Banque Cantonale Vaudoise v RBG Resources plc and Another [2004] SGHC 222

Case Number : Suit 542/2002, RA 210/2004

Decision Date : 30 September 2004

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Jainil Bhandari and Alvin Looi (Rajah and Tann) for plaintiff; Kenneth Lie and Raghunath Doraisamy (Joseph Tan Jude and Benny) for second defendant

Parties : Banque Cantonale Vaudoise — RBG Resources plc; Fujitrans (Singapore) Pte Ltd

Civil Procedure – Appeals – Discovery of documents – Whether second defendant should be allowed discovery and production of documents – Relevancy of documents

Civil Procedure – Discovery of documents – Application – Leave to adduce additional evidence for hearing of appeal against summary judgment against second defendant not obtained yet – Whether second defendant's application for discovery premature – Order 24 rr 5(3)(c), 7 Rules of Court (Cap 322, R 5, 2004 Rev Ed)

30 September 2004

Woo Bih Li J:

Introduction

1 This action is yet another consequence of the transactions of RBG Resources plc ("RBG") which was previously known as Allied Deals plc ("Allied Deals"). RBG had engaged in transactions with various banks which had either purchased metals from RBG or lent money to RBG on the security of metals. Many of the metals were allegedly stored in warehouses operated by or on behalf of the second defendant, Fujitrans (Singapore) Pte Ltd ("Fujitrans"). Such warehouses were not approved LME (London Metal Exchange) warehouses. Subsequently, court orders for the liquidation and appointment of liquidators of RBG were made in England and then in Singapore. In Suit No 1175 of 2002, the liquidators commenced an action, pursuant to directions made by me in interpleader proceedings, to determine competing claims of various banks and RBG to metals in warehouses, including those operated by or on behalf of Fujitrans. There were allegations that a Fujitrans employee, one Lim Tau Hee ("Lim"), had assisted RBG to perpetrate a fraud on various banks. Only the claim by one bank, Credit Lyonnais, remained in competition with RBG's claim by the time the trial was scheduled to commence. The metals claimed by Credit Lyonnais and RBG were also in warehouses operated by or on behalf of Fujitrans. The claims proceeded to trial before me and I have since delivered my judgment: see *RBG Resources plc v Banque Cantonale Vaudoise* [2004] 3 SLR 421.

Background to the discovery appeal in Suit No 542 of 2002

2 The plaintiff in the present action, Banque Cantonale Vaudoise ("BCV"), is another bank which had entered into transactions with RBG. It has a claim against Fujitrans in respect of various groups of metals, one of which is listed in Schedule 3 of its Re-Amended Statement of Claim filed on 5 September 2002. I will refer to this claim as the Schedule 3 claim and the metals which are the subject thereof as the Schedule 3 metals. BCV alleges that the Schedule 3 metals never existed or, if they did, are no longer in the warehouses operated by or on behalf of Fujitrans.

3 BCV's action was commenced on 8 May 2002. On 18 June 2002, Fujitrans applied for a stay of the entire action pending the outcome of the action filed or to be filed by the liquidators to

determine the competing claims I have mentioned. BCV consented to a stay of their claim in respect of metals which were also the subject of the liquidators' action but not in respect of the Schedule 3 metals. Fujitrans' application for a stay in respect of the Schedule 3 metals was heard by me. After hearing submissions, I did not grant a stay in respect of the Schedule 3 metals for the reasons stated in my Grounds of Judgment dated 7 November 2002: see *Banque Cantonale Vaudoise v RBG Resources plc* [2002] SGHC 264. Fujitrans appealed to the Court of Appeal against this decision but its appeal was dismissed on 19 February 2003.

4 In the meantime, BCV had applied for summary judgment against Fujitrans in respect of the Schedule 3 claim on 5 September 2002, *ie*, after Fujitrans had applied for a stay but before the hearing of the stay application. Pending my decision and the decision of the Court of Appeal on the stay application, BCV's application for summary judgment was held in abeyance.

5 BCV's application for summary judgment was eventually heard before an assistant registrar on 5 November 2003. For the purpose of that application, BCV claimed that its loss in respect of the Schedule 3 claim was caused by the negligent acts of Lim in allowing RBG's representatives to use Fujitrans' letterhead to issue false stock confirmations to BCV without regard as to the truth of their contents. RBG was thus vicariously liable for Lim's negligence.

