Neutral Citation Number: [2020] EWHC 1451 (Comm)

Case No: CL-2018-000176

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Rolls Building,
Fetter Lane
London, EC4A 1NL

Date: 05/06/2020

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- - - - - - - - - - - - - - - - - - - -

Between :

SCIPION ACTIVE TRADING FUND	**Claimant**
- and –	
VALLIS GROUP LIMITED (formerly VALLIS COMMODITIES LIMITED)	**Defendant**

- - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - -

Michael Collett QC and Malcolm Jarvis (instructed by Preston Turnbull LLP) for the Claimant
David Edwards QC and Nichola Warrender (instructed by DWF Law LLP) for the Defendant

Hearing dates: 20-23, 27, 29 and 30 January and 4 February 2020
Additional written closing submissions received 17 and 23 April 2020
Draft judgment circulated to parties 28 May 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 5 June 2020 2020 at 2:00 pm.

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(A) INTRODUCTION

1. This judgment follows the trial of a claim by the Claimant ***("Scipion")*** for the alleged loss of about 1,900 mt of copper scrap from a production and storage facility at Skhirat, Morocco ***("the Site")*** held, or intended to be held, as security for a loan made to Mac Z Group SARL ***("Mac Z")***.

2. The Defendant ***("Vallis")*** was the collateral manager of the copper stock at the Site pursuant to a collateral management agreement dated 18 July 2016 between Scipion, Mac Z and Vallis ***("the CMA")***.

3. The main part of the trial took place from 20 January to 4 February 2020, and included two significant developments, both described in more detail later but in outline as follows.

4. First, after week 1 of the trial Vallis in substance admitted breach, leaving only questions of causation and loss to be determined. These included, however, significant issues relating to the validity of a pledge over the copper scrap goods and resulting products, governed by Moroccan law, which Mac Z had granted in favour of Scipion, as well as issues relating to the correct approach to the assessment of loss and to mitigation.

5. Secondly, Scipion submitted at trial that it was entitled to recover from Vallis regardless of the validity of the pledge. This led eventually to the grant of permission for Scipion to amend, in the circumstances outlined in section B below and described in more detail in my judgment at [2020] EWHC 795 (Comm), and to additional written closing submissions served on 17 and 23 April 2020.

6. For the reasons set out in this judgment, Scipion's claim succeeds to the extent indicated below. I shall hear further argument to the extent necessary on any further matters of quantification arising from my conclusions.

(B) PROCEDURAL HISTORY

7. I set out below an overview of the procedural history. Further details of the history, particularly in relation to the pledge issue and title to sue, are given in my judgment on permission to amend mentioned in § 5 above.

8. The claim was commenced on 12 March 2018 and Scipion served Particulars of Claim on 17 April 2018.

9. Scipion's case, in brief, was and is that there was a physical loss of about 1,900 mt from the Site (or, at least, that Vallis was precluded from denying this), which was caused by Vallis's lack of care in breach of the CMA. Alternatively, if there were merely a paper loss (i.e. the records inflated the amount of copper stock by 1,900 mt), then Vallis breached its management duties under the CMA, which caused Scipion to make advances to Mac Z that it would not otherwise have made.

10. Scipion claimed that:

> "By reason of the Defendant's breaches of the Agreement, the balance due to the Claimant by the Borrower and/or Guarantor under the Facility, as detailed in paragraph 32(a), has been left unsecured and the Claimant has lost the benefit of the Pledge over the Goods and Products to secure performance of the Facility by the Borrower and/or Guarantor." (Re-Amended Particulars of Claim § 32(b))

11. The pledge referred to was a Pledge over Goods and Products granted by Mac Z in Scipion's favour on 18 July 2016 ("***the Pledge***").

12. Further or alternatively, Scipion claimed for:

> "the loss of the chance to secure performance of the Facility by [Mac Z] and/or Guarantor pursuant to the Pledge of the Goods and Products held by the Defendant under the Agreement" (Re-Amended Particulars of Claim § 33)

13. Scipion additionally alleged that Vallis's late notification of the loss of the copper scrap meant it lost the opportunity to take more immediate steps to investigate and/or mitigate the loss and/or to protect its rights.

14. Vallis's Defence was served on 29 May 2018. Vallis did not admit any loss of the goods (whether a physical or paper loss) and contended that Scipion had failed to discharge its burden of proof, drawing attention to apparent uncertainties in Scipion's case. It disputed Scipion's construction of the CMA and, in any event, relied on its systems and procedures to deny any breach of duty. Further, Vallis disputed causation and loss, in particular based on the alleged invalidity of the Pledge and failure to mitigate.

15. Vallis's Defence indicated that Vallis did not have a copy of the Pledge, but made non-admissions in relation to it, and also contained a positive denial that Vallis was

responsible for the loss of any security and/or the benefit of the Pledge in circumstances where no such pledge had been registered in Morocco.

16. Scipion in Reply pleaded that the Pledge had been registered on 30 October 2017 (after the date of loss) and that the lack of earlier registration did not mean no valid pledge or charge existed.

17. At a CMC on 1 August 2018 Popplewell J gave permission for expert evidence to be served sequentially on "*whether as a matter of Moroccan law there was a valid pledge (or charge) over the Goods and Products at the Site (Issue 20)*". The reference to Issue 20 was to the List of Issues:

> "20. Was the Facility secured by way of pledge (or charge) prior to the registration of it in the public registry on or about 30 October 2017 and, if not, were any sums advanced under the Facility a breach of a condition precedent and/or did the Goods and Products at the Site form part of the Borrowing Base under the Facility?"

18. Moroccan law expert evidence was served as follows:

    i) first report of Mr Hajji (Scipion's expert) served on 17 May 2019;

    ii) first report of Ms Fassi-Fihri (Vallis's expert) served on 19 June 2019;

    iii) Joint Memorandum completed on 19 July 2019; and

    iv) supplemental reports by Mr Hajji and Ms Fassi-Fihri served on 19 August 2019.

19. The Moroccan law experts considered not merely the effect of late registration on the validity of the Pledge, but also the anterior question of whether there was a valid pledge at all, with Ms Fassi-Fihri positively opining that there was not.

20. A Pre Trial Review took place on 4 October 2019.

21. On 27 December 2019, and as foreshadowed in correspondence, Vallis served an Amended Defence making consequential amendments to the Defence and a number of non-consequential amendments. One of the consequential amendments was to admit that the CMA constituted a bailment of the relevant goods to Vallis on the terms of the CMA (save insofar as the goods and products were not in fact received into Vallis's custody and control at the Site). Vallis's non-consequential amendments included:

    i) a new §5(7A) denying, for the first time, that there was a valid and enforceable pledge, due to (i) the absence of a list of products published in connection with Article 378 of the Moroccan Code of Commerce, (ii) non-compliance with requirements of Article 379 of the Code of Commerce and (iii) general principles of Moroccan law; and

    ii) amending Defence §54(3)(c) to rely on the denial and plea of Moroccan law added at §5(7A) as a further reason (in addition to non-registration of the Pledge) for denying that "*the cause of any loss of security created by any pledge and/or benefit of the pledge was any breach by the Defendant of the CMA*".

22. On 20 January 2020 Scipion served Re-Amended Particulars of Claim updating the position on quantum and a detailed interest calculation, but did not make any amendment arising from the issue about the validity of the Pledge.

23. After the first week of trial, Vallis's solicitors wrote to Scipion's solicitors on 27 January 2020 setting out admissions by Vallis to the effect (broadly) that there had been a physical loss of 1,899.114 mt of copper scrap which had been delivered into Vallis's possession at the Site, and that that physical loss was caused by a breach by Vallis of specified provisions of the CMA as pleaded in Scipion's Re-Amended Particulars of Claim.

24. All other issues remained in contention, including the validity of the Pledge and questions relating to mitigation.

25. Scipion at trial submitted *inter alia* that it was entitled to recover from Vallis regardless of the validity of the Pledge under Moroccan law. This led to a debate between the parties about whether or not Scipion was entitled to advance any such argument on its then pleaded case, and to an oral application by Scipion for permission to amend its Reply.

26. Having heard submissions from the parties, I adjourned the trial in order to allow Scipion to put forward, and Vallis to respond to, a properly formulated draft amended Reply. Following circulation of that document on 7 February 2020 along with supporting evidence and a skeleton argument, the parties agreed (and I approved) a timetable for service of further evidence and skeleton arguments. The parties agreed that, despite the application for permission to amend being contested, I should deal with it on the papers. The end result was my decision of 3 April 2020 granting permission to amend.

27. The parties thereupon agreed a timetable for service of an additional closing submission by Vallis in response to the case for which permission to amend had been granted, followed by a written reply submission by Scipion. Neither party requested a further oral hearing.

(C) FACTUAL BACKGROUND AND CMA TERMS

(1) Contractual and security arrangements

28. Pursuant to a facility agreement dated 18 July 2016 (***"the Facility")***, Scipion provided an uncommitted revolving copper borrowing base facility to Mac Z in the aggregate amount of US$ 10 million. The purpose of the Facility was to finance the purchase by Mac Z of copper stock (defined as ***"Goods***") for processing into copper products ***("Products")*** for sale to third-party buyers.

29. The Facility provided that the proceeds of sale (clause 7.1.1), as well as all payments and repayments to be made by Mac Z (clause 6.16 and 7.12), were to be paid to Local Collection Accounts ***("Collection Accounts")***, defined as accounts in Mac Z's name denominated in MAD or USD held with Banque Marocaine du Commerce Exterieur ***("BMCE")***.

30. Mac Z was required to ensure that the Borrowing Base Value ***("BBV")*** (defined in clause 1.1 as the value of Goods, Products, and Goods being processed ***("Work in Progress")***, plus any amounts standing to the credit of Mac Z) was equal to or greater than 125% of the outstanding advances made by Scipion to Mac Z under the Facility (see clause 21.3.1: the *"**Borrowing Base Coverage Ratio**"* or *"**BBCR**"*). In short, Mac Z had to ensure that the value of goods and products held as security (plus sums standing to the credit of Mac Z) was at least 25% greater than the sums advanced under the Facility.

31. In the event that the BBCR dropped below 125%, and Mac Z failed to rectify this when called upon to do so, then Scipion would be entitled to take steps to enforce its security.

32. Scipion had the right to cancel the Facility and to demand repayment at any time pursuant to clause 8.1 and, without prejudice thereto, the right to cancel the Facility upon the occurrence of an Event of Default pursuant to clause 23.19.

