IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 38

Originating Summons No 1232 of 2016

Between

Pars Ram Brothers (Pte) Ltd (in creditors' voluntary liquidation)

… *Plaintiff*

And

(1) Australian & New Zealand Banking Group Limited
(2) Bank of Baroda
(3) Bank of India
(4) CIMB Bank Berhad
(5) DBS Bank Ltd
(6) Habib Bank Ltd
(7) Indian Bank
(8) Indian Overseas Bank
(9) Malayan Banking Berhad
(10) Oversea-Chinese Banking Corporation Limited
(11) RHB Bank Berhad
(12) Standard Chartered Bank (Singapore) Limited
(13) The Bank of East Asia Limited
(14) UCO Bank
(15) CMA CGM & ANL (Singapore) Pte Ltd
(16) East West Commodities Pte Ltd
(17) Sin Thye Pin Trading Pte Ltd

… *Defendants*

JUDGMENT

[Companies] — [Winding up]
[Credit and security] — [Pledges and pawns]
[Credit and security] — [Remedies] — [Winding up]
[Credit and security] — [Trust receipts]

Pars Ram Brothers (Pte) Ltd (in creditors' voluntary liquidation)
v
Australian & New Zealand Banking Group Ltd and others

[2017] SGHC 38

High Court — Originating Summons No 1232 of 2016
Steven Chong J
7 February 2017

2 March 2017 Judgment reserved.

Steven Chong J:

1 This was an application by the liquidators of Pars Ram Brothers (Pte) Ltd ("the Company") under s 310(1) of the Companies Act (Cap 50, 2006 Rev Ed) for the court to determine whether the gross sale proceeds of 12 categories of pepper stock should be (a) held for the benefit of the general pool of the Company's creditors; or (b) paid to the defendant lenders who can assert a security interest in the pepper stock which they financed. I shall refer to these 12 categories as the "Disputed Categories". The Disputed Categories, and the parties with competing interests in each category, are set out in the Annex.

Background

2 By way of background, the Company was engaged in the spice business and financed its import of pepper stock through trade financing

facilities granted by the 1st to 13th defendants and a term loan facility granted by the 14th defendant.[1] Although the trade financing facilities were executed pursuant to each bank's standard terms, the broad terms of the financing arrangements were as follows:[2]

(a) Upon being furnished with proof of purchase of certain stock, the bank would disburse funds for the purchase directly to the relevant supplier. As security for the loan, the Company would furnish the shipping documents (*ie*, the bill of exchange, bill of lading and/or airway bill) for the financed stock to the bank under a pledge.

(b) To enable the Company to sell the stock to its end-customers, the bank would release the relevant shipping documents to the Company. In consideration for this release, the Company would execute a trust receipt on terms that the Company held the financed stock or its proceeds of sale on trust for the bank. The trust receipts typically identified the financed stock with reference to their bill of lading number and/or a description of the goods.[3] Several of the trust receipts had an express term that that the Company should hold or store the goods in a manner capable of separate identification: see Clause 2.9(a)(vii) of the Trade Terms of the Australian and New Zealand Banking Group Limited, paragraph 3 of CIMB Bank Berhad's Trust Receipt, Clause 11 of Indian Bank's Trust Receipt, Clause 6(c) of Indian Overseas Bank's terms for Advances Against Invoice, Clause 3(a) of RHB Bank Berhad's Master Trust Receipt Agreement, and

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1 1st affidavit of Tam Chee Chong ("TCC 1st Affidavit"), para 11.

2 TCC 1st Affidavit, para 12.

3 TCC 1st Affidavit, exhibit "TCC-7".

> Clause 5 of Standard Chartered Bank (Singapore) Limited's Trust Receipt.[4] Where such an express term was absent, there was at least an obligation to hold and store the goods in the bank's name or to pay the proceeds of sale of the underlying goods into a designated account: see Clause 1 of Bank of Baroda's Trust Receipt, Clause 6 of Bank of India's Trust Receipt, Clauses 1 and 5 of Habib Bank Ltd's Trust Receipt, Clause 10 of the Trust Receipt Bills Application Form Terms and Conditions for DBS Bank Ltd, and Clauses 2.1 and 2.3 of Malayan Banking Berhad's General Trade Terms.[5]

3 As the 10th, 13th and 14th defendants did not have trust receipts executed in their favour, it was not disputed that they should be treated as unsecured creditors.[6] To avoid confusion, I shall refer to the banks with trust receipts (*ie*, the 1st to 9th defendants and the 11th and 12th defendants) as "the Lenders", or individually as a "Lender".