6 The Schedule 3 claim was in respect of warehouse financing which BCV said was concluded in the following manner:

(a) RBG would "purchase" a quantity of metal of a certain type from a seller on "in-warehouse" terms.

(b) RBG would then send a written request by fax to BCV to make payment of the purchase price to the designated account of the seller.

(c) Copies of RBG's purchase contract and the seller's invoice would be attached to the written request, giving the impression that the sale was genuine. The payment term in the purchase contract and/or seller's invoice would invariably be on an "at sight" basis, *ie*, payment was supposed to be made to the seller when RBG received the sale documents from it.

(d) On the same day as the written request for financing was made by RBG or on the following day, BCV would also receive a fax on Fujitrans' letterhead stating that (i) Fujitrans held the type and quantity of metal as specified in the seller's invoice to BCV's order but for the account of RBG, and (ii) that Fujitrans would not release the cargo without BCV's written instructions.

(e) Relying on the attornment in the fax, BCV would make payment of the purchase price to the seller's designated bank account. The payment was effected either on the same day or the day after the fax attornment was received. BCV's position was that it would not have made payment if it knew that the fax attornment was false, and/or that the metal did not exist, and/or that it was not held to BCV's order.

(f) Subsequently, RBG would "sell" the metal to another counterparty. The sale was also invariably on "in-warehouse" terms. However, the sale contract allowed for payment to be made within a credit period of between 135 and 180 days.

(g) RBG would then send another written request to BCV to release the metal to the buyer.

(h) The buyer would execute a bill of exchange in favour of RBG, which would endorse the bill and deliver it to BCV.

(i) BCV would then send a fax to Fujitrans, specifically for the attention of Lim, instructing Fujitrans to release the metal to the buyer. The release instruction would refer to the previous Fujitrans attornment received by BCV.

(j) BCV would then present the bill of exchange for payment, usually through its correspondent bank in the buyer's jurisdiction. In certain transactions, BCV was paid in full for the sum advanced to RBG. In other transactions, BCV either received partial recovery of the sum advanced or did not receive any payment under the bill of exchange.

The Schedule 3 claim concerned transactions between October 2001 and March 2002.

7 After arguments were made, BCV was granted summary judgment against Fujitrans for US$17,593,289.10, interest and costs. This was on 5 November 2003 as well.

8 On 12 November 2003, Fujitrans filed a notice of appeal to a judge in chambers against this decision. The appeal was initially fixed for hearing on 27 November 2003. It was adjourned to 23 March 2004 due to the unavailability of counsel.

9 Before this appeal was heard, Fujitrans filed an application on 6 February 2004 for discovery of various categories of documents from BCV, that is:

1 . **Account Statements** for all Allied Deals (and later) RBG Resources PLC accounts from 1st September 1998 until May 2002 (or from the opening of the account facilities until their closure or inactivity) including but not limited to Current and Deposit Accounts and in particular the US$ Overdraft Account numbered 959.94.71.

2. **All Term Sheet and Loan Approval Documentation** sent to Allied Deals/RBG in respect of the business relationship with BCV for the period 1 September 1998 to May 2002.

3 . **BCV's Loans Administration and Securities Manuals** (translated into English if necessary) applicable to the business relationship between BCV and Allied Deals/RBG for the period of September 1998 to May 2002.

4. **All Approval forms (also known as Offering Tickets)** for authorised signatory approval for the release of funds on an overdraft basis on account of Allied Deals/RBG in respect of the following:

a. BCV File 2001-112: Payee Evanson International Pte Ltd paid into their account with Overseas Chinese Banking Corporation ("OCBC"), in the sum of US$724,042.38 (NET) on or around 2 October 2001;

…

[Another 20 files were set out as well.]

5 . **The Securities Register** recording the entry of each of the Bills of Exchange given as security for each of the thirteen payments made in paragraph 4 above. [It was not clear to me why para 5 referred to 13 payments stated in para 4 when para 4 referred to 21 payments.]