33. The Facility provided for an interest rate of LIBOR plus 11 per cent per annum (clause 9.1) and a late payment commission of up to 5% per annum plus the Interest Rate (clause 12).

34. The CMA, a tripartite agreement between Scipion, Mac Z and Vallis, included the following key provisions:

> "[Definitions]
>
> 'Warehouse Receipt' means a warehouse receipt to be issued by [Vallis] pursuant to Clause [5] and substantially in the format prescribed in Appendix [II]."
>
> "[Appointment]
>
> 2.1 SCIPION hereby appoints [Vallis] as its agent for the purposes of receiving and taking into [Vallis]'s custody the Goods and Products, at the [Site], for and on behalf of SCIPION with the intent and understanding that such appointment shall be for the purposes of, amongst other things, creating a pledge, or charge (as the case may be) over the Goods and Products in favour of SCIPION…[Vallis] agrees to act as follows:
>
> (a) to control and supervise the Goods and Products solely and exclusively in accordance with SCIPION's written instructions;
>
> (b) to receive, store and hold the Goods and Products in the [Site] at all times subject to the sole authority and direction of SCIPION subject to the limited agency created in favour of [Vallis] by SCIPION and;
>
> (c) to carry out the services detailed in this Agreement (including the services detailed in Appendix I).

2.2 [Mac Z] acknowledges and confirms that the Goods and Products shall be held in the name of SCIPION for the account of [Mac Z] until the end of the Security Period and until such time, [Mac Z] have no equitable or proprietary rights or interests in such Goods and Products, and such Goods and Products are held for and on behalf of SCIPION and to SCIPION's order and [Mac Z] shall not assert or create or allow to continue any security interest over all or any of the Goods and Products and [Mac Z] shall keep the Goods and Products free from any security interest or any attachment, seizure, distress, detention, arrest or other interference whatsoever, in each case other than as security for the Financing Facility.

2.3 …[Mac Z] and [Vallis] undertake at all times to immediately notify SCIPION should they know of any circumstance that may lead to the attachment, seizure, distress, detention, arrest or other interference whatsoever of or with any Goods and/or Products in the [Site]

…

2.7 [Mac Z] represents and warrants that with respect to all the Goods and Products deposited by it pursuant to the terms of this Agreement: (a) all such goods are exclusive property and it has all right, title and interest to such Goods and Products; (b) the Goods and Products are to be deposited and stored by it at the Production and Storage Facility for the purposes of creating a pledge or charge in favour of SCIPION over such goods as security for [Mac Z]'s obligations to SCIPION in connection with the Financing Facility; and (c) save and except for such pledges or charges to be created in favour of SCIPION, all such Goods and Products are free of any pledge, claim, lien, charge or demand."

"[Services]

3.1 [Vallis] undertakes to use all due care and skill in the provision and performance of its services…"

"[The Site]

…

4.2 Prior to the execution of a Lease/Sub-Lease in favour of [Vallis], [Mac Z] shall notify the location of the [Site]. Upon such notification, [Vallis] shall conduct both an external and internal inspection of the [Site] and carry out a site inspection stating

whether or not the [Site] is approved by [Vallis] for the storage of the Goods and Products.

…

4.4 [Mac Z] shall ensure that [Vallis] shall have complete, exclusive and uninterrupted access to, possession and enjoyment of the [Site] during the term of [the CMA], subject at all times to the rights of SCIPION to have access to the Goods and Products under Clause [4.5] of [the CMA].

…

4.6 [Mac Z] shall be responsible for the safety, security and structural maintenance of the [Site]…[Mac Z] shall be fully responsible at all times for the management of the [Site], its staff and processes.

[Issuance of Warehouse Receipts]

5.1 [Vallis] shall receive the Goods and issue Warehouse Receipts, in the format prescribed in Appendix II hereto, to the order of SCIPION for the account of Mac Z, for Goods it has received at the [Site] on the day of arrival of the Goods at the [Site].

Vallis shall also confirm the quantity of the Goods delivered at the [Site] and in order to assess the apparent good order and condition of the Goods delivered to [Mac Z], [Vallis] shall upon delivery of such Goods weigh, visually inspect and value the Goods and promptly issue the Warehouse Receipt. The quantity and value of Goods received will be reflected in the daily report issued by [Vallis].

5.2 [Vallis] shall and issue Warehouse Receipts in the format prescribed in Appendix II hereto, to the order of SCIPION, for the account of [Mac Z], in relation to the Products it has received in the [Site].

[Vallis] shall confirm the quantity of the Products held at the [Site] and in order to assess the apparent good order and condition of the Products weigh, visually inspect, and value the Products and promptly issue the Warehouse Receipt. The quantity and value of Products held will be reflected in the daily report issued by [Vallis].

5.3 [Vallis] represents and warrants to SCIPION that the Warehouse Receipts issued by [Vallis] are issued on the basis of

the quantity and value of the Goods actually received into the [Site]…

5.4 The Warehouse Receipt means a numbered and signed Warehouse Receipt described in its heading as a Warehouse Receipt in which it is stated that [Vallis] has either i) received at the [Site] a specific quantity and value of Goods as ascertained by [Vallis] upon inspection, or ii) is holding at the [Site] a specific quantity and value of Products; which Goods and Products have been received by [Vallis] for and on behalf of and to the order of SCIPION for the account of [Mac Z] in accordance with the terms of this Agreement.

…

[Release of Goods and Products]

6.1 [Vallis] shall not release or allow the release of any Goods from the [Site] unless it has received prior written instructions from SCIPION to release the Goods for further processing into Products in the [Site] in the format prescribed in Appendix VI….

[Indemnity]

7.1(b) [Vallis] shall indemnify SCIPION and keep SCIPION fully indemnified against all losses, damages, liabilities, costs (including all legal costs on a solicitors-and-clients' basis) and/or expenses of any nature whatsoever, howsoever incurred or sustained by SCIPION arising out of or in connection with any default by [Vallis] in either failing to provide the services in conformity with the provisions of [the CMA]…

[Liability of loss, damage and deterioration]

8.1 [Vallis] shall exercise all due care and skill in storing, supervising and caring for the Goods and Products and be responsible to SCIPION for the safe custody of the Goods and Products…

8.2 In the event of bulk product, there shall be an exemption of all claims for the first 3 (three) per cent of the total quantity of product held in any one warehouse at any one time and, notwithstanding any other terms in [the CMA], [Vallis] shall not be liable for any indirect or consequential damages, including damages for loss of profits, incurred by [Mac Z], whether in contract or tort.

8.3 Notwithstanding any other terms in [the CMA], [Vallis]'s total liability under, arising from or in connection with [the CMA], howsoever such liability may have been caused or arisen including a claim in tort and whether or not it is related to the Goods and/or Products, shall not exceed the cost price of the Goods and/or the

Products as evidenced by the relevant purchase contracts and/or invoices, but shall include cost of freight, insurance, fees, charges, expenses and interest as advised by SCIPION.

…

[Storage of Goods]

…

9.3 Notwithstanding any other terms in [the CMA], [Vallis] shall not be liable if the quantity of Goods and/or Products lost or damaged due to unexplained reasons or unauthorized release does not exceed two (2%) per cent of the quantity of such Goods and/or Products confirmed by the relevant Warehouse Receipt, unless such liability is occasioned as a result of the wilful or negligent acts or omissions by [Vallis] or its staff. [Vallis] may dispute the existence of extent of any loss and/or any amount claimed provided that it notifies SCIPION in writing of the grounds for dispute within five (5) Business Days of any claim by SCIPION or [Mac Z].

…

[Miscellaneous]

…

17.3In carrying out its duties [Vallis] shall exercise all reasonable care and skill and shall act faithfully on behalf of SCIPION, in particular [Vallis] shall:

(a) ensure that [Vallis only accepts into storage such consignments of Goods delivered to the [Site] from [Mac Z] which meet the requirement as stated in the Definitions under ‘Goods’;

[Appendix I - Services]

...

2. [Vallis] (or its agents) shall supervise the arrival of the Goods at the [Site], record the Goods, the weight and the value of the Goods upon arrival by way of weighbridge certificate subject to the terms and conditions of [the CMA] and supervise and control the Goods in the [Site].

3. [Vallis] shall provide SCIPION and [Mac Z] with a daily tonnage report for the Goods and Products held on site with a conversion estimation of the total copper product held…

> 5. [Vallis] shall issue Warehouse Receipts to SCIPION (in the format prescribed in Appendix II hereto) for each consignment of Goods received and inspected on the same day of their receipt, with copies of the same to be forwarded to [Mac Z]…
>
> 7. From the date [Vallis] first receives and takes delivery of Goods and Products at the [Site], [Vallis] shall submit a report (the 'Report') to SCIPION…every business day…The Report shall set out the total quantity and value of the Goods and Products held against each issued Warehouse Receipt in the [Site]…
>
> 9. [Vallis] shall ensure that the [Site] is suitable in all respects for the safekeeping and proper storage and control of the Goods and Products. [Vallis] shall further control the receipt, storage and release of Goods and Products at all times subject to and in accordance with SCIPION's instructions."

35. There were various amendments and addenda to the CMA which are not relevant for present purposes.

36. At the same time as entering into the Facility and the CMA, Scipion entered into a number of other agreements to secure performance of Mac Z's obligations. These included the Pledge, in which Mac Z purported to grant Scipion a pledge over the Goods, Work in Progress and the Products at the Site to secure full repayment and performance by Mac Z under the Facility. The Pledge provided in clause 2.5 that Scipion entrusted custody of the said Goods, Work in Progress and Products to Vallis. The validity of the Pledge is in issue and was the subject of Moroccan law expert evidence.

37. The security documents also included a pledge granted by Mac Z to Scipion over all of Mac Z's rights over the Collection Accounts; a Master Assignment Agreement in which Mac Z assigned to Scipion its rights under contracts for the sale of Products between Mac Z and third party buyers; a Corporate Guarantee from Mac Z's Moroccan parent company, Mac Z SA (now in liquidation); and a Personal Guarantee by the managing director of Mac Z, Mr Lamdouar, of its obligations under the Facility.

(2) Regular operations

38. On or about 28 July 2016, Vallis commenced provision of CMA services at the Site. There was already a quantity of copper scrap at the Site at this time. For this reason, the interim daily tonnage reports and the first warehouse receipt issued by Vallis were based only upon (a) a visual inspection and (b) quantity figures from records provided by Mac Z. These figures were used as the starting point for Vallis's Daily Reports (see below).

