouse Premises that I saw on 29 July 2002 and identify herein were generally the same goods as those shown to me by Lim Tau Hee on 11 March 2002 as goods held by Fujitrans for the account of Credit Lyonnais, apart from the fact that:

(1) Some of these metal goods were not in the same locations within the Rong De/Fujitrans Warehouse Premises on 29 July 2002 as they were on 11 March 2002, and

(2) the number of drums of Nickel Cathodes I saw at both Blocks 513 and 519 on 29 July 2002 appeared to be less than those I saw on 11 March 2002.

47 As can be seen, the 29 July 2002 visit did not advance CL's position further. Indeed CL did not rely on the 29 July 2002 visit in its pleadings or submissions to constitute appropriation by Lim. CL was relying on the visit of 12 March 2002 as that was the time when Lim had pointed out metals in various locations to Harris. However, in so far as CL was relying on the earlier visit for appropriation by Lim, it is significant that Harris' affidavit of evidence-in-chief suggested otherwise. Paragraph 69 thereof stated:

The fact that quantities of metal purchased by Credit Lyonnais were at some time held as part of an unsegregated bulk of that type of metal by way of a non-physical segregation of metal in the warehouse is evident from the manner in which Lim Tau Hee showed me metal that Fujitrans held for Credit Lyonnais when I visited the Fujitrans warehouse on 12th March 2002. The Trip Report that I made with respect to my 12th March 2002 trip to the Fujitrans warehouse records that metal goods held by Fujitrans for Credit Lyonnais were shown to me by Lim Tau Hee in a way that suggests that Credit Lyonnais' metal may have been kept as part of a general bulk of nickel, copper or tin in the Fujitrans warehouse or by way of non-physical segregation of such metal …

48 Furthermore, Harris' evidence was:[2]

Q. … Now, Mr Harris, I am suggesting to you that the statutory declaration which was sworn in July does not show that the metal which you saw, whether on 11 March [meaning 12 March] or on 29 July, can be positively identified to CLRD?

A. I think Mr Gill is correct in assuming that, your Honour, given that we go back to the same point, that the lot reference numbers of Mr Lim's system of identifying material, that benefit to us does not exist anymore. Mr Gill is correct, it cannot be identified.

49 One day earlier during cross-examination, Harris' evidence was that perhaps Lim had lied to him when Lim had pointed out various metals during the 12 March 2002 visit:[3]

Q. So, that brings me to the question which I wanted to ask before I went down this road and I told his Honour that I will ask you the question at the end, but I have asked you lots of questions along the way, but now finally I come to that question.

Can you tell the Court if you still believe that Mr Lim Tau Hee was being truthful when he pointed to material at the Fujitrans' warehouse, as you say, and told you that that material belonged to CLRD? We have seen so much. What is your view now?

A. At the time I visited the warehouse, your Honour, when Mr Lim pointed out cargoes that were owned by Credit Lyonnais to me, I believed he was telling the truth, that they were the cargoes that Credit Lyonnais owned. There is obviously some dispute over the cargoes as they stand at the moment. Everyone has their own view as to the problems that are occurring. If you

ask me do I believe now that he was lying or not, I think the only thing we can look at is the man's character, your Honour. From what we see, given the fact that he said several different conflicting comments to several people, he obviously cannot be telling the truth to everybody. Given that fact, he must have lied to somebody, or two people or everybody. I think it would be wrong for me to turn around and say that I believe in my heart that he was only telling me the truth and everyone else a lie. So, if the question is do I think he was lying to me specifically or lying to everybody, he was lying to somebody, yes, so maybe it could have been me.

50 Harris was referring to a conversation and a meeting which Lim had had with Kennard on 6 May 2002. I have alluded to this above. According to Kennard, Lim had told him that all the metals in the Fujitrans warehouses belonged to RBG. There was also apparently an inspection by Joseph Quiazon, a representative from another bank, but he did not give evidence.

51 In my view, Lim knew that RBG did not have enough metals for its transactions with various banks, whether the banks were purchasers or lenders. I will refer to this as the overlapping of metals. On 12 March 2002, he knew where different metals were stored, he knew the purpose of Harris' visit and he took Harris around and pointed to various locations where sufficient metals of the type in question were stored so as to give the impression that he could identify CL's metals to the exclusion of those of others.

52 There is one minor qualification. In one of the SGS survey reports, *ie* SGS Survey Report Certificate No 6005/170028, for severonickel dated 14 April 2001, there is a reference, at p 74, to words on a document on one drum of nickel identified in the SGS report as 519-W127. These words on the document are "Credit Lyonnais RBG A/C". The document is a piece of paper stuck near the bottom right of the drum with the words barely visible. In cross-examination, Mr Malcolm Brian Shierson ("Shierson"), one of the English liquidators of RBG, was prepared to give some weight to that sticker and agreed, initially, that it was possible to associate other drums in the same area as being nickel held for CL. However, he then said he was prepared to accept that the sticker gave CL "some credibility to claim that drum" alone.[4]

53 However, in RBG's closing submissions at para 4.8.12, RBG was not prepared to concede this one drum to CL arguing that the sticker was clearly insufficient to identify Lot 519-W127 as part of CL's claim.

54 In my view, if the effect of the sticker on one drum is to apply to other drums, the question will then be how many other drums are covered. There is no evidence to say how many other drums were intended to be covered, if at all any, by the person who pasted the sticker. This highlights the problem of ascertainment which CL faces. Indeed, as there was no evidence as to who pasted the sticker on the drum, I might not have attributed the action to Lim and the one drum to CL. However, in view of the fact that Shierson was prepared to accept CL's claim to this one drum, I will allow CL's claim in respect of it only.

55 Accordingly, except for the one drum, I am of the view that CL has failed in the Ascertainment Claim. In the circumstances, it is not necessary for me to express a view on other points, for example, a tracing exercise which Shierson said had been undertaken or the point raised by the liquidators that the warehouse receipts were forgeries.