6 . **The Credit Application Form**, and any amendments, submitted to the Central Credit Committee of BCV, Lausanne and subsequently approved by them, signed by the BCV Account Managers of Allied Deals and RBG Accounts.

7 . **All communications** (including but not limited to emails, memoranda, records of telephone conversations and faxes) **between the Line Supervisor in BVC's Head Office in Lausanne, Switzerland to Francois Greiner** relating to the operation of the overdraft account (No 959.94.71) and any other temporary overdraft facilities granted to RBG.

8 . **All communications** (including by [*sic*] not limited to emails, memoranda, records of telephone conversations and faxes) **between Allied Deals PLC/RBG and the designated account manager at BCV**.

10 Apparently in view of Fujitrans' application for discovery, Fujitrans' appeal against summary judgment was held in abeyance. The discovery application was heard on 10 June 2004 by an assistant registrar. It was dismissed save for category 3 relating to BCV's Loans and Securities Manuals. Although the discovery application did not seek the production of documents, an order for production was also made as BCV did not object to the making of such an order since discovery was being ordered. Fujitrans then filed a notice of appeal on 20 July 2004 against the assistant registrar's decision as it still wanted discovery and production of the other seven categories of documents.

11 The discovery appeal was heard by me on 10 August 2004. Although Mr Kenneth Lie, counsel for Fujitrans, submitted that the discovery application was not confined to the Schedule 3 claim, it seemed to me from the timing thereof and the sequence of events that it was made to avoid the summary judgment granted for the Schedule 3 claim. This was also apparent from para 11 of the First Affidavit of Fujitrans' expert on banking, Howard Michael Andrew Palmer. In addition, I would reiterate that there was a stay of the other claims of BCV pending the outcome of Suit No 1175 of 2002. Although I have given my decision in respect of that action, there is an appeal to the Court of Appeal by Credit Lyonnais against so much of my decision which went against it. As far as I was aware, BCV had not continued with its other claims against Fujitrans pending the outcome of that appeal.

12 After hearing submissions on the discovery appeal, it occurred to me that perhaps the discovery application was premature given that summary judgment had already been granted to BCV for the Schedule 3 claim and Fujitrans had not yet obtained leave to adduce additional evidence. Therefore, I asked counsel for each side to consider the point while I reserved judgment to reflect on the submissions made in respect of the substantive appeal.

13 On 17 August 2004, Fujitrans' solicitors, Joseph Tan Jude Benny ("JTJB"), wrote to the Registrar to respond to the point I had raised. Their position was that Fujitrans had proceeded with the discovery application first in order to show the court with certainty what information and documents were going to be referred to by its banking expert Howard Palmer in his intended affidavit for the appeal against summary judgment and leave would be sought to admit this intended affidavit "with other affidavits". JTJB asserted that without knowing the final outcome of the discovery application and the documents to be obtained, Fujitrans' application for leave would be speculative at least in part. JTJB suggested that Fujitrans would not be able to put forward its best case at the hearing of the application for leave without the benefit of the documents sought and Mr Palmer's consideration thereof. Furthermore, if the discovery application had been wholly successful, Fujitrans' chances of obtaining leave to adduce evidence on these documents would have substantially improved. JTJB did not think that it was necessary for it to file an application for leave immediately and that I could give my decision on its discovery appeal without the same.

14 Rajah & Tann, the solicitors for BCV, then wrote to the Registrar on 20 August 2004. Their position was that as parties had completed their submissions on the discovery appeal, they were not suggesting that my decision on the discovery appeal be deferred until Fujitrans made its application for leave to adduce additional evidence. They were, however, of the view that Fujitrans' intended application for leave should be filed earlier rather than later and sought directions from me on this.

15 In the light of these submissions, I made my decision on the discovery appeal although I was of the view that Fujitrans' discovery application and appeal were premature. I dismissed the discovery appeal with costs. As Rajah & Tann did not have any specific direction which they wished me to make, I did not give any direction on the leave application, especially since I did not know then whether Fujitrans would be appealing against my decision on the discovery appeal. If it was not, then no further direction was necessary. Fujitrans would have to apply for leave to adduce evidence by way of Mr Palmer's affidavit, but without any discovery, before proceeding with the summary judgment appeal proper. However, Fujitrans has appealed against my decision.