39. On various dates in 2016 and 2017, Scipion advanced sums totalling around US$ 10 million to Mac Z under the Facility.

40. As noted above, the CMA required Vallis (a) to issue warehouse receipts for Goods received and Products processed; and (b) to provide a report every business day setting out the total quantity and value of the Goods and Products held ("***Daily Reports***").

41. Vallis was also required by its professional indemnity insurance ***('PII')*** to audit all stock under its collateral management at least every 90 days. Vallis undertook PII stock audits on *inter alia* on 14 - 16 June 2017 and 18 - 23 August 2017.

42. The most senior staff members employed by Vallis at the Site at the time of the alleged loss were Laurent Adou (supervisor) and Youssef El Barji (assistant supervisor). In addition, there were four other Vallis staff members at the Site.

(3) Discovery of the loss

43. On 9 October 2017 Mr El Barji, Vallis's acting supervisor at the Site, reported a discrepancy between the amount of scrap copper recorded in Vallis's daily report to Scipion (1,970.556 mt) and what he could see visually at the Site.

44. On 11 October 2017, Laurent Adou, Vallis's Supervisor who was on leave from the Site at that time, returned to the Site at the request of Mr Burdairon, Vallis's Operations and Reporting Administrator (who had preceded Mr Adou as Site Supervisor). On the same day, Mr Adou sent an email to Mr Burdairon stating:

> "After having a look on stock of scrap copper located in the scrapyard, the remaining physical stock of net scrap copper can be estimated at 150 tonnes while our report shows 1970.566 tonnes which is not normal. … Investigations are in progress to know the origin of this enormous difference."

45. On 12 October 2017 Mr Burdairon flew to Morocco to carry out investigations into the loss at the Site. In an email sent to Vallis's senior management the following day, he reported *inter alia* that he and Mr Adou agreed that there are two possible 'scenarios':

> "Either the stock was removed from the Site without us knowing.
>
> Or it was wrongly reported when it came in."

46. On 14 October 2017 Vallis notified its insurers of a difference of 1,800 tonnes between scrap copper that Vallis had been reporting under the CMA and that physically present at the Site, and of a possible claim on its professional indemnity policy.

47. On 19 October 2017 Mr Barr-Sim, Vallis's Managing Director, notified Scipion by e-mail of a *"potential shortage of copper scrap"*. The email stated that it was estimated that only 150 tonnes scrap copper remained at the Site (compared with 1,970.556 mt stated in Vallis's daily report at close of business on 9 October 2017). Mr Barr-Sim stated that the cause of the stock shortage was being investigated thoroughly and that:

> "Potential explanations for the shortage are so far limited to the following:
>
> Scrap copper has been removed from the Mac Z site on approximately 90 trucks over the past 2 months.
>
> Scrap copper has been processed and sold.

> Weighbridge tickets presented to Vallis for the receipt of scrap copper and input to the daily reports have been falsified to inflate the amount of stock receipted into the scrapyard …"

(4) Subsequent events

48. As part of its investigations Vallis undertook a preliminary stock audit of the copper scrap physically present on the Site. The audit was conducted by Mr Adou on 19 and 20 October 2017 by weighing the copper scrap using forklifts and a weighbridge. As a result of that audit, it was estimated that there was some 30.967 mt of copper scrap left.

49. On 24 October 2017 Scipion contacted Roxburgh Forensics to conduct an investigation into the apparent loss of copper scrap. On the same day, Vallis informed Scipion of the results of its preliminary stock audit referred to above. At Scipion's request, Vallis updated the daily reports to reflect the estimate in the audit.

50. On 25 October 2017 Peter Aplin, a Vallis director, met Mr Lamdouar of Mac Z in Morocco and visited the Site. The following day, Mr Aplin attended a meeting at Scipion's offices in London, at which he agreed amongst other matters that Vallis's lead auditor Mr Kenny McDonald would attend the Site to undertake a full stock-take.

51. On 28 October 2017 Vallis notified Scipion of a further unauthorised release of 125.711 mt copper granules from the Site. Mr Lamdouar of Mac Z stated that this release was necessary to pay salaries, electricity and consumables following the blocking of Mac Z's accounts.

52. Also on 28 October 2017 Mr Nicolas Clavel and Mr Pierre St-Hubert of Scipion flew to Morocco to monitor investigations at the Site.

53. Between 30 October and 6 November 2017, Mr John Myers and Mr Stuart Walker of Roxburgh Forensics travelled to Morocco to undertake an investigation on behalf of Scipion.

54. Between 30 October and 5 November 2017 Vallis's lead auditor, Mr Kenny McDonald, attended the Site to undertake a full stock audit. Mr McDonald produced four Photographic Audit Reports dated 30 October, 1 November, 2 November and 10 November 2017. The final audit report dated 10 November 2017 noted no major discrepancies at the Site other than the Goods missing from the scrapyard, estimated at 1,899.114 tonnes with a value of US$11,324,118.

55. On 30 November 2018 Vallis gave Scipion notice of termination of the CMA under clause 13.2 thereof. On 28 January 2019 Scipion gave Vallis notice pursuant to clause 13.3 of the CMA directing Vallis to continue to perform the CMA for a "*holdover*" period of 30 days.

56. The CMA terminated on 28 February 2019 and, since that date, the goods remaining at the Site have been held and stored at the Site by Ace Global Depository.

(5) Mitigation steps taken by Scipion

57. The question of mitigation is in issue between the parties. However, the following factual matters are not contentious and can be set out by way of factual background.

58. On 20 October 2017, Scipion took the following steps to protect its position under the Facility:

    i) Scipion served notices of Events of Default under the Facility and related guarantees on Mac Z, the Corporate Guarantor and Mr Lamdouar.

    ii) Scipion served a blocking notice on BMCE in relation to the Collection Accounts, which succeeded in blocking US$21,830.40.

    iii) Scipion instructed Vallis to cancel immediately all releases from the Site.

    iv) Scipion took steps to register the Pledge, which it achieved on 30 October 2017.

59. On 23 October 2017 Scipion instructed Moroccan lawyers to issue a preventive seizure over the goods and goodwill of Mac Z, which it achieved on 25 October 2017.

60. Further, Scipion brought proceedings against Mac Z and the Corporate Guarantor:

    i) On 9 November 2017, Scipion issued a claim in the High Court of England and Wales (Commercial Court) against Mac Z and the Corporate Guarantor.

    ii) On 18 December 2017, the court entered default judgment against Mac Z and the Corporate Guarantor for the sums due to Scipion under the Facility, in an amount to be decided by the court.

    iii) On 27 March 2018, the court determined that sum to be US$ 12,006,830.02, consisting of the principal amount (US$10,389,602.91), interest, late payment commission and post-default expenses plus costs assessed at £46,750.

61. In the period from December 2017 to April 2019, Scipion sold a total of around 207.535 mt of goods and products. As of today, the goods and products that remain at the Site consist largely of Maroc Telecom cable totalling 1,182.258 mt.

(D) WITNESSES

62. The principal witnesses on the issues that by the end of trial remained for me to determine were as follows.

63. Mr Nicolas Clavel is the Founder and Chief Investment Officer of Scipion Capital Limited, which manages the Claimant. He gave his evidence in a straightforward and honest manner.

64. Mr Christopher Rogers is a non-executive director of Scipion Capital Limited, for whom he has worked since May 2015 in a number of capacities including regional head of Francophone Africa. He previously had a 28-year career at Citibank in various roles, and has more than 40 years' experience of living and working in Africa. Though occasionally discursive, I consider he gave evidence honestly and carefully.

65. Mr Angus Macdonald has been General Counsel of Scipion Capital (UK) Ltd since March 2018. He has over 20 years of experience as a senior finance and transactional lawyer, acting as the lead lawyer on a wide range of financings and international projects, particularly in the mining and resources areas. Prior to joining the Scipion

group, he had been a partner of an Australian law firm, a finance lawyer at law firms in London, Hong Kong and Amsterdam, General Counsel of the private mining group Zamin, and General Counsel of the global trading group Gerald Metals. Mr Macdonald too was a truthful witness. He had, though, a tendency from time to time to lapse into advocacy on Scipion's behalf while giving evidence. In addition, as discussed in section (H) below, some aspects of his oral evidence on points of significance had not been foreshadowed in his witness evidence in the way one might reasonably have expected.

66. Scipion called Mr Simon Cohen as its valuation expert. Mr Cohen is a base metals trader with 20 years' experience and has worked for well-known companies such as Glencore. He specialises in trading secondary material such as copper blister, slags, remelted copper and copper scrap. He states in his first report that his experience includes purchasing lead ingots from a named Moroccan company, purchasing copper anodes and granules from Mac Z in his current position at Danex Petroforce, and purchasing copper, zinc and lead concentrates from artisanal miners.

67. The purchases Mr Cohen had made from Mac Z were of goods subject to the CMA, and he has had other previous dealings with Scipion. Scipion submitted that this was not surprising, given that it was common ground that the relevant market in Morocco is small with a very limited number of local recyclers. However, the position was more acute than that, because Mr Cohen while at Petroforce had in fact made an offer (in the form of a 'soft' i.e. non binding bid) for the very stock on which he was asked to express an expert opinion as to value. This inevitably calls into question Mr Cohen's objectivity when providing a valuation report on that stock. As discussed in section (H)(1)(g) below, there were also some inconsistencies in Mr Cohen's evidence.

68. Vallis called as its valuation expert Lesley Campbell, who has been a trader of physical metal, an LME broker and an advisor on metal risk management for over forty years. She has worked on a number of projects to hedge scrap metal, including copper, entailing the calculation of metal contained in parcels of scrap material for hedging purposes, and has worked as a consultant to a European sustainable waste management project, focussing on the global dynamics of the scrap market. Ms Campbell did not have experience of the domestic Moroccan market. However, her evidence was clear, logical and in my view objective.

69. Scipion called as its Moroccan law expert Mr Amin Hajji. Mr Hajji has been an academic since 1984 and is currently a Professor of Law at the Faculty of Law of Casablanca. He has also been an attorney at the Casablanca Bar since 1994 and founded the firm Hajji & Associés in 1996. He has particular knowledge of aircraft acquisition financing, which was the subject of his 1994 PhD.