**The Commingling Claim**

56 As I have stated above, the Commingling Claim is based on the premise that after the metals had been ascertained (by appropriation), they were wrongfully commingled by Fujitrans with other

metals. As CL has failed to establish that the metal it claims were ascertained in the first place, the Commingling Claim must also fail.

**The Bulk Claim**

57 The Bulk Claim was based on ss 20A(1) and 20A(2) of the Act which state:

> 20A.—(1) This section applies to a contract for the sale of a specified quantity of unascertained goods if the following conditions are met:
>
> (a) the goods or some of them form part of a bulk which is identified either in the contract or by subsequent agreement between the parties; and
>
> (b) the buyer has paid the price for some or all of the goods which are the subject of the contract and which form part of the bulk.
>
> (2) Where this section applies, then (unless the parties agree otherwise), as soon as the conditions specified in paragraphs (a) and (b) of subsection (1) are met or at such later time as the parties may agree —
>
> (a) property in an undivided share in the bulk is transferred to the buyer; and
>
> (b) the buyer becomes an owner in common of the bulk.

58 The liquidators submitted, therefore, that the following requirements had to be satisfied in order for CL to be able to rely on s 20A:

> (a) The first requirement of sub-s (1) is that there should be "a contract for the sale of a specified quantity of unascertained goods";
>
> (b) The second requirement is that the goods or some of the goods form part of a bulk, *ie* the goods must be fungible goods in that they must be of the same kind and interchangeable with any other goods therein the same number or quantity;
>
> (c) The third requirement is that the bulk must be identified either in the contract or by subsequent agreement between the parties; and
>
> (d) The fourth and final requirement is that the buyer must have paid the price for some or all of the goods which are the subject of the contract and which form part of the bulk.

I will adopt this categorisation for present purposes.

59 As regards the first requirement, it was not disputed, subject to the submissions on s 62(4) of the Act, which I will come to, that each contract of sale to CL was a contract for the sale of a specified quantity of unascertained goods at the time the contract was entered into.

60 As regards the second requirement, s 61(1) of the Act defines "bulk" as:

> ... a mass or collection of goods of the same kind which —
>
> (a) is contained in a defined space or area; and

(b) is such that any goods in the bulk are interchangeable with any other goods therein of the same number or quantity ...

61 As both sides referred to the report on *Sale of Goods Forming Part of a Bulk* by The Law Commission and The Scottish Law Commission (Law Com No 215; Scot Law Com No 145), 20 July 1993 ("the Commissions") when they proposed the present s 20A, I will do likewise. The definition of bulk in s 61(1) was proposed by the Commissions. The Commissions also provided guidance as to what constitutes a bulk at para 4.3 of their report:

(a) a cargo of wheat in a named ship;

(b) a mass of barley in an identified silo;

(c) the oil in an identified storage tank;

(d) cases of wine (all of the same kind) in an identified cellar;

(e) ingots of gold (all of the same kind) in an identified vault;

(f) bags of fertiliser (all of the same kind) in an identified storehouse;

(g) a heap of coal in the open at a specified location.

62 After these illustrations, the Commissions said that their proposed definition (of "bulk") was intended to exclude a seller's general stock.

63 Relying on this statement, the liquidators argued that since RBG was in the business of buying and selling metals, the metals in the Fujitrans warehouses were part of RBG's general trading stock and hence, should be excluded from the definition of bulk.

64 I do not agree with that approach. The Commissions' statement (at para 4.3) was followed by another sentence and I set out both below:

> The definition is intended to exclude a seller's general stock. A person who buys a quantity of unascertained goods to be delivered out of the seller's general stock would not be buying an item out of an identified bulk.

65 I am of the view that the general stock was intended to be excluded because it would not be an identified bulk. However, if a bulk comes within the definition of s 61(1) of the Act and it is identified, it will come within s 20A(1) even if the identified bulk is also part of the general stock of the vendor. The real question on this requirement is whether there was a bulk within the definition of s 61(1) and whether it has been identified.

66 As will be recalled, the definition of "bulk" refers to a mass or collection of goods "of the same kind". In the examples given by the Commissions, reference was made to ingots of gold, all of the same kind.

67 In the case before me, the metals in the Fujitrans warehouses were not all of the same kind. There were, for example, copper, nickel and tin. That the nickel, copper and tin might each have constituted a sub-bulk of metal of the same kind is a different point.

68 Furthermore, the warehouse receipts did not identify the location of the particular warehouse in which the metals were stored. Each warehouse receipt was on the letterhead of Fujitrans and there was a reference in its contents only to "Inwarehouse Singapore". I have set out the full text of one such warehouse receipt (at [28] *supra*) as an illustration.

69 Likewise, the monthly confirmations from Fujitrans also did not identify the location of the particular warehouse. The cover letter from CL forwarding each monthly summary for confirmation also did not identify the location of the particular warehouse. It simply referred to "a summary of base metal stock stored within your warehouse facilities" as at a certain date.

70 As regards the third requirement, CL had to establish that the bulk was identified either in each contract or by subsequent agreement between the parties. It was common ground that at the time each contract was entered into, the bulk was not identified as the location of the metal sold was not mentioned in the contract document, *ie* the purchase confirmation. Indeed it was CL's position that, legally, RBG was not obliged to tender or forward delivery documentation from Fujitrans subsequent to the entry of each contract so long as the delivery documentation pertained to metal of the type and quality sold, even though CL and RBG may have been contemplating metal in a Fujitrans warehouse.

71 The question then was whether the bulk was identified by subsequent agreement between the parties. Here, CL's case also ran into difficulty.

72 Its case was that the warehouse receipts, and also the monthly stock confirmations, had appropriated the metals set out therein by virtue of the lot numbers mentioned therein and not that these documents had identified the bulk from which the metals were coming from.