4 The complication arose from the manner in which incoming and outgoing shipments were handled by the warehouse in which the pepper stocks were stored.[7] Incoming bags were stacked together with existing goods of the same description without segregation. As such, it has become impossible to identify the stock financed by each Lender because it has been commingled in mixed bulks with stocks financed by other Lenders. However, goods of different descriptions were placed in separate stacks and form the separate "categories" of which we now speak.

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4 TCC 1st Affidavit, pp 155, 177, 185–186, 202, 207.

5 TCC 1st Affidavit, pp 174, 176, 181, 184, 189.

6 Plaintiff's Submissions, para 7.

7 TCC 1st Affidavit, para 55.

5 The liquidators were able to identify the specific shipments comprising the mixed bulk in each category by referring to the incoming shipments notified on the warehouse's ledger after the last "NIL" balance. They were also able to identify the Lenders who had financed these specific shipments by correlating the shipment details to the particulars of the trust receipts. On this basis, they have identified the Lenders asserting interests in each category, as set out in the Annex.[8] However, due to outgoing shipments prior to liquidation, the available quantity of stock in each category is insufficient to meet each Lender's claims in full. To fulfil outgoing shipments, bags had been removed for delivery *randomly* from the stacks of corresponding description. The central issue is therefore to identify the specific Lenders who are entitled to claim the proceeds of sale of the remaining bags in each category.

6 It was not seriously disputed that the Lenders have security interests in the proceeds of sale of the pepper stock financed by them, by reason of the original pledge of the shipping documents; the trust receipt maintains the bank's security in the pledged pepper stocks despite the bank releasing the bill of lading to the Company. To fully appreciate the analysis below, it is perhaps useful to clarify at the outset the nature of the Lenders' interest. Ewan McKendrick explains in *Goode on Commercial Law* (LexisNexis, 4th Ed, 2009) at p 1124 that "the letter of trust is to be regarded as a means of securing the continuance of the pledge rather than as an independent security device". In a similar vein, the English court in *In re David Allester, Limited* [1922] 2 Ch 211 observed at 216:

> The pledge rights of the bank were complete on the deposit of the bills of lading and other documents of title. These letters of trust are *mere records of trust authorities* given by the bank and accepted by the company stating the terms on which the

8 TCC 1st Affidavit, para 62.

> pledgors were authorized to realize the goods on the pledgees' behalf. The bank's pledge and its rights as pledgee do not arise under these documents at all, but under the original pledge …
>
> [emphasis added]

7 The trust receipt merely makes it clear that the goods are regarded as security and not the absolute property of the pledgee despite the redelivery of physical possession to the pledgee. Hence, it is a legal possessory security interest that the Lenders are asserting in the proceeds of sale.

8 The parties did not contest that this security interest survives the Company's insolvency. The point of contention is that in respect of each of the Disputed Categories, the stocks have been mixed. The Lenders cannot identify their cargo because it has been commingled with cargo financed by other Lenders. This commingling is strictly a breach of the Company's contractual obligation under the trust receipts to segregate the stock financed by the respective banks (see [2(b)] above). As such, the issue is whether this commingling affected the Lenders' security interests so as to preclude each Lender from asserting its interest in the proceeds of sale, in priority to the pool of general creditors.