70. Vallis called as its Moroccan law expert Ms Safia Fassi-Fihri. Ms Fassi-Fihri is a member of the Casablanca Bar, with 10 years' experience in business law in Morocco and sub-Saharan Africa, principally in the mergers & acquisitions, private equity and finance sectors. She is co-founder and Managing Partner of BFR & Associés and a member of the Board of CGEM, the Moroccan equivalent to the British CBI. She has also practised with leading international law firms in Paris and Casablanca, and has acted as general counsel for a major insurance company in Morocco.

71. Although Ms Fassi-Fihri accepted that she had not come across an Article 378 pledge being used in practice, I am satisfied that both Moroccan law experts were qualified to give evidence on the issues of Moroccan law which arose, and that both expressed their genuine opinions and did their best to assist the court. Mr Hajji had an occasional tendency (possibly in an attempt to avoid confrontation) to agree with propositions that appeared at odds with his views as expressed in his report or elsewhere in his cross-examination. There were occasions on which Ms Fassi-Fihri seemed to be seeking to advocate Vallis's case, but on the whole I consider that she gave her evidence with proper independence.

(E) CAUSATION: CLAIM BASED ON POSSESSORY RIGHTS

72. Scipion submits that it is entitled to recover substantial damages from Vallis without having to establish that the Pledge was valid under Moroccan law. As set out in its written closing dated 3 February 2020, Scipion's case in this regard is as follows:

> "70. The measure of loss recoverable by a pledgee who has been deprived of the pledged goods is the full value of the goods at the date of the wrongful seizure, not merely the value of the pledgee's security interest in the goods: *Swire v. Leach* (1865) 18 CB (NS) 479 …, approved by Lord Collins MR in *The Winkfield* [1902] P 42 at 57 ….
>
> 71. This measure of loss reflects the general principle that a possessory interest in goods is sufficient to claim substantive damages for loss or damage to the goods, and the correlative principle that it is irrelevant that the claimant may have to account to a third party for some or all of the damages recovered: see *The Winkfield* at 54; *The Jag Shakti* [1986] 1 AC 337 at 345 …; *The Sanix Ace* [1987] 1 Lloyd's Rep. 465 at 468-469...
>
> 72. Moreover, by reason of the relationship of bailment between them on the terms of the CMA, Vallis is precluded from denying that Scipion had sufficient interest in the Goods to recover the damages claimed. In *The Winson* [1982] AC 939 at 959 …, Lord Diplock said that it "*follows from the existence of the legal relationship of bailor and bailee as a matter of general principle of the law of bailment, which may also be described as hornbook law, that as between [the bailors and the bailees] the latter as bailees were estopped from denying the title to the goods of the former as their bailor …*".
>
> 73. That general principle of the law of bailment is reinforced in the present case by the specific terms of the CMA. By Recital (A) to the CMA … it was "*hereby agreed by the Parties that the requisite security in favour of SCIPION over the Goods shall be created by the delivery of the Goods into the custody of VCL who shall hold the Goods as an agent of SCIPION for the purposes of creating the requisite security in favour of SCIPION*" and by clause 2.2 of the CMA … "*MZG acknowledges and confirms that the Goods and Products shall*

> *be held in the name of SCIPION for the account of MZG until the end of the Security Period and until such time, MZG have no equitable or proprietary rights or interests in such Goods and Products ...*" (emphasis added). Those provisions amounted to an agreement that the basis for the transaction covered by the CMA was that Scipion (and not Vallis) had all equitable and proprietary rights in the Goods, which would include such security rights as would be conferred by a valid Art.378 pledge under Moroccan law. Vallis is therefore precluded from denying Scipion's claim to damages on the basis that Scipion did not in fact have such rights: see the discussion of "*contractual estoppel*" in *Credit Suisse International v. Stichting Vestia Group* [2014] EWHC 3103 (Comm) at [301]-[310] ...
>
> 74. It will not have escaped the Court's notice that there would be highly unpalatable consequences if Vallis could escape liability to Scipion on the grounds of the invalidity of the Pledge. If the Goods were lost without wrongdoing on the part of Mac Z, and Mac Z were to claim against Vallis for their loss, Vallis would be able to defend Mac Z's claim on the basis that under the CMA (and particularly clause 2.2) Mac Z had no possessory, equitable or proprietary rights to the Goods. The result would be that, even though Vallis's admitted breach of the CMA caused the loss of almost 1,900 MT of scrap copper, Vallis would not be liable to pay substantive compensation to anyone. In the words of Hobhouse J in *The Sanix Ace* at 471, "*This reduces their argument to absurdity*".
>
> 75. Scipion has measured its loss by reference to the value of the benefit which it would otherwise have had by reason of Vallis holding the Goods to its order as security for Mac Z's indebtedness under the Facility, which limits its claim to the sums to which Scipion is entitled under the Facility (and avoids the possibility of Scipion recovering from Vallis any excess over and above the sums outstanding under the Facility, for which excess it is common ground Scipion would have to account to Mac Z). However, as Vallis itself correctly observed at para.140 of its opening skeleton, the applicable measure of loss is a matter of law for the Court. The fact that Scipion has framed its claim by reference to the Facility debt secured on the Goods to avoid an over-recovery does not mean that it is necessary for Scipion to establish the validity of the Pledge under Moroccan law to recover the sums claimed."

73. Scipion thus makes essentially three points:

    i) it is entitled to recover substantial damages by virtue of its possessory rights;

    ii) it is entitled to recover substantial damages as bailor; and

iii) Vallis is estopped by the terms of the CMA from denying that Scipion had sufficient rights in relation to the lost goods as to entitle it to recover substantial damages.

I consider the first two points together, since Scipion's claimed possessory rights derive from its position as contractual bailor.

(1) Authorities: claims by possessors/bailors

74. Scipion relied on five authorities in support of its first two basic propositions.

75. First, *Swire v Leach* (1865) 144 ER 531, in which the plaintiff pawnbroker brought an action in trover (i.e. conversion) against the defendant landlord who had seized unredeemed pledged goods under a warrant of distress. After finding that the goods were privileged from distress, the Court of Common Pleas held that the plaintiff was entitled to the full value of the goods. Erle CJ (with whom Keating and Williams JJ agreed) said:

> "[W]as the plaintiff entitled to recover damages to the full value of the goods seized and sold? …In distraining these goods, the defendant was an absolute wrong-doer. The landlord had no colour of right to take them. The bailee, therefore, is entitled to the full value of the goods. He may retain out of that the sums he has advanced upon them and the interest, and he will be liable to hand over the surplus to the respective owners of the goods." (p536)

Williams J similarly stated:

> "As to the damages, it is clear that, as against a wrong-doer, the plaintiff was entitled to recover the full value of the goods at the time of the wrongful seizure."

Keating J agreed with both judgments.

76. Secondly, in *The Winkfield* [1902] P. 42, the postmaster general, as bailee, brought a claim for letters and parcels that had been lost in a collision between two vessels. Collins MR, who gave the leading judgment, stated:

> "… the law is that in an action against a stranger for loss of goods caused by his negligence, the bailee in possession can recover the value of the goods, although he would have had a good answer to an action by the bailor for damages for the loss of the thing bailed.
>
> It seems to me that the position, that possession is good against a wrongdoer and that the latter cannot set up the jus tertii unless he claims under it, is well established in our law, and really concludes this case against the respondents.
>
> …

> I think it can be shewn that the right of the bailee to recover cannot be rested on the ground suggested in some of the cases, namely, that he was liable over to the bailor for the loss of the goods converted or destroyed. … as between possessor and wrongdoer the presumption of law is, in the words of Lord Campbell in *Jeffries v. Great Western Ry. Co*., "*that the person who has possession has the property.*" In the same case he says: "*I am of opinion that the law is that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him, having no title in himself, is a wrongdoer, and cannot defend himself by shewing that there was title in some third person, for against a wrongdoer possession is title. .. .*" Therefore, it is not open to the defendant, being a wrongdoer, to inquire into the nature or limitation of the possessor's right, and unless it is competent for him to do so the question of his relation to, or liability towards, the true owner cannot come into the discussion at all; and, therefore, as between those two parties full damages have to be paid without any further inquiry." (p.55)
>
> "… the root principle of the whole discussion is that, as against a wrongdoer, possession is title. The chattel that has been converted or damaged is deemed to be the chattel of the possessor and of no other, and therefore its loss or deterioration is his loss, and to him, if he demands it, it must be recouped. His obligation to account to the bailor is really not ad rem in the discussion. It only comes in after he has carried his legal position to its logical consequence against a wrongdoer, and serves to soothe a mind disconcerted by the notion that a person who is not himself the complete owner should be entitled to receive back the full value of the chattel converted or destroyed." (p.60)

77. Thirdly, in *China-Pacific SA v Food Corp of India (The "Winson")* [1982] AC 939, the essential dispute was whether cargo owners were liable to salvors for some of the storage costs of their salvaged cargo. Having found a bailment relationship between the parties, Lord Diplock stated:

> "It follows from the existence of the legal relationship of bailor and bailee as a matter of general principle of the law of bailment, which may also be described as hornbook law, that as between the cargo owner and the salvors the latter as bailees were estopped from denying the title to the goods of the former as their bailor, including as an incident of that title its right to possession…the salvors could not resist a demand for possession of the salved wheat made by the cargo owner upon its arrival at a place of safety by relying upon jus tertii, viz the shipowner's right to possession as against the cargo owner, at any rate until an adverse claim to possession had been made upon them by the shipowner." (p959G-960A)

78. The fourth authority is *Chabbra Corporation v Jag Shakti (Owners) (The "Jag Shakti")* [1986] AC 337, where pledgees of a bill of lading brought a claim in conversion against shipowners who had delivered the cargo to another party. The question was whether shipowners were liable for the full market value of the goods, or merely the sums advanced by the pledgees to finance the transaction. The Privy Council (Singapore) held that it was the former. Lord Brandon, giving the only judgment, said:

> "It has further, in their Lordships' opinion, been established, by authority of long standing, that where one person, A, who has or is entitled to have the possession of goods, is deprived of such possession by the tortious conduct of another person, B, whether such conduct consists in conversion or negligence, the proper measure in law of the damages recoverable by A from B is the full market value of the goods at the time when and the place where possession of them should have been given. For this purpose it is irrelevant whether A has the general property in the goods as the outright owner of them, or only a special property in them as pledgee, or only possession or a right to possession of them as a bailee. Furthermore the circumstance that, if A recovers the full market value of the goods from B, he may be liable to account for the whole or part of what he has recovered to a third party, C, is also irrelevant, as being res inter alios acta." (p.345)