73 Likewise, CL's case was that in Harris' visit of 12 March 2002, the metals had been appropriated by Lim by his pointing out of metals at various locations in the warehouses to Harris.

74 In the circumstances, the liquidators submitted that CL "cannot turn a failed attempt to purchase unascertained but subsequently specific goods into an ex-bulk sale". Although this submission was not happily worded as the metals were never specified, *ie* ascertained, I agree that there cannot be an agreement on a bulk by default. Either the bulk was identified subsequently by agreement or it was not. A failed or invalid appropriation of goods in a bulk does not become an agreement that the goods were sold as part of that bulk. There was no such agreement. As much was admitted by Harris in cross-examination:[5]

> Q. I said with RBG, Mr Harris, did you have an agreement with RBG that the material that they were selling you and which subsequently became identified in the warehouse receipt was going to be held as part of a bulk in the Fujitrans' warehouse? It is a very simple question: was there such an agreement or was there no such agreement with RBG?
>
> A. Sorry, I misunderstood the question. There was no agreement with RBG that it would be held as a bulk. It was specified goods. Sorry, Mr Gill.

75 In the circumstances, CL would also be unable to satisfy the fourth requirement. Although it has paid the price under each contract of purchase, the metal was not purchased as part of a bulk.

76 Accordingly, CL has also failed in the Bulk Claim.

**Are the liquidators estopped by objective acts?**

77 CL also submitted that by delivering or procuring the delivery of the warehouse receipts to CL, RBG had represented to CL that it was appropriating metals to the purchases or alternatively, that it was identifying the bulks of nickel, copper and tin in the Fujitrans warehouses as bulks from which CL's metals were to come. In reliance on such representations, CL had acted to its detriment by paying the purchase price and RBG is therefore estopped from contending otherwise.

78 However, estoppel was not pleaded and CL was not entitled to rely on estoppel.

79 Secondly, the cases relied on by CL on estoppel do not advance its position.

80 The first case relied on by CL was *Knights v Wiffen* (1870) LR 5 QB 660. However, that case did not deal with the issue as to whether the liquidators of a company are bound by representations made by that company. The headnote for that case states:

> The defendant, having a quantity of barley in sacks lying in his granary which adjoined a railway station, sold eighty quarters of it to M. No particular sacks were appropriated to M., but the barley remained at the granary subject to his orders. M. sold sixty quarters of it to the plaintiff, who paid him for them and received from him a delivery order addressed to the station-master, as was usual in such cases. The plaintiff sent this order in a letter to the station-master, saying, "Please confirm this transfer." The station-master shewed the delivery order and the plaintiff's letter to the defendant, who said, "All right, when you get the forwarding note I will put the barley on the line." M. became bankrupt; and the defendant, as unpaid vendor, refused to deliver the barley when the forwarding note was presented to him by the station-master acting for the plaintiff:—
>
> *Held*, that the defendant was estopped by his statement to the station-master from denying that the property in the goods had passed to the plaintiff; for, by making such statement, he induced the plaintiff to rest satisfied under the belief that the property had passed, and so to alter his position by abstaining from demanding back the money which he had paid to M.

81 CL also submitted that the legal position from *Wiffen* was acknowledged in *In re Goldcorp Exchange Ltd* [1995] 1 AC 74 in which the Privy Council distinguished the facts there from those in *Wiffen*. However, I note that in *Goldcorp Exchange*, what the Privy Council had said of *Wiffen*, at 93, was that:

> There may perhaps be a shadow over this decision, notwithstanding the high authority of the court: see the observations of Brett LJ in *Simm v Anglo-American Telegraph Co* (1879) 5 QBD 188, 212.

The Privy Council then proceeded on the assumption that the decision in *Wiffen* was correct but considered that *Wiffen* did not apply to the facts before it.

82 In any event, the issue before me is not so much whether RBG is estopped but whether the liquidators of RBG are estopped *vis-à-vis* CL's Ascertainment Claim and Bulk Claim.

83 On this issue, the liquidators relied on three cases which, I agree, mean that they are not estopped. I will refer to the cases in chronological order.

84 In *In re Exchange Securities & Commodities Ltd* [1988] Ch 46, Harman J said, at 58:

> If the liquidator did not make the statement, it does not fall within the fifth probandum of the

requirements of estoppel by representation as stated in *Spencer Bower and Turner, Estoppel by Representation*, 3rd ed. The liquidator, and I have used the words "trustee" and "liquidator" entirely interchangeably in this set of observations, is entirely free to say, "I am not the company for this purpose. I am here fulfilling the statutory function of considering the debts of the company and paying its true creditors. Let all creditors come in and satisfy me as to their true debts regardless of what may have been the position caused by estoppels, which are only, of course, rules of evidence, as between the company and you before it went into liquidation."

85 In *The Fat Kee Firm v The Po On Marine Insurance Co., Ld.* [1907] 4 HKCU 1, the facts are similar to those before me, although they are not identical. There, the firm of Kwong Yik Wo was a large dealer in flour which was stored in the Hop Yick godowns. The firm obtained advances on its consignments of flour from various persons including the firm of Fat Kee and Hung Sheung, from an insurance company and also from the owner of the godowns, one Mrs Musso. Kwong Yik Wo encountered financial difficulties and its managing partner disappeared. The firm was made bankrupt and the Official Receiver was appointed trustee. The manager of the Hop Yick godowns also disappeared. It was discovered that very little flour remained in the godowns and these had been seized by Mrs Musso. Subsequently, some flour was found in the Po On godowns deposited in the names of Chan Wai Chi and Chai Kee. Fatt Kee and Hung Sheung filed a writ against Po On Marine Insurance Co and Chan Wai Chi in trover for the return of 10,000 bags of flour in the Po On godowns and damages for detention. Apparently these claimants were pledgees or chargees of the flour. The Chief Justice of Hong Kong said there were two main contentions. The first was whether there was a sufficient appropriation of the bags of flour, assuming that the law as to ascertainment in the case of sales applied to pledges of goods. The second was whether the plaintiffs could acquire title based on estoppel, assuming they could not establish appropriation.