Security interests in commingled stock

9 The authorities cited to me largely deal with *ownership interests* in commingled stock. These cases suggest that the commingling of stocks in a mixed bulk does not extinguish the proprietary interests of the contributors. It was held in *Indian Oil Corporation Ltd v Greenstone Shipping SA (The "Ypatianna")* [1987] 3 All ER 393 ("*Indian Oil Corp*") at 907 that the equitable solution is for the contributors to hold the mixed bulk as co-owners in proportion to their respective contributions. Any doubt about the quantity

contributed was to be resolved in favour of the innocent party who did not cause the mixture. Where a mixture came about through no fault of either of the parties whose property comprised the mixture, the position was stated as such in *Sandeman & Sons v Tyzack & Branfoot Steamship Co Ltd* [1913] AC 680 ("*Sandeman*") at 694–695:

> Neither owner has done anything to forfeit his right to the possession of his own property, and if neither party is willing to abandon that right the only equitable solution of the difficulty, and the one accepted by the law, is that [both parties] become owners in common of the mixed property.

10 This principle in *Sandeman* was applied by the New South Wales Court of Appeal in *Hill & Anor v Reglon Pty Limited* [2007] NSWCA 295 to not only mixtures of different oil parcels but also to "cases where items or goods become so inextricably mixed that they cannot be distinguished one from the other" (at [100]). *Glencore International AG and others v Metro Trading International Inc (No 2)* [2001] 1 Lloyd's Rep 284 ("*Glencore*") stands for the same proposition. This was a case where the storage terminal had commingled oil owned by various suppliers. The storage terminal went into insolvency and there was a shortfall in the amount of oil in its possession. It was said that as long as the owners could identify their own oil as a constituent of the mixed bulk, the bulk was co-owned in proportion to the quantity and value of the oil contributed (at 331). Title to the mixed bulk therefore did not pass to the storage terminal.

11 If commingling does not affect ownership, is there any legal reason why it should affect security interests? In this respect, Mr Edwin Tong SC, appearing for the 2nd and 12th defendants, directed my attention to the decision of the New Zealand High Court in *Gibson and Stiassny v StockCo Limited and ors* [2011] NZCCLR 29 ("*Gibson*"). Mr Tong suggested this was

a case where the parties were asserting a *security interest* in the mixed herd of livestock and the court applied the same principles in *Indian Oil Corp*.

12 Upon closer examination of the facts of *Gibson*, it appears to me that both competing parties were in fact asserting *ownership interests* in the mixed herd. This is clear from [254], where the court concludes: "in accordance with the authorities I have referred to, both *owners*, StockCo and the Charging Group, have an interest in common in the cows in proportion to their respective shares" (emphasis added). It is important to be clear how exactly security in the livestock came into the picture. The Charging Group, which had gone into receivership, consisted of four companies which had granted charges over all livestock owned by them to certain banks. The banks were interested in whether the mixed herd was *owned* by the Charging Group and therefore subject to the charges. On the opposing side, StockCo's claim against the Charging Group was that it *owned* part of the livestock which it had purchased and leased back to one of the four companies, and not that it held a security interest.

13 Therefore, *Indian Oil Corp* was applied in *Gibson* to determine the competing ownership claims in the mixed herd. The relevance of security interests was merely this: if the Charging Group owned a discernible share of the mixed herd, the banks' security under the charges would attach to that share. To this extent, this case is consistent with the principle stated in Goode's *Legal Problems of Credit and Security* (Sweet & Maxwell, 5th Ed, 2013) at para 1-62 that a creditor's security interest will survive commingling with goods *not belonging to the debtor* to the extent that the debtor's co-ownership share is identifiable from the other co-owners'. However, it does

not directly address whether the commingling of stocks that are subject to several security interests would destroy these security interests.

14 Philip Wood's *Comparative Law of Security Interests and Title Finance* (Sweet & Maxwell, 2nd Ed, 2007) was the only commentary cited to me that squarely addresses the situation where goods in which one secured party has a perfected security interest are commingled with goods in which another secured party has a perfected security interest. In such a scenario, Wood cites Article 9 of the Uniform Commercial Code as authority that if neither party has priority, "each secured party is allocated the proportion of the product or mass that the value of that secured party's collateral bore to the sum of the values of both parties' collateral at the time that the collateral became commingled" (at para 16-041).

15 This must be the correct position based on first principles. The critical point is that *prior to* the mixture of the stocks in each category, the Lenders already possessed a perfected security interest by virtue of the underlying pledge. It is crucial to bear in mind that ascertainment of part of the bulk was *not* necessary to create or perfect the Lenders' security interests in the stocks financed by them. Hence, the failure to segregate the pledged goods did not negate the existence of the Lenders' security.