Lord Brandon identified the only exception to this general principle as being where B has a cross-claim arising out of the same transaction which it can offset against A's claim. After citing *Swire v Leach* and *The Winkfield,* Lord Brandon continued:

> "Applying the general principle laid down in *Swire v. Leach*, 18 C.B.N.S. 479 and *The Winkfield* [1902] P. 42 to the present case, their Lordships reach the following result. First, the plaintiffs, as holders and endorsees for value of the bills of lading, had a right to delivery of the salt to them at Chittagong. Secondly, that right entitled the plaintiffs to recover from the shipowners, who had wrongfully converted the salt by delivering it to the buyers, the full value of the salt on delivery at Chittagong. Thirdly, the circumstance that the plaintiffs, having recovered from the shipowners the full value of the salt, might, after taking out of the sum recovered the sums expended by Atlas in financing the purchase of the salt by the buyers from the sellers, have to account, in whole or in part, for the balance to the buyers was, as between the plaintiffs and the shipowners, wholly irrelevant." (p.348)

79. Fifthly, in *Obestain v National Mineral Development Corporation (The "Sanix Ace")* [1987] 1 Lloyd's Rep. 465, charterers brought a claim against shipowners for damage to their cargo onboard the vessel. Shipowners resisted the claim on the grounds that charterers had been paid in full for the goods under a sub-sale, and had therefore suffered no loss. Hobhouse J rejected this argument:

> "In contract, although nominal damages can be awarded, the right to recover substantial damages can be proved by proving possession or ownership of the relevant goods.
>
> …
>
> All the cases demonstrate the principle that it is the loss to the proprietary or possessory interest that is compensated, not some other or different economic loss.
>
> …
>
> … it was the carriers' argument that, in the present case, there is no-one who could recover substantial damages from the carriers, notwithstanding the demonstrated culpable unseaworthiness of the ship and the serious damage to the cargo which had resulted. This reduces their argument to an absurdity." (pp. 468, 469 and 470-471

(2) Authorities: estoppel

80. Scipion relied on the summary set out in *Credit Suisse International v. Stichting Vestia Group* [2014] EWHC 3103 (Comm) §§ 301-310, including in particular the following passage:

> "302. The so-called principle of contractual estoppel was explained as follows by Moore-Bick LJ in *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd*, [2006] EWCA Civ 386 at paragraph 56:
>
> > "There is no reason in principle why parties to a contract should not agree that a certain state of affairs should form the basis for the transaction, whether it be the case or not. For example, it may be desirable to settle a disagreement as to an existing state of affairs in order to establish a clear basis for the contract itself and its subsequent performance. Where parties express an agreement of that kind in a contractual document neither can subsequently deny the existence of the facts and matters upon which they have agreed, at least so far as concerns those aspects of their relationship to which the agreement was directed. The contract itself gives rise to an estoppel: …".
>
> This has been widely accepted as an authoritative statement of the principle of law that has in recent years been dubbed "contractual estoppel", and it was endorsed by Aikens LJ in *Springwell Navigation Corp v J P Morgan Chase Bank*, [2010] EWCA Civ 1221 at paragraph 144. It is irrelevant that one party or both (or all) parties knew or could reasonably have discovered that the state of affairs was not as agreed. So too are any question

about whether either (or any) party relied on what was agreed and any question of detriment."

(3) Application to the present case: Scipion's possessory rights

(a) The parties' key submissions

81. In so far as any of these authorities rely on the claimant being a pledgee, they do not (as Vallis points out) advance Scipion's case. Vallis accepts that if, contrary to its submissions, the Pledge was valid under Moroccan law, then it was open to Scipion to bring a claim for the value of the lost scrap.

82. However, the principle set out in the cases is of more general application, being based on the rights of a person entitled to either a proprietary or possessory interest in the goods in question (excluding, as Hobhouse J mentioned in the quoted passage from *The Sanix Ace*, a bare proprietary title not including any right to possession). Thus, as stated in *The Jag Shakti*, substantial damages can be recovered by a person *"who has or is entitled to have the possession of goods"*. Although Lord Brandon in that case proceeded to explain that that included the situation where the claimant has the general property in the goods as their outright owner, or only a special property *"as pledgee, or only possession or a right to possession of them as a bailee"*, that list is in my view not intended to be exhaustive. In particular, as illustrated by *The Winson*, the principle applies to a claim by a person who has the right to possession as bailor.

83. Vallis submits that the question of whether Scipion held any proprietary or possessory rights in the lost goods, as opposed to any contractual rights, is a question not of English law but of Moroccan law. That is because under English conflicts of laws principles, the transfer of proprietary interests in tangible movables – which embraces security rights – is governed by the *lex situs*: see Dicey, Morris & Collins *"The Conflict of Laws"* (15th ed.) §§ 24-005 and 6 and *Glencore v Metro* [2001] 1 Lloyd's Rep. 284 §§ 30-36 (Moore-Bick J). *Dicey* explains that it is necessary to distinguish between contractual and proprietary effects of a transfer of movable property. The contractual effects of a transfer may be governed by the law applicable to the contract between the parties, but the proprietary effects of the transfer, i.e., whether real rights are created or transferred, will be governed by the *lex situs*.

84. Thus, Vallis submits, although the CMA was governed by English law, whether or not it gave Scipion possessory rights is a matter governed by Moroccan law. Scipion has not adduced any Moroccan law evidence as to its rights other than in relation to the Pledge.

85. Having made that point, Vallis continues, in its final written closing, as follows:

> "16. Therefore, Scipion's asserted entitlement to hold any possessory interest allowing it to recover substantial damages in these proceedings is based on the existence of a bailment relationship between Scipion and Vallis. It is this and only this relationship upon which Scipion relies to assert both that (a) it holds any possessory rights giving it a right to recover substantial damages and (b) to preclude Vallis from challenging otherwise.

> 17. It was common ground at trial that there was a bailment relationship between Scipion and Vallis on the terms of the CMA.
>
> 18. Vallis also accepts that at common law there is a rule that a bailee is estopped from denying or disputing his bailor's title i.e. he is estopped from pleading jus tertii against his bailor.
>
> 19. Vallis submits, however, that the bailee's estoppel was abolished by section 8(1) of the Torts (Interference with Goods) Act 1977 …
>
> …
>
> 41. In short, Vallis submits that, notwithstanding the bailment relationship which existed between itself and Scipion, it is entitled in these proceedings to show that a third party, Mac Z, has a better right than Scipion as respects all or any part of the interest claimed by Scipion or in the right of which it sues.
>
> 42. If, as is Vallis' case, the Pledge was invalid then Vallis submits that Scipion in fact held no security, proprietary or possessory rights in the copper scrap at the time of the loss with all such rights in fact remaining vested in Mac Z."

86. I note in parentheses at this point that Vallis's acceptance, recorded in quoted § 17 above, of a bailment relationship between Scipion and Vallis on the terms of the CMA reflected the parties' pleaded cases: see §50 of my judgment on permission to amend. Given that acceptance, it may well be academic to consider the way in which the bailment relationship arose. I am inclined to think that it arose in the way set out in Scipion's opening skeleton argument, namely by Mac Z, as owner of the goods, bailing them to Vallis, and Vallis as bailee attorning to Scipion and agreeing to hold the goods on Scipion's behalf: cf *Official Assignee of Madras v Mercantile Bank of India Ltd* [1935] AC 53, 58 (quoted by Blair J in *Impala Warehousing* [2015] EWHC 811 (Comm) § 58):

> "At the common law a pledge could not be created except by a delivery of possession of the thing pledged, either actual or constructive. It involved a bailment.
>
> If the pledgor had the actual goods in his physical possession, he could effect the pledge by actual delivery; in other cases he could give possession by some symbolic act, such as handing over the key of the store in which they were. If, however, the goods were in the custody of a third person, who held for the bailor so that in law his possession was that of the bailor, the pledge could be effected by a change of the possession of the third party, that is by an order to him from the pledgor to hold for the pledgee, the change being perfected by the third party attorning to the pledgee, that is acknowledging that he thereupon held for him; there was thus a change of possession and a constructive

> delivery: the goods in the hands of the third party became by this process in the possession constructively of the pledgee. …"

That analysis indicates how possession can be transferred, thus allowing a pledge to be effected, by attorning to the intended pledgee. The relevant point for present purposes is not the creation of a pledge (which is disputed) but that constructive possession can be transferred by attornment.

87. In response to Vallis's submissions as summarised in §§83-85 above, Scipion argues as follows:

    i) Vallis does not challenge the proposition (originally stated at paragraph 71 of Scipion's original written closing) that *"a possessory interest in goods is sufficient to claim substantive damages for loss or damage to the goods, and the correlative principle that it is irrelevant that the claimant may have to account to a third party for some or all of the damages recovered"* (citing *The Sanix Ace*).

    ii) It follows that it is not in dispute that a possessory interest is sufficient for Scipion to recover substantial damages for the loss of the goods, regardless of the existence of any better right of a third party to some or all of the damages.

    iii) Vallis has admitted that Scipion had a possessory interest in the goods at the time when they were lost, as confirmed in my judgment on permission to amend:-

    > "Further, Vallis's admission in Amended Defence §12 implicitly includes an admission that Scipion had possessory rights in respect of the Goods (since there would otherwise be no bailment between Vallis, as bailee, and Scipion, as bailor)." (§ 53)

    iv) It is therefore not open to Vallis to contend that Scipion held no possessory rights in the Goods at the time they were lost.

    v) In any event:-

        a) Since the bailment was on the terms of the CMA, Scipion's claim is governed by English law (i.e. the law chosen by the parties) pursuant to Article 3 of Regulation 593/2008 on the law applicable to contractual relations (Rome I): *Impala Warehousing and Logistics (Shanghai) Co Ltd v Wanxiang Resources (Singapore) Pte Ltd* [2015] EWHC 811 (Comm) at § 74-81, concluding that a bailment on terms should be classified as contractual for these purposes. As noted in Scipion's written opening, neither party has sought to plead or prove a different governing law.

        b) Vallis accepts that it is common ground that there was a bailment relationship between Scipion and Vallis on the terms of the CMA, and does not dispute that the terms of that bailment relationship gave Scipion possessory rights in the goods.

c) Vallis is in any event precluded from asserting that Scipion did not have possessory rights in the goods at the time when they were lost.