86 After considering various cases on the issue of estoppel, including the case of *Wiffen*, the Chief Justice of Hong Kong concluded (at 29):

> [O]ne thing is abundantly clear from this discussion: that the creditors of Kwong Yik Wo, who are represented by the Official Receiver, are not bound by the estoppel, and that so far as the bankrupt's estate is concerned, the plaintiff cannot set up this estoppel.

However, I should mention that although this legal principle is clearly stated, it was not entirely clear to me what representation or conduct in that case was alleged to have constituted the estoppel. It may have been the presence of the manager of Kwong Yik Wo in a godown when inspection was done by a representative of a claimant.

87 The third case is an unreported decision by Choo Han Teck J in *Asia Sawmill Co Pte Ltd v Tan Bak Liang* [1999] SGHC 160. Although the facts there are different from those before me, an issue arose as to whether an alleged agreement, if it existed, could bind the liquidators of Asia Sawmill. Choo J said at [5] to [7]:

> Counsel for Liang argued that the liquidator is estopped from reneging from the agreement between the parties. She submitted that Liang San is prejudiced because Kheng Kee had already been wound up. This argument fails on two counts. First, as I have stated, there was no evidence of any representation by Asia Sawmill to Liang San. …
>
> Secondly, any estoppel that might have arisen against Asia Sawmill in these circumstances does not bind the liquidator. On the assumption that a representation as alleged was indeed made, it was made by the company Asia Sawmill as Liang San contends. It is not alleged that the liquidator made it or was privy to it in any way. On that basis, Liang San's case would still fail at

the threshold because the defence of estoppel operates only against the person who made the representation whether by himself or his agent. This liquidator was not in the circumstances of this case the agent of Asia Sawmill. …

The principle that a liquidator may not be estopped by representations made by the company was fully explored in *Re Exchange Securities & Commodities* [1988] 1 Ch 46. This case concerned the application by the liquidator of two companies in liquidation for directions. The two companies were related and were involved in the business of speculating internationally in commodities. It transpired that they had reported fictitious profits to some investors. In the course of the liquidator's applications the question of whether the liquidator was estopped by the representations of the companies in respect of the fictitious profits. Harman J held that he was not. The question to be asked is whether the estoppel will defeat the statutory scheme (of liquidation). Harman J held that it would because it would permit fictitious creditors to deplete the company's assets. This case before me may not involve a fictitious creditor or claim, but the answer would be the same because the alleged agreed set-off by Asia Sawmill, if at all (I have found on the documents and defendant's affidavit that there was no agreement by Asia Sawmill), was clearly made in bad faith by an errant director, and ought not bind the liquidator. …

88 Accordingly, I am of the view that estoppel cannot be used as against the liquidators of RBG.

89 Furthermore, I doubt if estoppel would have been available as against RBG itself, assuming it was not in liquidation, to overcome an absence of ascertainment. For example, if RBG sold 100mt of nickel to each of three purchasers and there were only 120mt of nickel in the Fujitrans warehouses, how would any of the purchasers be able to claim its 100mt in the face of competing claims by the others? Of course, if RBG decided to physically deliver to one purchaser its 100mt first, that would probably constitute the appropriation, leaving aside any question of undue preference in a liquidation. However, in the absence of such a delivery, each of the purchasers would still have no title to the metals in the warehouses. Estoppel would not help as the question would remain as to which metals the purchaser has title to.

90 As to whether estoppel could be available against RBG itself in a bulk claim, I also have some doubt if the bulk has not been identified. Further, can there be a bulk claim by estoppel over and above the s 20A claim?

91 Perhaps, in most instances, the illustration above would resolve itself either by RBG making physical delivery or payment of damages or going into liquidation.

**Public policy**

92 CL also raised another issue which it said need not be pleaded. CL said that to allow RBG its claim to the metals is contrary to public policy and would doubly enrich RBG. CL submit that such a claim should be dismissed on the further ground of *ex turpi causa non oritur actio* (from a base act no action originates) and/or of *ex dolo malo non oritur actio* (from fraud or an illegal act no action originates). CL also submitted that the fact that RBG's claim is advanced by liquidators makes no difference. CL relied on *In re Silver Valley Mines* (1882) 21 Ch D 381 and *Knowles v Scott* [1891] 1 Ch 717 for the proposition that liquidators are agents of the company. In my view, the facts in those cases are very different and do not involve the question of public policy or illegality.

93 CL also referred to *Beresford v Royal Insurance Company, Limited* [1938] AC 586. The headnote of that case reads:

> The personal representative of a person, who, having insured his life, commits suicide while sane, cannot recover the policy moneys from the insurance company, for it would be contrary to public policy to assist a personal representative to recover the fruits of the crime committed by the assured. It makes no difference in law that the policy on its true construction binds the insurance company to pay in the event of the assured's suicide while sane, after the expiry of a year from the commencement of the insurance, for the Court will not enforce a provision which is illegal or contrary to public policy.

According to CL, that case illustrates that even a personal representative of the estate of a wrongdoer is bound by the doctrine that a wrongdoer is not allowed to benefit from his illegal conduct. In my view, that case is clearly different from the facts before me.

94 As I have already mentioned, RBG is not the substantive plaintiff in so far as CL's claims are concerned. CL is making its claim to metals in Fujitrans warehouses and I see nothing contrary to public policy to require CL to establish its title to the metals. It is not a question of allowing RBG to benefit from its illegal conduct in the sense mentioned in *Beresford*. Furthermore, there is no question of double enrichment. CL has paid for the metals. If it cannot establish its title to the metals, it will have to claim as an unsecured creditor.