16 This being the case, I can see no principled reason to make a distinction between ownership and security interests in a mixture. It appears that in *Indian Oil Corp* as well as the authorities cited within, the courts were fashioning a solution to resolve a *practical* and *evidential* difficulty posed by the mixture, while being mindful that the relevant legal interests ought to ideally remain unaltered. As Staughton J put it at 906:

> Two points of significance in my view emerge from the authorities. First, in some cases a decision had to be made 'not upon the notion, that strict justice was done, but upon this, that *it was the only justice that could be done*' … Or as Lord Moulton put it, such cases 'have been little more than instances of cutting the Gordian knot – reasonable adjustments of the rights of the parties in cases where complete justice was *impracticable* of attainment' … Second, if the wrongdoer has *destroyed or impaired the evidence* by which the innocent party could show how much he has lost, the wrongdoer must suffer from the resulting uncertainty. …
>
> [emphasis added]

17 Therefore, I find that each Lender's security interest remains intact notwithstanding the mixture with goods in which other Lenders might have security interests. As earlier mentioned, the difficulty posed by the mixture should be treated as an evidential one, namely, how to identify whose interest remains in the mixed stocks. Here, since the mixtures came about through no fault of the Lenders, there is no reason to prefer the interests of one Lender over another (see *Sandeman* cited at [9] above). Thus, the just solution is for the mixed stock to be divisible among the contributing Lenders rateably in proportion to the value of their respective contributions. An analogy may be drawn to tracing through mixed funds in equity: where claimants to a mixed fund are each innocent contributors, they share *pari passu* (see *In re Diplock, Diplock v Wintle (and associated actions)* [1948] 1 Ch 465 at 539). It was not disputed by the parties that if the Lenders had subsisting security interest in the stocks, this interest can be traced into the proceeds of sale.

Proceeds of bags not financed by Lenders

18 The only substantive argument in opposition was raised by the 7th and 16th defendants. Acting on their behalf, Mr Mirza Namazie Mohamed prepared a spreadsheet based on the available information set out in the

liquidators' affidavits. It should be stated upfront that all parties accepted that the bags which were not financed by the Lenders should go to the pool of general creditors. Based on this spreadsheet, however, there were six categories containing the following numbers of bags that were *apparently* not financed by the Lenders:

(a) 1,199 bags in Category 4;

(b) 1,500 bags in Category 11;

(c) 3,000 bags in Category 12;

(d) 1,300 bags in Category 13;

(e) 30 bags in Category 15; and

(f) 321 bags in Category 17.

19 It is common ground that the proceeds of sale of bags not financed by the Lenders in Categories 11, 13, 15 and 17 should go to the pool of general creditors.

20 No satisfactory explanation was initially offered by the liquidators as to why the proceeds of sale in respect of Categories 4 and 12 were not payable to the pool of general creditors even though they apparently contained bags not financed by the Lenders. This discrepancy was pointed out by Mr Namazie based on his understanding of the liquidators' documents. Counsel for the liquidators informed the court that there was an explanation for the apparently "discrepant accounting". As this point had not been previously raised by any party, he sought time to file an affidavit to provide an explanation, which he duly did by 4pm the same afternoon.

Category 4

21 In relation to Category 4, on the face of the trust receipt, there were three critical entries. It records *300 bags* but refers to *15 metric tonnes* and identifies the cargo with reference to the *Bill of Lading No GMD15SGNSIN1255*. The liquidators pointed out that on perusal of the bill of lading and the accompanying Invoice No PS16-051015, it becomes evident that there is a clear error in the recording of the trust receipts. It should have recorded 1,500 bags instead of 300 bags.[9] This explanation was accepted by Mr Namazie. Since all 1,500 bags delivered to the warehouse on 15 October 2015 were financed by the 4th defendant under a trust receipt, none of the proceeds should go to the pool of general creditors.