Scipion also takes issue, as I discuss later, with the propositions that (1) the 1977 Act permits Vallis to plead *ius tertii* and (2) any *jus tertii* exists.

(b) Governing law

88. Beginning with the question of governing law, the general proposition stated in the paragraphs from Dicey on which Vallis relies is as follows:

> "*… There is little doubt," said Devlin J., "that it is the lex situs which, as a general rule, governs the transfer of movables when effected contractually*." "*The proper law governing the transfer of corporeal movable property*," said Diplock L.J., "*is the lex situs." "The practical considerations of trade and commerce"*, said Moore-Bick J., "*provide strong support, in my view, for the adoption of a lex situs rule in all cases*". And according to Tomlinson J., the contention that the proprietary effects of dealings with a ship should today be referred to the lex loci actus, rather than the lex situs, was one which was "*unlikely to be fruitful*". …" (§ 24-005, footnotes omitted)
>
> "A distinction must be drawn between the contractual effects of the transfer and its proprietary effects. The contractual effects of the transfer, like those of any other contract, depend upon the law applicable to the contract. That law will, for instance, determine whether the seller is liable to the buyer for defects in the quality of the goods. And the transfer may be invalid as a transfer but valid as an executory contract to transfer. But the proprietary effects of the transfer depend on the lex situs. That law will determine whether title passes to the transferee by mere agreement or whether delivery is necessary. If the lex situs says that no title passes to the transferee because the parties lack capacity to transfer or because of some defect of form or essential validity in the transfer, then other jurisdictions should, it is submitted, accept the fact that no title has passed, no matter what the applicable law of the transfer may say. *"The contractual rights and duties of the parties can be enforced only in so far as they are consistent with the recognition of the property rights existing or created under the lex rei sitae." "A contract made in England and governed by English law for the sale of specific goods situated in Germany, although it would be effective to pass the property in the goods at the moment the contract was made if the goods were situate in England, will not have that effect if under German law ... delivery of the goods was required in order to transfer property in them."* (§ 24-006, footnotes omitted)

89. However, paragraph 24-005 also includes the following concluding sentence:-

> "The furthest that our courts have gone in holding that questions of title may sometimes be governed by some law other than the lex situs appears to be as follows. If an owner of chattels situated in England seeks to recover them from a bailee or a stranger, and by English domestic law his right to do so depends on his right to immediate possession, the question whether he has such a right may be held to depend on the applicable law of the contract under which the chattels were bailed to the defendant" (§ 24-005)

citing *Kahler v Midland Bank* [1950] A.C. 24 and *Zivnostenska Banka v Frankman* [1950] A.C. 57, cases concerned with exchange control regulations.

90. This qualification is significant in the present case, because the issue here does indeed turn on Scipion's rights to possession. *Kahler* and *Zivnostenska Banka* were considered and distinguished by Moore-Bick J in *Glencore v Metro*, which is the case specifically cited by Vallis and one of the cases cited in the paragraphs from Dicey quoted above. The issue in *Glencore* related to title to oil held in storage tanks. Moore-Bick J said:

> "27.. Mr. Schaff suggested that these cases could be seen as illustrating the limitations of the lex situs rule in cases where the court is concerned only with the passing of property between the immediate parties to the transaction. In particular he drew my attention to a passage in the speech of Lord Reid in *Zivnostenska Banka v Frankman* where he said at page 83
>
> > "there is no apparent reason why the parties should find it attractive that rights under the contract with regard to deposited property should vary according to the place where that property might be at the time; and should, so long as that property was deposited abroad, be settled by a law with which the parties were perhaps unfamiliar."
>
> It is important to bear in mind, however, what the issues were, both in that case and in *Kahler v Midland Bank* . In each case the action was brought in detinue to obtain the delivery up of securities held by the bank, and as Slade J. pointed out in *Winkworth v Christie* , in order to succeed in such an action the claimant must establish an immediate right to possession of the goods. Property in the goods may carry with it an immediate right to possession, but not if that right has been qualified, either under a contract with a third party to whose order the goods are directly held (as in *Kahler v Midland Bank*), or under the contract between the claimant and the defendant (as in *Zivnostenska Banka v Frankman*). In such cases the contract effectively determines whether the claimant has a good possessory title (in the sense of an immediate right to possession) as against the defendant, but it has no bearing on the question of proprietary title. Neither of these cases seems to me, therefore, to provide any support for this part of the argument."

91. That was a discussion of cases where a claimant had general title to the goods but his right to possession was qualified by the terms of his contract with the defendant. However, the distinction between proprietary title and right to possession is of more general application, and (moreover) capable of application to the difference between a right to possession and actual legal possession. Even on the footing that proprietary title and actual possession are determined by the *lex situs*, the right to possession involved in a bailment is in my view governed by the law governing the bailment: which in the case of a contractual bailment, or 'bailment on terms', means the law governing the contract (see *Impala,* cited above).

(c) Effect of bailment on CMA terms

92. The focus must therefore be on the bailment relationship, on the terms of the CMA, between Scipion and Vallis, and its implications for Scipion's title to sue. Vallis appears implicitly to accept this, in that notwithstanding its submission on governing law it goes on to state that Scipion's asserted possessory interest must be based solely on the bailment relationship (the existence of which Vallis accepts).

93. It is of the essence of a bailment that the bailor has, as against the bailee, a right to the return of the goods in accordance with the contractual terms (see, e.g., Chitty on Contracts § 33-010: *"... the fact that the bailee is given possession of the goods and not ownership means that he cannot keep the goods. They must be returned to the bailor at the end of the period of the bailment. The bailee is therefore normally under an obligation to return the bailed chattel to the bailor at the end of the period of the bailment, unless he can show good cause for not returning it."*). Lord Diplock in the passage quoted above from *The Winson* referred to *"the title to the goods of ... their bailor, including as an incident of that title its rights to possession"*.

94. Vallis argues, however, that if the Pledge was invalid under Moroccan law, then in the present case Scipion lacked any possessory (or security or proprietary) rights and all such rights remained vested in Mac Z.

95. Scipion submits that that contention is not open to Vallis because Vallis has not challenged the proposition, set out in *The Sanix Ace,* that a possessory interest in goods is sufficient to claim substantive damages regardless of whether a third party has a better right to some or all of the damages; nor the proposition that the bailment relationship between Scipion and Vallis gave Scipion possessory rights in the goods. However, it appears to me that Vallis does in fact advance the argument that, due to the (assumed) invalidity of the Pledge under Moroccan law, Mac Z had all rights in and to the goods, with the result that (a) Scipion had no possessory rights – despite the existence of the admitted bailment relationship – and (b) (presumably) the *Sanix Ace* principle is not engaged.

96. In my view, however, clause 2.2 of the CMA provides a complete answer to that line of argument. It states:

> "[Mac Z] acknowledges and confirms that the Goods and Products shall be held in the name of SCIPION for the account of [Mac Z] until the end of the Security Period and until such time, [Mac Z] have no equitable or proprietary rights or interests

> in such Goods and Products, and such Goods and Products are held for and on behalf of SCIPION and to SCIPION's order…"

97. The acknowledgment and confirmation in CMA clause 2.2 is an agreement by Mac Z as to a state of affairs of the kind referred to in *Credit Suisse International,* and in any event is a clear contractual provision binding on Mac Z. It would in my view preclude Mac Z from contending – even if the Pledge were invalid under Moroccan law – that it had better rights to the goods than Scipion or that Scipion had no possessory rights in relation to the goods. The acknowledgement that the goods are to be held to Scipion's order, and clause 2.2 as a whole, are inconsistent with any assertion by Mac Z that its own interests in the goods preclude Scipion from having any possessory interest in them; and they are accordingly inconsistent with any assertion by Vallis that Mac Z's interests in the goods had that effect.

98. That conclusion does not depend on clause 2.2 being viewed as a confirmation or acknowledgment by Vallis, but merely on it being binding on Mac Z as against Scipion (and, if necessary, as against Vallis). Vallis's point that clause 2.2 contains no promise, representation, statement or acknowledgement by or on behalf of Vallis does not therefore alter the position.

99. Vallis submits that clause 2.2:-

> "… does not contain any positive representation, statement or acknowledgement (even by Mac Z) that Scipion had or would have "*all equitable or proprietary rights in the Goods*." It records that Mac Z would have no such rights until the end of the security period but does not say in positive terms who would do so. Here it is important to bear in mind that the Goods themselves were situated in Morocco and were intended to be the subject of a valid Moroccan not English law pledge as is now accepted by Scipion. There is, however, no Moroccan law evidence before the Court as to the various forms of equitable or proprietary rights which could be held in the Goods nor (other than in relation to the pledge issue) as to what was required for the effective and valid transfer of such rights to Scipion. Vallis submits that without such evidence the Court cannot safely conclude – as Scipion's argument invites it to – that the language in clause 2.2 must mean and can only mean that Scipion would hold "*all equitable and proprietary rights in the Goods*.""

Further:-

> "… if Scipion's construction of clause 2.2 of the CMA were correct then there would be no need for Mac Z also to have irrevocably agreed the matters set forth in subsequent provisions such as clauses 2.4 and 2.6 of the CMA. That those provisions were thought necessary by the parties is a factor against clause 2.2 of the CMA forming any part of an agreement that Scipion would hold "*all equitable and proprietary rights in the Goods*.""

100. I do not accept those submissions. Clause 2.7 makes clear that Mac Z represents and warrants there are no third party interests in the goods. It is obvious that the party in whom, by clause 2.2, Mac Z agreed all rights would be vested was Scipion. Moreover, clause 2.2 includes specific provision that the goods are to be held to Scipion's order. Further, both clauses 2.4 and 2.6 begin with the words "*For the avoidance of doubt",* so their existence is not inconsistent with Scipion's reading of clause 2.2. On any view, clause 2.2 is inconsistent with Mac Z claiming any kind of superior title to Scipion during the Security Period, i.e. until the indebtedness has been paid off.

(d) Torts (Interference with Goods) Act 1977

101. In case I am wrong in the above conclusion, I go on to consider whether the contention Vallis seeks to advance is precluded by the principles set out in the five authorities relied on by Scipion, most acutely (in my view) the principle set out in *The Winson* that the relationship between bailor and bailee precludes the bailee from denying the title to the goods of the bailor, including as an incident of that right the bailor's right to possession. In my view Vallis's contention is indeed inconsistent with that principle.