The steps that should have been taken

16 Before I deal with the discovery appeal before me, I would like to say something about what I consider to be the correct steps that should have been taken.

17 One must start with the undisputed premise that by the time Fujitrans filed its discovery application, summary judgment had already been granted against it for the Schedule 3 claim. Accordingly, the office of assistant registrar was *functus officio* as regards any subsequent discovery application unless that application was confined to claims which were not the subject of the summary judgment. As I have stated, the purpose of the discovery application was to set aside the summary judgment on the Schedule 3 claim. Therefore, the discovery application could not and should not have been made to the assistant registrar.

18 Could the discovery application have been made to a judge in chambers? In my view, it could have been made only in the context of the pending summary judgment appeal. It should have been made by way of a preliminary application in the appeal proper, whereupon the question as to whether the appellant should be granted leave to adduce further evidence would then have been considered first.

19 Therefore, the discovery application should not have been made first. It seemed to me that this course of action was taken because JTJB had overlooked the point that leave should have been obtained first. Likewise, Rajah & Tann had overlooked this point. Had JTJB considered the leave point before filing the discovery application, it would or should have been obvious to them that the discovery application should not have been made to the assistant registrar. After I had raised the point as to whether leave should have been obtained first, JTJB sought belatedly to justify its steps.

20 Naturally, in the application for leave, Fujitrans would have to indicate the additional evidence it wished to adduce. It would not have been necessary to exhibit a draft of the affidavit to be filed in support of its leave application, although this would be preferable. As it was, Mr Palmer was able to make some affidavits against BCV even without discovery. Drafts of those affidavits should have been used first to support the leave application, with the qualification that the application for leave extended to evidence to be adduced from documents for which discovery was being sought. The category of documents sought could and should have been set out in a schedule attached to the supporting affidavit and the court should then have been asked to rule on the leave application first. A possible alternative would have been for Fujitrans to file the leave application and the discovery application contemporaneously and ask that they be heard together. Naturally, it would be for the

court to decide whether both applications should be heard together or not.

21 In my view, it was putting the cart before the horse to make the discovery application first. I was not persuaded by the arguments of JTJB on this point. If it was speculative to seek leave without having discovery first, it was even more speculative to seek discovery without obtaining leave first.

22 As for JTJB's argument that a successful discovery application would substantially improve Fujitrans' chances of success in its leave application, I was of the view that this argument demonstrated that it was wrong to make the discovery application first. It was precisely because a discovery order in favour of Fujitrans would or might affect the outcome of the leave application that the discovery application should not have been made first. The court hearing the leave application would have decided whether to grant leave or not. If it did, and if that leave was to extend to evidence to be adduced from documents to be discovered, the court would have directed that its order granting leave on this aspect be subject to a successful discovery application.

23 Now that it is known that Fujitrans is appealing against my decision, I venture to express some suggestions on the steps to be taken as I believe that Fujitrans still has not filed its leave application.

24 It seems to me that Fujitrans should immediately apply to a judge in chambers for leave to adduce evidence in respect of the summary judgment appeal, and to include an application for leave to adduce evidence from any successful application for discovery. If it succeeds, then at least the appeal against my decision will not be academic. If the application does not succeed then Fujitrans can appeal against that decision to the Court of Appeal, and that appeal should be heard together with Fujitrans' appeal against my decision so that the Court of Appeal will be in a position to make a decision in respect of both appeals at one go. Otherwise the Court of Appeal will be in the same invidious position as I was in, *ie*, having to give a decision which is not in the correct sequence. On further reflection, notwithstanding that both solicitors were still seeking a ruling from me on the discovery appeal without a leave application, I should have directed that Fujitrans immediately apply for leave to adduce evidence and for that application to be heard by me so that I could have ruled on the leave application first and then on the discovery appeal. In that scenario, I would have treated the discovery appeal as a fresh application for discovery since the assistant registrar had no jurisdiction to hear the discovery application for the reason I have mentioned.

25 If Fujitrans declines to take up the above suggestion, it is open to BCV to immediately apply to a judge in chambers for a declaration that Fujitrans is not permitted to adduce further evidence or further evidence from future discovery so that, again, any dissatisfied party may thereafter appeal to the Court of Appeal which can then deal with that appeal and the appeal against my decision in the correct sequence.