**Section 62(4) of the Act**

95 As CL was relying on s 20A of the Act, RBG sought to deny CL any relief under s 20A by, in turn, relying on s 62(4) of the Act. Section 62(4) states:

> The provisions of this Act about contracts of sale do not apply to a transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.

96 In view of my conclusion on the Bulk Claim, it is, strictly speaking, not necessary for me to decide the issue arising from s 62(4). However, as there were much evidence and arguments on this issue, I will offer some views on it.

97 The parties had initially proceeded on the basis that it was necessary for the liquidators to establish that, in reality, each sale contract was a contract by RBG to provide metal as security to CL for a loan to RBG. In dealing with this point, much was said on behalf of the liquidators about financing transactions as though a financing transaction was necessarily a transaction for a loan. In my view, a financing transaction does not necessarily encompass a loan. Thus in *Thai Chee Ken v Banque Paribas* [1993] 2 SLR 609, the Court of Appeal cited the following passages with approval. In *In re George Inglefield, Limited* [1993] Ch 1, Romer LJ said at 27:

> The only question that we have to determine is whether, looking at the matter as one of substance, and not of form, the discount company has financed the dealers in this case by means of a transaction of mortgage and charge, or by means of a transaction of sale; because, of course, financing can be done in either the one way or the other, and to point out that it is a transaction of financing throws no light upon the question that we have to determine.

Also *Gough on Company Charges* (Butterworths, 1978) states at 252:

> Identical 'financing' transactions might be effected equally in the form of a loan with mortgage given as security (subject to redemption) or by means of a legal sale (whether or not the seller retains any legal, conditional right of repurchase). The law can describe any given transaction as

having a certain legal nature determined independently of its economic 'object'. It is possible, therefore, to express certain transactions, having the same economic object, in various legal forms.

98 In *Thai Chee Ken*, the respondent bank had purchased shares in another company from the appellant company, Pan-Electric Industries Ltd ("Pan El"). However, it was a condition of that agreement to purchase that Pan El would execute the repurchase agreement contemporaneously. Naturally, the repurchase was to be done at a later date from the purchase. However, Pan El went into liquidation and the liquidators contended that the transactions were really a loan with a charge which were void *vis-à-vis* the liquidators for want of registration. The Court of Appeal concluded that the transaction was a purchase and repurchase and was not a loan with a security. The Court of Appeal noted, *inter alia*, that there was no suggestion that the documents were a sham or a disguise.

99 Although *Thai Chee Ken* does not concern the application of s 62(4) of the Act or its equivalent, the observations of the Court of Appeal are helpful, as I have noted above. As in *Thai Chee Ken*, there was no suggestion in the case before me that the documents regarding the purchase and the call option were a sham or a disguise in the sense that they were illegal or that CL had acted dishonestly. The suggestion of a sham or a disguise was in the sense that the transactions did not reflect commercial reality. By that, the liquidators meant that the transactions amounted in commercial reality to loans because of the financing element.

100 In addition to what I have already said about financing transactions, I will say that a loan envisages the relationship of a borrower and a lender and the obligation of the borrower to pay the lender. A mortgage, pledge or charge is a security which is provided to secure a payment obligation.

101 On the facts before me, there was no relationship of borrower and lender and no obligation on the part of RBG to pay CL after each sale, although the original intention might well have been for CL to lend money to RBG on the security of the metals it purchased. It seems to me that the legal transaction was a sale and purchase and not one of a loan with a security. The fact that CL was holding the same metals it had bought against each call option does not change the position.

102 However, that is not all. In the liquidators' closing reply submissions, the liquidators sought to rely on a new point not pleaded arising from a passage of the judgment of the Lord President in *Gavin's Trustee v Fraser* [1920] SC 674. Before I refer to that passage, it is important to bear in mind the facts in the case of *Gavin*.

103 In *Gavin*, Mr Gavin had initially borrowed some money from the defendant, one Mr Fraser, a timber merchant. He had also entered into a contract with Mr Fraser to haul timber which Mr Fraser was felling and to put it on railway wagons. Mr Gavin was to supply the haulage plant and the job was expected to last more than a year. About a month after this contract was entered into, Mr Gavin entered into a transaction with Mr Fraser in which he allegedly sold the plant to Mr Fraser. The transaction was evidenced by an exchange of letters in which Mr Fraser agreed to sell the plant back to Mr Gavin one year later on repayment of the capital sum plus interest at 6% per annum. Subsequent correspondence also showed that Mr Gavin sought to get a higher sum for the plant thereafter, from Mr Fraser, but Mr Fraser refused to agree to this. Mr Gavin continued to be in possession of the plant and used it for the haulage contract. However, he became bankrupt a few months later.

104 It was in these circumstances that the trustee in bankruptcy made a claim against Mr Fraser for, *inter alia*, the plant alleging that the sale contract of the plant was a fictitious one. The trustee was, therefore, the pursuer and Mr Fraser was the defender. In the course of the dispute, Mr Fraser

relied on s 18 r 1 of the Sale of Goods Act 1893 regarding the passing of title in a sale of specific goods while the trustee relied on s 61(4) of the 1893 Act which, for present purposes, is *in pari materia* with s 62(4) of the Act.

105 In these circumstances, the Lord President said at 686–687:

> But the point on which I definitely part company with the Lord Ordinary is as to the meaning of the relative clause. The exclusion applies in terms, not to transactions which, while they employ sale form, *actually* operate by way of security, but to transactions which, while they employ sale form, *are intended* so to operate. The latter class logically includes, but is wider than, the former. The former class could not, in any case, fall within the application of an Act dealing only with sale; at any rate, if section 61(4) applies to them at all, it does so only to the effect of stroking the t's and dotting the i's of the law as existing without it. But the latter class, in so far as its content exceeds that of the former, falls directly within the application of the Act. [emphasis in original]

106 This was the passage which the liquidators relied on to argue that even if the transactions were sale contracts, s 62(4) of the Act would still kick in because the intention of the parties was to create a security arrangement.