102. Vallis submits that the principle is in substance a preclusion on a bailee relying on *jus tertii*, and accepts that at common law a bailee is estopped from denying or disputing his bailor's title. However, it contends that the bailee's estoppel was abolished by section 8(1) of the Torts (Interference with Goods) Act 1977 ("***the 1977 Act***"):-

> " 8. Competing rights to the goods
>
> The defendant in an action for wrongful interference shall be entitled to show, in accordance with rules of court, that a third party has a better right than the plaintiff as respects all or any part of the interest claimed by the plaintiff, or in right of which he sues, and any rule of law (sometimes called jus tertii) to the contrary is abolished."

103. Section 1 of the Act defines "*wrongful interference*" as follows:-

> "In this Act "wrongful interference" , or "wrongful interference with goods", means —
>
> (a) conversion of goods (also called trover),
>
> (b) trespass to goods,
>
> (c) negligence so far as it results in damage to goods or to an interest in goods,
>
> (d) subject to section 2, any other tort so far as it results in damage to goods or to an interest in goods …"

The definition of "*goods*" includes *"all chattels personal other than things in action and money"*.

104. Vallis submits that section 8 applies to Scipion's claims against it, although brought in contract not tort, for these reasons:-

i) As a matter of statutory interpretation, the 1977 Act was intended to apply to and govern the bailee's liability. There are explicit references to bailors and bailees in sections 2(2), 3(6), 6(4) and 12 to 16 of the Act.

ii) Section 2(2) of the Act expressly provides that *"an action lies in conversion for loss or destruction of goods which a bailee has allowed to happen in breach of his duty to his bailor (that is to say it lies in a case which is not otherwise conversion but would have been detinue before detinue was abolished)."* This expanded definition of "*conversion*" (which falls within the definition of a *"wrongful interference"* or "*wrongful interference with goods*" in section 1(1) of the Act) demonstrates a clear intention on the part of Parliament to bring claims for loss or destruction of goods brought by bailors against bailees within the scope of the Act.

iii) In addition to including this expanded definition of conversion, the definition of a "*wrongful interference*" or "*wrongful interference with goods*" in section 1(1) of the Act further includes "*negligence so far as it results in damage to goods or to an interest in goods*" and a catch-all of "*any other tort so far as it results in damage to goods or to an interest in goods*." A physical loss of goods results in damage "*to an interest in goods*", and the breaches of duty alleged against Vallis in contract/bailment and the standard of care applicable are synonymous with a concurrent claim in negligence and/or tort.

iv) Support can be found for construing references to "*tort*" as encompassing claims in bailment in such cases as *American Express Co v British Airways Board* [1983] 1 WLR 701. The issue there was whether claims in bailment were precluded by section 29 of the Post Office Act 1969: "*no proceedings in tort shall lie against the Post Office in respect of any loss or damage suffered by any person*". Lloyd J held that they were:

> "To my mind it would make nonsense of section 29 of the Act of 1969 to hold that the Post Office can be liable for breach of bailment. As explained by Diplock L.J. in *Morris v. C. W. Martin & Sons Ltd*. [1966] 1 Q.B. 716 the two most obvious duties arising out of the relationship of bailor and bailee are the duties on the part of the bailee to take reasonable care of the goods, and not to convert them. Both negligence and conversion are, of course, typical torts. The advantage to the plaintiff in laying his action in bailment is that it shifts the burden of proof. It is for the bailee to explain how the loss occurred. In that sense the plaintiff's task is easier in bailment; the defendant's more difficult. It would be a curious result if Parliament had, by section 29(1), given the Post Office full protection in negligence and conversion where, as defendant, its task is easier, but not in bailment where, for the reasons I have just mentioned, its task is more difficult."

By parity of reasoning, the reference to "*tort*" in the 1977 Act covers bailment. It would be a curious result if Parliament had abolished the rule against raising *jus tertii* in claims in negligence and conversion, but not in bailment, where a defendant's task is more difficult due to the shift in the burden of proof. The

fact that the 1977 Act explicitly refers to aspects of bailment makes it an even more curious a result if a claimant can avoid its operation simply by bringing the same claim in bailment rather than in tort.

v) The Court of Appeal held in *De Franco v Commissioner of Police of the Metropolis* (unrptd, 'The Times' 8 May 1987) that the "*primary object*" of section 8 of the Act was to allow the third party to assert his title, but recognised that another purpose was to allow defendants properly to defend themselves. Both purposes would be thwarted if a claimant could avoid the application of the Act by electing to sue in contract/bailment rather than in tort where concurrent claims exist.

vi) There is no principled reason to draw any distinction between claims brought against tortfeasors and those brought against a party with whom a pre-existing relationship exists, be that bailment or in contract. Conversely, there is no prejudice to a claimant in construing the Act as submitted by Vallis, since if the claimant does have good title then its claim will prevail irrespective of whether its claim is brought in tort or contract/bailment.

vii) The abolition of the *jus tertii* rule in the context of an agent as bailee – as was the position here, since Vallis was appointed as Scipion's agent pursuant to section 2.1 of the CMA – is expressly recognised in *Chitty on Contracts* (33rd ed.) § 31-135:

> "**When agent estopped as to title**
>
> 31-135 An agent cannot in general dispute the title of his principal or set up the right of a third party to the property in the goods, or the documents of title to the goods, with which he is entrusted by his principal. It was formerly the law that if he was a bailee he could not (subject to exceptions) set up a better title to the goods bailed than that of his bailor (jus tertii). But this rule was abolished by s.8(1) of the Torts (Interference with Goods) Act 1977." (footnotes omitted)

viii) A similar statement of principle is to be found in *Clerk & Lindsell on Torts* (22nd ed.) § 17-82 which, in the context of conversion, states that the common law position regarding the *jus tertii* rule has been "*considerably changed*" by the Act, which *"[e]ffectively ... permits the defendant to plead that a named third party has a better right than the claimant, and to have all known competing claims determined simultaneously"*.

ix) The suggestions in Palmer on *Bailment* (3rd ed.), that if a claimant elects to sue in contract or bailment then the Act does not apply, should not be followed. Palmer states (footnotes omitted):

> "Section 8 applies only to actions for wrongful interference and not, for example, to actions for breach of contract. … A more controversial question arises when the defendant's wrongdoing simultaneously constitutes both a wrongful interference within s.1 of the 1977 Act and a breach of contract or bailment. It is

> submitted that the plaintiff can elect to sue in contract or in bailment and avoid any imperative classification of the action as one for wrongful interference." (§ 4-062)
>
> "First, s.8(1) applies only to actions for wrongful interference with goods; and this requires that the claimant sue in tort. However, … the rule in *The Winkfield* may also apply to actions for breach of contract. Against a claimant-possessor who sues in contract, the Act would appear to afford no authority for a plea of jus tertii whatever. It would follow that such a claimant continues to be entitled to recover damages quantified on the full value of the goods irrespective of the size of his personal liability or loss." (§ 4-144)
>
> "The first point to note about s.8 is that it applies to actions for wrongful interference – not to claims in contract or bailment or to restitution claims for recovery of money. … It has not yet been determined whether the section will apply where there are concurrent actions available in both contract/bailment and tort, although it is submitted that in such situations the section should not exclude the common law rule from claims in the former." (§ 43-051)

Vallis submits that these statements are not based on any authority, reasoned justification or proper basis. Their footnotes include reference to an earlier article by Palmer published in the Modern Law Review (1978) 41 MLR 629 entitled "*The Application of the Torts (Interference with Goods) Act 1977 to Actions in Bailment*", but that article relies in part on *dicta* in *Harold Stephen & Co Ltd v Post Office* [1977] 1 WLR 1172, which Lloyd J in *American Express Co v British Airways Board* at pp.705 to 706 concluded did not support the view that the reference to 'tort' in the Post Office Act 1969 excluded claims in bailment. On the contrary, he treated it as supporting the view that such claims were covered. Further, Vallis submits, the Modern Law Review article acknowledges that claims against bailees for want of reasonable care *might* fall within the 1977 Act.

105. I am unable to accept these submissions. Section 1 of the 1977 Act sets out an exhaustive definition of *"wrongful interference",* that being the type of claim to which section 8 (among others) applies. The words *"any other tort"* in section 1(d) indicate that the reference to *"negligence"* in section 1(c) is to the tort of negligence. None of the limbs of the definition applies to claims in contract for breach of a contractual bailment. Scipion's claim against Vallis is such a claim, and Vallis by its solicitors' letter of 27 January 2020 admitted that the *"physical loss was caused by a breach by Vallis of clauses 3.1 and/or 6.1 and/or 8.1 of the CMA …".*

106. Section 2(2) of the Act provides that a claim can be brought in conversion where a claim could formerly have been brought in detinue for loss or destruction of goods in breach of a bailee's duty to his bailor. However, not all bailments are contractual, and it does not follow from section 2(2) that a claim for breach of a contractual bailment is to be characterised, for the purposes of the Act, as a claim in conversion and hence a type of *"wrongful interference".*

107. Equally, the other references in the Act to bailment do not indicate that claims arising from contractual bailments are to be categorised as claims for wrongful interference. Nor, indeed, do they demonstrate that all claims made in respect of non-contractual bailment will necessarily constitute claims for "*wrongful interference*". Sections 2(2), 3(6) and 6(4) contemplate that bailors may bring wrongful interference claims against bailees in the form of claims for conversion, wrongful interference by detention of goods, or failure to return goods transferred pursuant to a purported bailment. *Non sequitur* that all claims by bailors are for wrongful interference. Sections 12-15 contemplate that bailees may sue bailors for failure to take delivery of the goods, but do not suggest that such claims are claims for wrongful interference.

108. I do not consider it possible to construe the Act, given the clear definition in clause 1, as extending to contractual claims where concurrent liability exists in contract and tort or bailment (even assuming that such liability might be established in the present case, which as Scipion points out might depend on Moroccan law pursuant to Article 4 of the Rome II Regulation on the law applicable to non-contractual obligations).