26 Naturally, should either alternative suggestion be taken up, an application should be made to the Court of Appeal for directions in respect of the existing appeal on discovery pending the outcome of the leave application.

The discovery appeal before me

27 Mr Lie argued that the remaining seven categories of documents for which discovery was sought related to Fujitrans' defences of, *inter alia*, *novus actus interveniens*, BCV's non-reliance on the warehouse attornments, *ex turpi causa non oritur actio*, contributory negligence, and/or BCV's failure to mitigate its loss. He also submitted that these seven categories would show, *inter alia*, that BCV and its officers financed transactions with RBG including those resulting in the Schedule 3 claim

without regard to BCV's internal rules and procedures (if any) or standard banking practice as explained by Mr Palmer.[1]

28 Under O 24 r 1 of the Rules of Court (Cap 322, 2004 Rev Ed, R 5), the court may at any time order a party to give discovery of documents. Such a discovery is not usually limited to any particular category of documents or any specific document although this may be so. I will refer to this as a general discovery order, but this does not suggest that the discovery to be given is of all documents whatsoever. The documents must still be relevant to the issues in the case.

29 Under O 24 r 5(1), the court may at any time order discovery of particular documents including any class of documents. However, under O 24 r 5(4), an order under r 5 shall not be made before an order under r 1 has first been obtained in respect of the party against whom the order is sought, "unless, in the opinion of the Court, the order is necessary or desirable".

30 Under O 24 r 5(3)©, discovery extends to "train of inquiry" documents. Paragraph 24/5/2 of *Singapore Civil Procedure 2003* (Sweet & Maxwell Asia, 2003) states:

> Unlike in O 24, r 1, r 5 provides for discovery of "train of inquiry" documents which were discoverable in general discovery before the introduction of the 1999 amendments. Greater flexibility is therefore given for the discovery of specific documents.
>
> "Train of inquiry" documents have been defined as any document which, it is reasonable to suppose, "contains information which may enable the party (applying for discovery) either to advance his own case or to damage that of his adversary, if it is a document which may fairly lead him to a train of inquiry which may have either of these two consequences" and must be disclosed (*Compagnie Financière, etc.* (1882) 11 QBD 55 at 63). See also *The Captain Gregos* (1990) *The Times*, December 21, CA. Brett LJ's formulation of relevance for discovery purposes at p 63 of the *Compagnie Financiere* case was, it appears, approved by the Court of Appeal in *Taylor v Anderton* [1995] 1 WLR 447; [1995] 2 All ER 420. The formulation was stated to make it clear that the definition of relevance was framed in the widest possible terms. See also *Wright v Times Publications Ltd & Anor* [1991] 3 MLJ 12; *Norman Wright & Anor v OCBC Ltd* [1992] 2 SLR 710; *Manilal & Sons (Pte) Ltd v Bhupendra KJ Shan (t/a JB International)* [1990] 2 MLJ 282.

31 Under O 24 r 7, the court may refuse to make an order under r 1 or r 5 if it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.

32 Mr Lie also cited parts of paras [6] and [7] of the judgment of Choo Han Teck JC (as he then was) in *Thyssen Hunnebeck Singapore Pte Ltd v TTJ Civil Engineering Pte Ltd* [2003] 1 SLR 75. I prefer to set out the entire para [6] and most of [7] as they show that the "train of inquiry" kind of discovery is not as wide as Mr Lie was suggesting. Choo JC said:

> 6 In my view, I would hold that a "fishing expedition" in the context of discovery refers to the aimless trawling of an unlimited sea. Where, on the other hand, the party concerned knows a specific and identifiable spot into which he wishes to drop a line (or two), I would not regard that as a "fishing expedition". But I would myself prefer to approach such applications strictly on the basis of the broader relevancy test. That has the advantage of training one's focus directly on the matter at hand, and avoiding the distractions inherent in analogies – even one that has become a term of art, the "fishing expedition", for example. My use of the phrase "broader relevancy test" probably requires no explanation in the context so far. However, some explanation is necessary to avoid any confusion by reason of the Court of Appeal judgment in *Tan*

Chin Seng & Others v Raffles Town Club Pte Ltd [2002] 3 SLR 345 at 350 which counsel for the defendants, Mr Goh, relied on in his effort to persuade me that documents are no longer discoverable unless they are shown to be relevant in relation to the pleadings.