107 However, the Lord President also continued to say immediately after that passage (at 687):

> Now, a transaction which actually operates by way of security is one which produces the legal relations of security – holder and reversioner. In like manner, a transaction which is intended so to operate is one which is intended to produce those legal relations. The intention of parties with regard to the operative effect of a transaction into which they enter, one with another, is the same thing, in substance and in quality, as that common intention which is the vital ingredient in all forms of agreement. It "must refer to legal relations: it must contemplate the assumption of legal rights and duties as opposed to engagements of a social character" (Anson on Contract, I. 1, 4). The intention may miscarry on technical grounds, or on account of other legal defect; but that is another matter.
>
> Midway in his opinion the Lord Ordinary arrives at the conclusion that the transaction in the present case was a contract of sale, not of loan, and adds – rightly, as I think – that, "after entering into it the defender could not have sued Gavin as his creditor in any part of the £1200, either before or after 31st December 1918". So much for the legal rights of parties under the transaction. But the Lord Ordinary goes on to contrast with this what he calls the "intention" of the parties. That "intention" was, the Lord Ordinary says, *inter alia*, that (notwithstanding the sentence above quoted) "if the defender did not want to keep the plant and preferred his money, Gavin was to pay him his £1200 if able to do so". The Lord Ordinary is at pains to make it clear that by "intention" in this passage is meant, not any contractual intention, but an understanding which "had no legal validity," and as to which "it is not proved that either party had any belief that it had, or that the other was under any but a moral obligation to carry it out, and was not bound in law by the contract literally, as it was expressed in writing". My examination of the evidence has failed to disclose any trace of any such understanding or moral obligation. But the Lord Ordinary goes on to construe the relative clause in section 61(4) as covering "intention" in this sense, and arrives at the conclusion that the transaction was not attended with a transfer of property, because it was "intended" – in the sense explained in the passage referred to – "by the parties to it, notwithstanding its form and the legal relations which it created of seller and purchaser, simply to serve the purpose of affording the defender some security for his advances as against possible creditors of Gavin." I am unable, for the reasons already given, to agree with

the interpretation of the relative clause on which this conclusion is based. It appears to me that there underlies it a confusion between the motive which may have inspired the transaction and the contractual intention with which the actual transaction was made.

108 Accordingly, in so far as the liquidators were seeking to go behind the legal relationship between RBG and CL, it seems to me that the Lord President's judgment in the case of *Gavin* did not assist the liquidators.

109 The other judgments in the case of *Gavin* also do not support the liquidators' contention.

110 For example, Lord MacKenzie said at 688:

> The issue is the same as in the latest case in this Division *Hepburn v. Law* [1914 SC 918], whether there was merely the form of a contract of sale without the reality, and in the English case of *Maas v. Pepper* [[1903] 1 KB 226, [1905] AC 102], in which the Lord Chancellor used the expression that the sale was colourable. The word "colourable" is defined in the Oxford Dictionary as "covert, pretended, feigned, counterfeit, collusory, done for appearance only". None of these expressions can be applied with justice to the transaction here. If not, and if the contract amounts in reality to a contract of sale, it matters not, in my opinion, what the ulterior object may have been. A real contract of sale is not struck at by any rule of the common law or by the provisions of section 61(4) of the Sales of Goods Act.

111 Lord Skerrington was able to reach a conclusion without having to express a definite opinion on the object and effects of s 61(4) of the 1893 Act. Nevertheless, he went on to say at 696:

> The language used is wide enough to include a case where an attempt has been made to conceal a loan under the disguise of a sale. I am disposed, however, to think that the Legislature had primarily in view transactions in which a lender stipulates for and obtains a property title as a security for his loan and by a transparent and innocent legal fiction is represented to be a purchaser; and also sales where, by a collateral agreement, the purchaser undertakes to account to the seller for any profit which he may make on a resale after recouping himself with interest for his outlays, including the price which he paid for the goods. … As regards the case now before us, I am of the opinion that the facts established at the proof do not justify the Lord Ordinary's finding to the effect that the transaction between the parties was intended to operate by way of security. There is no evidence to the effect that the parties intended to subject themselves to any "moral obligation" different from or additional to their legal obligations. Even if there had been evidence to that effect I should not have regarded as material an "intention" which the parties deliberately deprived of any legal efficacy.

112 Lord Cullen said at 699–700:

> While the Lord Ordinary holds that the contract between the parties was one of sale, and that there was no contract of loan, thus disposing of the issue of fact raised on record in favour of the defender, he has gone on to decide that Rule 1 of section 18 does not apply to the case. He holds it excluded by section 61(4) of the Act, which provides: "The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security". The pursuer has no plea expressly directed to this enactment. I confess to having some difficulty in grasping quite clearly the Lord Ordinary's view in this part of his judgment. He has held that the contract of December 1917 was a true contract of sale, attended with no contractual reservation or collateral engagement, apart from the *pactum de retrovendendo*, which in itself did not make the