Category 12

22 In relation to Category 12, the liquidators' explanation was less than satisfactory. The warehouse's ledger[10] referred to four consecutive entries of 1,000 bags. There were no dates in respect of three entries but there were specific references to pallet numbers or delivery order numbers. This supports Mr Namazie's point that these entries refer to four independent deliveries of 1,000 bags each.

23 The liquidators' further affidavit purported to explain that the warehouseman made a mistake in recording the further three deliveries of 1,000 bags when they were never delivered and that only 1,000 bags were in fact delivered. [11] This accords with the fact that the liquidators only found

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9 Affidavit of Lim Loo Khoon ("LLK Affidavit"), para 8.

10 TCC 1st Affidavit, p 98.

11 LLK Affidavit, paras 13–14.

1,000 bags for this category during their stock take on 11 December 2015. I am not prepared to accept the liquidators' bald explanation. Crucially, it does not explain away the discrete entries of four consecutive shipments in the ledger.

24 Having said that, it is common ground that only 1,000 bags were financed by the 12th defendant. No other bank has come forward to claim any interest in the other 3,000 bags for Category 12. It can therefore be inferred that even if the additional 3,000 bags had been delivered to the warehouse as recorded in the ledger, these would have been financed by the Company itself. Since the 3,000 bags were no longer in the warehouse at the time of the auction of the stocks by the liquidators,[12] the inference must be that they had been sold by the Company prior to the auction.

25 What then is the legal effect of these facts? Mr Namazie suggested that it should not be assumed that the remaining 1,000 bags were the ones financed by the 12th defendant. Factually, that may well be so. Legally, however, this fact makes no difference because I accept Mr Tong's argument that the 12th defendant, as holder of the trust receipt, would have the first bite of the proceeds of the remaining 1,000 bags in any event.

26 Mr Tong submitted that since the evidential difficulty of ascertaining whose bags remain was caused by the Company's breach of its obligation to segregate the stock under the trust receipts (specifically, Clause 5 of the 12th defendant's Trust Receipt[13]), this difficulty must be resolved in favour of the 12th defendant. This proposition was based on *Lupton v White and others*

12 TCC 1st Affidavit, para 17.

13 TCC 1st Affidavit, p 207.

[1803–13] All ER Rep 356 at 358–359, in which the defendant failed its undertaking to the court to keep separate accounts of the lead ore mined from a parcel of land pending a dispute as to title. Since the plaintiff's difficulty in recovering his entitlement was caused by the defendant's breach, it was held that the whole net produce should go to the plaintiff save for what the defendant could prove to be his own. *Glencore* provides a clearer statement that any loss should be borne by the party responsible for the mixture (at 322). The court decided that any withdrawals from a commingled bulk should be deemed to be a withdrawal of the storage terminal's own share first. The rationale was that the storage terminal should not be permitted to rely on its own wrongful act in commingling different parcels of oil to assert title to the remaining stock. Applying the same principle here, the proceeds of the remaining 1,000 bags in Category 12 should go to the 12th defendant.

Must all Lenders elect to assert their security interest?

27 Acting on behalf of the 5th and 9th defendants, Mr Ng Yeow Khoon raised an interesting proposition. He said that the court should only make a declaration in favour of the Lenders if all the banks with trust receipts elect to assert their security interest collectively. Since the 5th and 9th defendants are not asserting their security interest, he submitted that the sale proceeds should go to the general pool.

28 The fundamental flaw is that this argument assumes that the nature of the Lenders' interest is dependent on the conduct of the bank in asserting its rights after the dispute has arisen. This must be wrong because the nature of the Lenders' interest is determined with reference to the interest when it arose. The 5th and 9th defendants have trust receipts. Their interests are governed by the trust receipts and the underlying pledges. The fact that they choose not to

assert their security interest does not change the nature of their interest. In fact, it appears to me that they have adopted this course because *mathematically* it yields a more favourable outcome for them if all the proceeds are shared in the general pool. This argument must therefore be rejected.

Conclusion

29 In the circumstances, I grant a declaration that the gross sale proceeds of the 12 Disputed Categories of pepper stock amounting to $6,907,771.67 should be paid (in proportions to be resolved separately) to those defendants who can assert a security interest in the underlying stock which they financed, save that the general creditors may assert an interest in the following quantities of the underlying stock:

(a) 1,500 bags in Category 11;

(b) 1,300 bags in Category 13;

(c) 30 bags in Category 15; and

(d) 321 bags in Category 17.