7 *Tan Chin Seng* is an important case because it restricts the full ambit of the position enunciated by Brett LJ in *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 at 63 which was to become the classic exposition of the old rules of court when it held that a document is relevant and discoverable if it will enable the party seeking discovery to either advance his own case or damage that of his adversary. Brett LJ then went on to say that a document would be discoverable in this sense "if it is a document which may fairly lead [the party seeking discovery] to a train of inquiry, which may have either of these two consequences". In *Tan Chin Seng*, the Court of Appeal approved the proposition in Pinsler's *Singapore Court Practice: Order 24* (2000 Ed) at para 24/1/15 that "a document is no longer discoverable merely because there is some connection (irrespective of the nature of the link) between it and an issue in the case". The court, however, issued the reminder that although discovery under the concept of "train of inquiry" is no longer applicable under a general discovery order, it is still applicable where discovery for specific documents under O 24 r 5 are concerned. What is a specific document within the meaning of this rule is a question of act. In some cases, it is conceivable that a request for "all the documents relating to this project" may be regarded as sufficiently specific although in most cases it would not. Conversely, it is conceivable that in some cases, a request for "all the invoices relating to this project" may be sufficiently specific and in some cases, not so. The judgment in *Tan Chin Seng* concluded on the law relating to discovery with the statement that cases decided under the previous rules are not necessarily inapplicable. One of the essential conditions to warrant an order for discovery is still the proof of relevancy. The rest of the judgment dealt with the facts of that case. …

33 The question really was the relevancy of the documents for which discovery was sought. Without discovery, Mr Palmer was able to allege in his First Affidavit in support of the discovery application that BCV had not acted "in accordance with established principles of international banking best practice".[2] This allegation was made even though BCV was not the only bank which had financed RBG in its metal purchases and there would probably be some similarity between what BCV did and what the other banks did. However, I need say no more on this at this stage.

34 Mr Palmer also said in his First Affidavit that in this type of transaction-by-transaction lending, BCV would have secured its own position by the following conditions precedent that would have been requested by the account manager in BCV and/or its central credit committee:

a. That the metals be stored in an LME approved warehouse;

b. That the buyers of the metals (to whom BCV is looking for repayment of monies outlaid on behalf of RBG by virtue of their bills of exchange) be acceptable to BCV;

c. That the borrower (RBG) submits accounts for approval on a regular (six monthly or annual) basis;

d. That the amount borrowed by RBG for the purchase of metals be within the limits of the facility extended to them and communicated to them;

e. That BCV's security in the metals and bills of exchange be appropriately recorded and checked; and

f. Other conditions precedent that BCV would introduce into the loan to protect its position as a lender.

35 Mr Palmer went on to justify why the discovery of the various categories of documents, including the seven categories which were the subject of the appeal, were necessary so as to discover whether the above were conditions precedent of the loan arrangements between BCV and RBG.

36 Having considered his First Affidavit, it seemed to me that Mr Palmer was making two different points. First, he expected to find the specific conditions precedent in the documents sought. Second, even if they were not conditions precedent, they were steps which a prudent bank should have required. On the latter point, I was of the view that clearly no discovery was required. On the former point, the question was whether the application for the categories sought was in fact a fishing expedition as submitted by Mr Jainil Bhandari, counsel for BCV. Mr Bhandari also submitted that the discovery was merely to substantiate Mr Palmer's suspicions which was not permissible, relying on *RHM Foods Ltd v Bovril Ltd* [1982] 1 All ER 673. That was a case where the plaintiff was seeking discovery before it delivered its statement of claim.

37 Mr Bhandari also submitted that there was no allegation in any of the affidavits for Fujitrans that, without the discovery, Fujitrans would be unable to avoid the summary judgment or that the documents sought were necessary for disposing fairly of the matter or for saving costs.