> sale any the less a true sale. Accordingly, the "intention" that the said sale should operate "by way of mortgage, pledge, charge, or other security" which the Lord Ordinary finds to have existed, would seem to have been nothing contractual in nature, but only some state of mind, presumably common to both parties, which bound neither, and which each was free to modify or desert entirely at pleasure. I have difficulty in supposing that this is what is postulated in section 61(4) by the word "intended", but assuming that it is, I am, unlike the Lord Ordinary, unable to find evidence of its existence in the present case. I do not find proof that the parties to this contract of sale were minded in common that it should operate by way of mortgage, pledge, charge, or other security. The defender's evidence is to the contrary effect. Gavin's evidence, for what it is worth, is to the effect that there was no contract or sale but only a contract of loan, a presentation of the facts the truth of which has been negatived. Under reference, however, to the cases which the Lord Ordinary says he has followed, the pursuer's counsel argued that if a transaction which embraces a contract of sale is, on all its terms taken together, such that, when it is put in operation according to its terms, the resulting rights and obligations *hinc inde* are just those appropriate to a simple and explicit contract of loan on security, then the transaction, in respect of such *modus operandi*, falls under the ban of section 61(4). This may or may not be right, but it does not appear to me to apply to the present case. It is not a true description of the *modus operandi* of the contract here in question to say that it was equivalent to that of a mere security transaction. The contract had alternative modes of operation. If Gavin had exercised his power of repurchase by paying to the defender the £1200 with interest, the parties would, no doubt, have stood in the end in the same position in which they would have stood as the result of a loan given and repaid. There would, however, have been these differences, that the defender during the interval stood owner of the plant, and that Gavin was under no obligation to repay the money. On the other hand, in the event, which happened, of Gavin failing to exercise his power of repurchase, the *modus operandi* of the contract was to leave the defender owner of the plant as by right of purchase, freed from the spent *pactum de retrovendendo*. A transaction by way of security only does not operate to such an effect.

113 Accordingly, while it may be said that e-mail from RBG prior to the transactions had suggested that RBG was seeking a loan with the metals being provided as security, and CL's e-mail in response did not disagree with what RBG was seeking, the end result was the contractual structure of a purchase and an option granted to RBG which gave RBG the entitlement but not the obligation to buy the metals back. As was observed by Lord Cullen in *Gavin*, RBG would have stood in the same position as a borrower who had repaid the loan to it if RBG exercised its option. However, in the interval, CL would have been the owner, if the appropriation had been properly and validly carried out. Further, if RBG chose not to exercise its option, then CL would remain the owner of the metals.

114 The liquidators also relied on the minutes of a CL credit committee meeting of 7 December 1998, where the following was stated:

> For the future, there are possibilities to enhance our income from this relationship by providing self securing, self liquidating stock finance facilities ("Cash & Carry") either on an on balance sheet or an of balance sheet basis. This would benefit both CLUK and CL Rouse as the business would be structured in such a manner as to ensure that CL Rouse transacts the hedging. In addition, the CL group would benefit from the fact that margin payments made under such a facility would be retained in the organisation.

115 The names below those minutes were those of Andy Howell, Relationship Manager, and Roy Pemberton, Head of Commodities. Neither were called by CL to give evidence to explain this paragraph of the minutes which seemed to suggest that CL was looking at a security arrangement. However,

Harris said that Andy Howell was working in a separate department and reported to Roy Pemberton while Harris himself reported to Andy Grooch. Harris also said that Andy Howell had never spoken to him about CLRD's relationship with RBG. Moreover, I note that the minutes were dated about three years before RBG began to enter into transactions with CLRD. Accordingly, I did not place much weight on the minutes.

116 What is more interesting is cl 5 of the standard Call Option Confirmation which the liquidators also relied on. It will be recalled that after each purchase by CL, CL would grant RBG a call option to buy back the metals. Clause 5 stated:

> Upon the occurrence of an Event of Default RBG shall not be entitled to exercise its rights under this call option and all such rights shall lapse and CLRD may sell nickel it is holding against this option to third parties and RBG shall indemnify and keep indemnified CLRD against all losses, costs and expenses incurred by CLRD as a result of such third party sales.

117 In the call option confirmation, one of the events of default was if RBG became insolvent or was generally not paying its debts as they became due. Bearing in mind that RBG was not contractually obliged to exercise the call option in the first place, the inclusion of cl 5 was surprising. It gave rise again to the spectre of a security arrangement.

118 Harris, not being a lawyer, could only say that he had inquired of CL's legal department and it was explained to him that as CL was holding stock against each option, there might be a loss to CL if CL had to liquidate the stock. CL would then want to claim consequential damages against RBG. Clause 5 was incorporated to take into consideration the case of *Hadley v Baxendale* (1854) 9 Exch 341; 156 ER 145.[6] In para 148 of CL's reply submissions, CL submitted that cl 5 would have applied where RBG, having exercised the call option, committed a breach of the terms of the call option. In my view, cl 5 was not worded as such.

119 In any event, I note that cl 5 would not apply if RBG had simply allowed the call option to lapse without an event of default. Accordingly, I am of the view that cl 5 did not turn a purchase and a call option into a loan with a security.

**RBG's claim in conversion**

120 As I have mentioned above, Harris had made an inspection of Fujitrans warehouses on 12 March 2002. Subsequently, on 7 May 2002, he had a telephone discussion with Lim and instructed Lim to release metals purchased by CL to Steinweg.

121 According to the evidence of Tay Choon Peng, an operations officer with Steinweg, Steinweg received written instructions from CL on 7 May 2002 to take delivery of the following metals from Fujitrans:

(a) 1,000 bundles of ENAF brand tin ingots weighing 504.360mt nett;

(b) 100 bundles of ENAF brand tin ingots weighing 50.882mt nett;

(c) 1,000 drums of Severo brand nickel cathodes weighing 494.987mt nett;

(d) 150 bags of Sherritt brand nickel briquettes weighing 300mt nett; and

(e) 350 drums of Severo brand nickel cathodes weighing 173.519mt nett.

122 The Keppel Distripark was in a free trade zone as was Jurong Port where Steinweg's warehouse was located. Steinweg had to obtain cargo clearance permits to move the metals from one free trade zone to another. Steinweg obtained the permits on 8 and 9 May 2002. It then informed Lim that it was sending its hauliers to collect CL's cargo. Lim then released 150 bags of nickel briquettes to Steinweg. After they were moved out of Keppel Distripark on 9 May 2002, Tay telephoned Lim to ask about the next batch of CL's metal to be released and at that time Lim said he had instructions not to release any metal. The 150 bags amounted to 300mt.