Costs

30 Turning to the issue of costs, the costs order for a liquidator's application under s 310 of the Companies Act was recently examined by the Court of Appeal in *Vintage Bullion DMCC (in its own capacity and as representative of the customers of MF Global Singapore Pte Ltd (in creditors' voluntary liquidation)) v Chay Fook Yuen (in his capacity as joint and several liquidator of MF Global Singapore Pte Ltd (in creditors' voluntary liquidation)) and others and other appeals* [2016] 4 SLR 1248 ("*Vintage Bullion*") at [64]–[66]. Having decided the substantive issues in Vintage's

favour, the Court of Appeal ordered that costs follow the event such that Vintage's costs were to be paid out of the liquidation estate. Its reasons were:

(a) It was inappropriate for Vintage's costs to be borne out of the disputed subject matter because the proceedings concerned rival claims between the company and its customers rather than the isolated administration of a trust fund;

(b) The proceedings were arguably precipitated by the liquidators' refusal to recognise the customers' legal entitlement to the sum which the Court of Appeal found was to be held on trust for them;

(c) Even if the liquidators had adopted a neutral position, Vintage had assisted in the due administration of the liquidation, with the result that its costs should be borne by the liquidation estate; and

(d) The proceedings were not dissimilar to adversarial proceedings because the liquidators and Vintage had adopted completely opposing positions.

31 According to the liquidators, the present application was prompted by the banks' disagreement as to how the sale proceeds should be distributed. I accept that the liquidators adopted a neutral position. Unlike in *Vintage Bullion*, it cannot be said that the liquidators were advancing a rival claim against the secured Lenders in whose favour I have now found. As I was substantially assisted by Mr Tong, counsel for the 2nd and 12th defendants, in properly determining the liquidators' questions, in line with *Vintage Bullion* at [65(b)], I award costs of $8,000 inclusive of disbursements to the 2nd and 12th defendants for their participation in these proceedings to be paid out of the liquidation estate. All other parties are to bear their own costs.

Steven Chong
Judge

Pradeep Pillai, Joycelyn Lin and Chng Yan (Shook Lin & Bok LLP) for the plaintiff;
Edwin Tong SC, Loong Tse Chuan and Chua Xinying (Allen & Gledhill LLP) for the 2nd and 12th defendants;
Ng Yeow Khoon and Claudia Marianne Frankie Khoo (KhattarWong LLP) for the 5th and 9th defendants;
Namazie Mirza Mohamed and Ong Ai Wern (Mallal & Namazie) for the 7th and 16th defendants;
Ho Zi Wei (Rajah & Tann Singapore LLP) for the 10th defendant;
Chooi Yue Wai Kenny (Yeo-Leong & Peh LLC) for the 15th defendant.

Annex

A.1 The following table summarises the Disputed Categories of pepper stock and the Lenders interested in the respective categories:

Category	Interested banks with trust receipts
3	Australian & New Zealand Banking Group Limited Malayan Banking Berhad RHB Bank Berhad Standard Chartered Bank (Singapore) Limited
4	CIMB Bank Berhad Indian Bank RHB Bank Berhad Standard Chartered Bank (Singapore) Limited
7	Bank of Baroda Standard Chartered Bank (Singapore) Limited
8	Bank of Baroda Standard Chartered Bank(Singapore) Limited
9	Standard Chartered Bank (Singapore) Limited
10	Bank of India Standard Chartered Bank (Singapore) Limited
11	Bank of India CIMB Bank Berhad DBS Bank Ltd Indian Bank Standard Chartered Bank (Singapore) Limited

12	Standard Chartered Bank (Singapore) Limited
13	CIMB Bank Berhad
15	Bank of Baroda
16	Bank of Baroda
17	Australian & New Zealand Banking Group Limited Bank of India CIMB Bank Berhad DBS Bank Ltd Indian Bank Indian Overseas Bank RHB Bank Berhad Bank of Baroda Standard Chartered Bank (Singapore) Limited