38 Before I deal with each of the seven categories of documents, I would say that although they appeared to be specific categories, they were actually very wide. Also, they were not confined to the period of October 2001 to March 2002 during which the transactions giving rise to the Schedule 3 claim occurred.

Accounts statements for all Allied Deals/RBG accounts held at BCV for the period 1 September 1998 to May 2002 including but not limited to the overdraft account number 959.94.71

39 Mr Palmer's justification for this category was stated in para 66 of his First Affidavit:

> This specific and simple piece of information which will be readily collated by BCV will allow Fujitrans to review the relationship between BCV and RBG that developed over 4 years rather than merely looking at the 21 individual transactions from Greiner's 2nd affidavit. It is my suspicion that the temporary overdraft facility from which all the funds in these 21 transactions were drawn was a specific attempt to respond to an impending financial disaster that BCV were appraised of. It is likewise my suspicion that these 21 transactions will be seen to be treated very differently from the other account withdrawals and remunerations made by RBG in the normal course of business. I must state again that an overdraft facility is a most unusual method of financing transactions such as these …

40 The very wide ambit of the category sought itself suggested that Mr Palmer was hoping to find some evidence to lend credence to his suspicion, a suspicion which was not based on anything more than his belief that an overdraft facility was a most unusual method of financing. His suspicion itself was couched in vague terms. In my view, this request was a fishing expedition.

All Term Sheet and Loan Approval Documentation sent to Allied Deals/RGB in respect of the business relationship with BCV for the period 1 September 1998 to May 2002

41 Mr Palmer's justification for this category was stated in para 69 of his First Affidavit:

… [T]here must have been a series of conditions precedent which would guide the lending managers in their day-to-day running of the account. Without this record, Fujitrans would not be able to pinpoint the imprudent acts and/or omissions of various officers and managers of BCV as appears to be the case on the face of the documentation I have reviewed.

42 This category was very wide and demonstrated that Mr Palmer was hoping to find an omission on the part of BCV to follow a procedure. It seemed to me that this request was also a fishing expedition to try and uncover something to be used against BCV.

All Approval Forms (also known as Offering Tickets) for authorised signatory approval for the release of funds on an overdraft basis on account of Allied Deals/RBG in respect of 21 files

43 Paragraph 72 of Mr Palmer's First Affidavit stated that these offering tickets would guide him as to the basis upon which BCV operated its normal prudent checks (if any) for each release of funds and against which security they did so.

44 I found the relevance of this justification to be vague. For example, supposing it was known which security funds were released against, what would that demonstrate? In my view, this request was a fishing expedition.

The Securities Register

45 Mr Palmer said at para 73 of his First Affidavit that the Securities Register recorded the entry of each bill of exchange given as security for each transaction. That was not disputed by BCV. Nor did BCV dispute that it did receive bills of exchange from time to time, although perhaps not necessarily for every transaction. The existence of the bills was not the issue. Mr Palmer's point regarding bills of exchange was that BCV should have ensured that the buyers of the metal and the parties who issued the bills were acceptable to BCV. The Securities Register would not have any relevance on the point as to whether BCV should have ascertained the creditworthiness of the buyers.

The Credit Application Form and any amendments submitted to the central credit committee of BCV and subsequently approved by them, signed by the BCV account manager of RBG

46 Mr Palmer's justification for this request was stated in paras 74 and 75 of his First Affidavit:

74 This is an internal document, which begins an account and requests facilities for the client, which may be incrementally increased and approved internally by a central credit committee in head office. In my experience, it is most unlikely that a temporary overdraft facility would have been approved in such a high amount (*ie* US$19 million) and it is not uncommon to find communication problems between account managers and the central credit committee in the manner in which accounts are run.

75 It is likewise apparent that BCV were being unrealistic in their view as to their real security position as on the face of all documentation I have read, it appears as if the primary security for them were obligations entered into by way of bills of exchange issued by companies unknown to BCV and against whom certain checks of due diligence would have been expected on a transaction-by-transaction basis. Whether this was clear internally is an important consideration.

47 I was of the view that Mr Palmer was again hoping to find some communication problem

between staff of BCV so as to make out a case of negligence or some other fault against BCV. This was fishing.