123 The liquidators' position was that according to RBG's records, which were admittedly incomplete, there should have been 750mt of nickel briquettes in the Fujitrans warehouses as at the date of provisional liquidation in England in May 2002. There was no reference in any packing list of nickel briquettes leaving the Fujitrans warehouses. The liquidators submitted that CL was not able to demonstrate that the 300mt of nickel briquettes removed on its behalf belonged to it and that its 300mt would have been part of the 450mt missing from the warehouses.

124 In any event, I note that CL could not establish appropriation of the nickel briquettes prior to the release for the same reasons I have stated in respect of the Ascertainment Claim.

125 I also note that CL is not relying on s 18 rr 5(1) and 5(2) of the Act to claim that the release of the nickel briquettes amounted to appropriation if there was no earlier appropriation of the same. If CL had sought to rely on the release, it would have had to contend with two questions bearing in mind that the date of release, *ie* 9 May 2002, was after the effective date of the appointment of provisional liquidators and commencement of winding up in England. The questions then would have been whether Lim still had authority to release the metal and whether the release was void for being a disposal of RBG's assets after the commencement of winding up.

126 CL, however, relied on the telephone conversation between Harris and Lim of 7 May 2002 wherein Lim had said that 100% of CL's nickel briquettes were in the warehouses. It seems to me that this argument pertained to the question whether the nickel briquettes had been appropriated, prior to their release to Steinweg, by the warehouse receipts and the other factors which CL had relied on for the Ascertainment Claim. I have already given my view on that. I also do not place much weight on what Lim had said. In my view, he said whatever he wanted to regardless of the fact that there was no appropriation of the metal. I do not consider that statement of his, during the telephone conversation, as being adequate evidence of earlier appropriation by him.

127 As for the argument that Lim apparently had no difficulty in identifying the nickel briquettes for release to Steinweg, that is again neither here nor there. There were 300mt of nickel briquettes in the Fujitrans warehouses and it was convenient for him to pick those for release and not because they had been earlier appropriated to CL.

128 On another point, RBG argued that what was released to Steinweg did not conform to what was purchased by CL. This argument was raised because CL's initial contract of purchase of nickel briquettes and subsequent rollovers were for the purchase of nickel briquettes of LME grade. The nickel briquettes released were not all of LME grade. However, on this point, Harris said that after the initial purchase, CL was aware that not all the nickel briquettes were of LME grade and therefore a further discount was given by RBG to CL for the deliverability allowance as the non-LME metal would attract a bigger discount should it be on-sold by CL to others. There was documentary evidence of this further discount. Thus, although the contract documents were not amended, it seems to me that RBG and CL had agreed that what was being sold to CL were nickel briquettes of mixed grades. However, this view does not get CL off the hook in the light of my conclusion that the nickel briquettes had not been appropriated to CL before the release to Steinweg.

129 In the circumstances, I find that RBG has established its claim against CL for conversion.

**Orders**

130 Accordingly, I make the following orders:

(a) I declare that, save for the drum of nickel identified as 519-W127 by SGS, RBG remains the legal and beneficial owner of the metals in the Fujitrans warehouses which had been held for the account of RBG prior to any dealing of the metals between RBG and CL.

(b) The sale proceeds of RBG's metals are to be released to RBG or its solicitors, as RBG's solicitors may direct.

(c) CL is to pay damages to RBG for conversion of the nickel briquettes. Such damages are the net purchase price or prices which CL has obtained for the same.

(d) CL's counterclaim is dismissed save for the said drum of nickel for which I declare CL to be the legal and beneficial owner. The sale proceeds of that drum of nickel are to be released to CL or its solicitors, as CL's solicitors may direct, subject to any set-off in view of (c) above.

131 I will hear the parties on interest, costs and any other consequential relief.

*Plaintiff's claims allowed, save for one drum of nickel. Second defendant's claim dismissed, save for one drum of nickel.*

**SCHEDULE**

**Dramatis Personae**

BCV Banque Cantonale Vaudoise (first defendant)

CL Credit Lyonnais (second defendant)

CLR Credit Lyonnais Rouse Limited (a subsidiary of CL and a ring-dealing member of LME)

CLRD Credit Lyonnais Rouse Derivatives (a division of CL)

Fujitrans Fujitrans (Singapore) Pte Ltd

Kennard Daryl John Kennard, an English solicitor in Singapore representing Banque Cantonale Vaudoise, the first defendant

Lim Lim Tau Hee

LME London Metal Exchange

Harris William John Harris, also known as Bill Harris, Metals Marketing Manager of CLR who also tenders metal for CLRD

RBG RBG Resources plc (incorporated in England under the name of Impactworld plc, changed its name to Allied Deals plc in 1996 and then to RBG Resources plc in 2001)

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|---|---|
| Rong De | Rong De Distribution Pte Ltd |
| SGS | SGS Testing & Control Services Singapore Pte Ltd |
| Shierson | Malcolm Brian Shierson, one of the English liquidators of RBG |
| Steinweg | C Steinweg Warehousing (FE) Pte Ltd |

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[1]See para 135 of CL's closing submissions.

[2]See notes of evidence, 6 February 2004, p 49 lines 9–18.

[3]See notes of evidence, 5 February 2004, p 88 line 14 to p 89 line 18.

[4]See notes of evidence, 13 January 2004, p 76 line 24 to p 77 line 22.

[5]See notes of evidence, 5 February 2004, p 97 lines 5–14.

[6]See notes of evidence, 3 February 2004, p 67 line 1 to p 68 line 16 and notes of evidence, 4 February 2004, p 2 line 8 to p 3 line 24 and p 74 line 24 to p 75 line 3.