48 As regards his para 75, Mr Palmer had asserted that, from the documentation he had read, the primary security for BCV was the bills of exchange. If the documentation that Mr Palmer was relying on already demonstrated this, there was no need for discovery of this category. It seemed to me that Mr Palmer was hoping to find some document to substantiate his suspicion that BCV itself had considered the bills as primary security and yet omitted to check the creditworthiness of the buyers. Again this was fishing.

All communications (including but not limited to e-mails, memoranda, records of telephone conversations and faxes) between the line supervisor in BCV head office in Lausanne, Switzerland, to Francois Greiner relating to the operation of the overdraft account (no 959.94.71) and any other temporary overdraft facilities granted to RBG

49 At para 77 of his First Affidavit, Mr Palmer said:

> It is most unlikely in my experience that Francois Greiner as Head of BCV's trade finance department would have the ability to agree to an overdraft facility of US$19 million. It is most likely that this was agreed internally between Francois Greiner and his director/general manager in charge of the trade finance department. … My opinion is that these communications would reveal the real purpose behind the utilization of an overdraft facility, contrary to prudent banking practice, for so much in so short a space of time and would clarify whether BCV actually were aware of the financial loss they were facing. My experience tells me that they must have been aware of problems to utilize the overdraft facility in the first place.

50 To me, this was again a vague justification and a fishing attempt. How did BCV's awareness of the financial loss they were facing address the issues?

All communications (including but not limited to e-mails, memoranda, records of telephone conversations and faxes) between RBG and the designated account manager at BCV

51 Paragraph 79 of Mr Palmer's First Affidavit stated:

> The duty of an account manager to keep the head of the trade finance department and/or the general manager/director informed of the matters mentioned above is imperative. … They would enable Fujitrans to establish that BCV were not applying the normal prudent banking measures expected of an international bank or rather compounding a problem by continual lending in an emergency situation that was perceived by them. It would also be pertinent to see how RBG were able to convince BCV that they should continue to finance RBG in spite of the perceived emergency situation.

52 I did not see how the duty of an account manager to keep the head of the department informed would enable Fujitrans to establish that BCV was not being prudent, as no specific breach by the account manager was cited. Seeing how RBG was able to convince BCV to continue financing was also irrelevant because of its vagueness. This was yet another fishing exercise.

53 I would add that Mr Palmer made a second affidavit before the discovery appeal was heard by me and I allowed that Affidavit to be admitted. In that Affidavit, he referred to BCV's Annual Report for 2002 and its Annual Review for 2002. Under the heading, "Corporate Governance" in the Annual Report, it is stated that "In 2002 BCV went through the worst crisis in its history". The crisis

refers to an investigation conducted by one Paolo Bernasconi, an independent expert approved by BCV and the Vaud Cantonal Government. Although Mr Palmer made further reference to that report, it turned out that his Second Affidavit did not add much to the discovery appeal.

54 Fujitrans had not filed its Defence yet. As I have said, it was obvious that its discovery application was an attempt to support its appeal against summary judgment. This was like a case in which a bank applies for summary judgment against a guarantor of a loan, whereupon the guarantor raises numerous allegations against the bank to avoid summary judgment, for example, that the bank was negligent in allowing the borrower too much credit, and/or in not terminating the facility earlier, and/or in failing to check the value of its security, and so on. In order to avoid summary judgment, the guarantor seeks wide-ranging discovery in the hope of finding something that will enable the guarantor to find fault with the bank. In some cases, the terms of the guarantee will preclude the guarantor from raising such issues. However, what if they do not? If Fujitrans' application were allowed, this kind of application will be made as a matter of course as part of the defendant's strategy using the "train of inquiry" argument, when, in reality, it is a fishing expedition. Likewise, this kind of application will be made as a matter of course when a bank sues a party for negligence, misrepresentation or fraud.

55 In my view, BCV's discovery application was certainly not for saving costs and was not necessary for disposing fairly of the cause or matter or desirable.

56 In the circumstances, it was not necessary for me to deal with BCV's alternative argument based on banking secrecy to resist an order for discovery being made against it. Fujitrans' discovery appeal was dismissed with costs.

Appeal dismissed.

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[1]See para 10 of Mr Lie's written submission.

[2]See para 19 of his First Affidavit.