109. Although it is not entirely clear why Parliament confined the 1977 Act to claims in tort, that is in my view the inescapable conclusion of its terms. Further, that limitation should not have the result that third parties are unable to assert their title or that defendant wrongdoers properly to defend themselves. The third party can still bring a claim against the wrongdoer, and it seems likely that a claimant who recovers from the wrongdoer in respect of the third party's interest in the goods would still be under a duty to account to the third party at common law. Whilst this latter point was not explored in argument, it seems likely that principles of equity and/or unjust enrichment would prevent a claimant from retaining damages to the extent that they reflected not its own real loss but that of a third party with an interest in the goods. It was common ground between the parties that if Scipion had a valid pledge, then any excess value in the goods over and above the sums secured by them would have to be returned to the borrower i.e. Mac Z. The same must apply in circumstances where no valid pledge has been proven but Scipion is entitled to sue Vallis for breach of the CMA relying on its possessory rights as a ground for recovering substantive damages.

110. The decision in *American Express v British Airways Board* does not assist, because it was not contemplating contractual claims, it being long established that such claims do not lie against the Post Office (see *Harold Stephen* at p1177F: *"We have known for centuries that the Post Office has not been liable in contract for failing to carry to deliver letters. Lord Mansfield so held as long ago as 1779 in Whitfield v Lord Le Despencer (1778) 2 Cowp. 754.*)

111. The view that section 8 does not apply to contractual claims is supported not only by *Palmer* but also by *Chitty*:

> "It should be noted, however, that s.8 applies only to claims for wrongful interference with goods; if the bailor sues, not in tort, but in contract or for breach of the bailee's common law obligations arising from the bailment, it appears that the bailee could not avail himself of the protection of the section." (§ 31-135)

112. For these reasons, section 8 of the Act is not in my view to be construed as covering Scipion's claim against Vallis in the present case. Even if it were to be construed, then as I have already concluded (§§ 96-100 above) there is no *jus tertii* which Vallis would be entitled to assert.

113. Finally, and in any event, I agree with Scipion that since section 8 abolishes *"any rule of law (sometimes called jus tertii)"*, it does not affect any contractual provisions giving rise to an estoppel, preclusion or agreed basis of dealing as between the parties, insofar as they preclude a defendant from challenging a claimant's title or interest or from asserting that a third party has a better title or interest.

(e) Conclusion

114. For the reasons set out under subheadings (c) and (d) above, I conclude that Scipion is entitled to sue Vallis for the loss of the lost goods by reason of its rights as bailor on the terms of the CMA without needing to show the validity of the Pledge.

(4) Application to the present case: estoppel as to Pledge validity

115. In the light of my conclusions in section (3) above, it is not strictly necessary to consider Scipion's alternative argument that Vallis is estopped by the terms of the CMA from denying the validity of its security. However, I do so briefly in case these considerations should become relevant.

116. Scipion submits that Vallis is estopped from denying Scipion's title to the lost goods by CMA recital (C) and (possibly) clause 2.2:

> "(C) It is hereby agreed by the Parties that the requisite security in favour of SCIPION over the Goods shall be created by the delivery of the Goods into the custody of VCL, who shall hold the Goods as an agent for SCIPION for the purposes of creating the requisite security in favour of SCIPION."
>
> "2.2 "[Mac Z] acknowledges and confirms that the Goods and Products shall be held in the name of SCIPION for the account of [Mac Z] until the end of the Security Period and until such time, [Mac Z] have no equitable or proprietary rights or interests in such Goods and Products, and such Goods and Products are held for and on behalf of SCIPION and to SCIPION's order…"

117. Recital (C) is paralleled by Recital (D), which refers in similar terms to security in favour of Scipion over the Products. Recitals (C) and (D) are the only recitals which contain the words *"It is hereby agreed by the Parties ..."*. They follow recitals (A) and (B):

> "(A) [Mac Z], pursuant to the facility agreement dated , has entered into and agree to the terms and conditions of the Copper Borrowing Base Facility (the "Financing Facility") offered and provided to [Mac Z] by SCIPION for the purpose of assisting with its commercial trade business.

> (B) Pursuant to the provisions of the various transaction documents entered into by, among others, SCIPION with [Mac Z], the Financing Facility is to be secured by way of pledges over the Goods and Products or their equivalent, which in the case of Goods are to be purchased by [Mac Z] from the various domestic suppliers of copper scrap; and in the case of Products, to be sold to Eligible Buyers."

118. *"Security"* is not a defined term in the CMA. The meaning of *"requisite security"* can be taken from Recital (B): *"Pursuant to the provisions of the various transaction documents ... the Financing Facility is to be secured by way of pledges over the Goods ... or their equivalent"*. The *"requisite security"* is therefore the security which it was intended would be created by the various transaction documents.

119. As Scipion submits, it is long established that a recital in a deed can found an estoppel, and there is no difference in principle where a contract is not contained in a deed. Whether a recital in a deed or other contract is intended to be binding on a party involves a question of construction. When a recital is intended to be a statement which all parties have mutually agreed to admit as true, it is an estoppel on all of them: *Primesight v. Lavarello* [2014] AC 436 §§ 30-32.

120. Scipion submits that recital (C) was an agreement between Mac Z, Scipion and Vallis that, as between themselves, the intended security would be created by the delivery of the goods into the custody of Vallis, regardless of whether the intended security was actually so created. Vallis is therefore precluded from denying the validity of the Pledge.

121. Although the point is in my view not free from doubt, I consider that the focus of recital (C) is on the *means* by which the security is to be created, namely via delivery of the Goods into Vallis's custody and Vallis then holding them as Scipion's agent. As Vallis points out, it is the pledges referred to in recital (B) that will constitute the security, and the words *"shall be created by the delivery ..."* in recital (C) seem naturally to focus on the steps by which the parties envisage the security being perfected, rather than constituting an agreement that the pledges referred to in recital (B) are to be assumed to be legally valid. Scipion suggests that recital (C) would serve no purpose unless it represented an agreement between the parties that valid security existed. However, the parties may simply have wished to record their agreement that Vallis was to have the custody of the goods and that it would hold them as Scipion's agent.

122. So far as clause 2.2 is concerned, I have already dealt with its effect on any claim by Mac Z to have better title than Scipion to the goods, and hence on any *jus tertii* plea by Vallis. I do not understand Scipion to submit that clause 2.2 also has the effect that Vallis is directly precluded from denying the validity of the Pledge, and would incline to the view that it does not, because it is not an acknowledgment or confirmation given by or on behalf of Vallis. Clause 2.2 does, however, mean that any assertion Vallis might make that Mac Z has superior title or interest to Scipion is bound to fail.

(F) CAUSATION: VALIDITY OF PLEDGE UNDER MOROCCAN LAW

123. My conclusions in section (E) make it strictly unnecessary to consider whether the Pledge was valid under Moroccan law. However, I set out my reasoning and conclusions on that issue below in case they should become relevant on any appeal.

(1) The relevant question

124. As already noted, Scipion claims that Vallis's breach of the CMA caused loss by leaving the balance due to Scipion under the Facility unsecured:

> "By reason of the Defendant's breaches of the Agreement, the balance due to the Claimant by the Borrower and/or Guarantor under the Facility, as detailed in Paragraph 32(a), has been left unsecured and the Claimant has lost the benefit of the Pledge over the Goods and Products to secure performance of the Facility by the Borrower and/or Guarantor." (Re-Amended Particulars of Claim § 32(b))

125. Further or alternatively, Scipion claims for:

> "the loss of the chance to secure performance of the Facility by [Mac Z] and/or Guarantor pursuant to the Pledge of the Goods and Products held by the Defendant under the Agreement" (Re-Amended Particulars of Claim § 33)

126. In so far as the above allegations relate to the Pledge, they are premised on an implicit allegation that had the copper scrap not been lost, Scipion's rights under the Pledge would have enabled it to recover from Mac Z the sums under the Facility. In order for that to be the case, it would be necessary that the Pledge was valid and effective under Moroccan law, or at least that it is more likely than not that it would have been accepted as such by the Moroccan courts (and Scipion did not seek to argue the contrary).

(2) Key provisions of the Pledge

127. The Pledge is a tri-partite agreement between Mac Z as pledgor, Scipion as the secured party, and Scipion Capital (UK) Limited as agent. It is dated 18 July 2016 and expressed to be governed by Moroccan law and subject to the exclusive jurisdiction on the Moroccan courts.

128. The recitals to the Pledge state:

> "(A) Pursuant to a facility agreement dated on or around the date of this Agreement entered into between the Secured Party as lender, and the Pledgor as borrower (the "Facility Agreement") to fund the purchase by the Pledgor of the Goods for processing into Products, the Secured Party has agreed to make available to the Borrower an uncommitted Dollar revolving copper borrowing base facility in a maximum total amount of USD 10,000,000 on the terms and conditions set out in the Facility Agreement and for the purposes therein mentioned (notably

regarding the duration and the interest rate applicable to the Facility).

(B) As security for the due performance of the Secured Obligations (as defined below), the Pledgor has agreed, according to Clause 4.1 of the Facility Agreement, to grant to the Secured Party a Pledge over Goods and Products *"convention de nantissement de marchandise"* pursuant to the terms of this Agreement (as defined below).

(C) In this context, the Parties have agreed to enter into this Pledge over Goods and Products the "Agreement", subject to the provisions of Articles *378 et seq. of Dahir n°1 96-83* dated August 1, *1996 portant promulgation de la toi n° 15-95 formant code de commerce "(Commerce Code").]"*

129. The Pledge includes the following key definitions:

"…

"Collateral" means the Pledged Assets and the Pledged Documents".

…

"Finance Documents" has the meaning ascribed to such term in the Facility Agreement.

"Goods" means copper scrap.

"Products" means copper products including wires, tubes and billets, whether finished or unfinished.

…

"Pledge" means the Pledge created over the Collateral pursuant to this Agreement, in compliance with articles 378 *et seq.* of the Commerce Code.

"Pledged Assets" means the Goods, Work in Progress and the Products, whether current or future, owned by the Pledgor and Pledged under this Agreement in favor of the Secured Party, the list of which is specified in Schedule 1 'List of Pledged Goods and Products'.

…

"Secured Obligations" means present and future liabilities (whether in respect of any payment or performance of the Obligors under or in connection with the Finance Documents)."

130. The Pledge's key operative provisions are as follows:

"2.1 Constitution of the Pledge

As security for the full repayment, discharge and performance of the Secured Obligations, and in compliance with articles 378 *et seq.* of the Commerce Code, the Pledgor hereby grants in favour of the Secured Party, a first ranking Pledge over the Collateral, including any Goods and/or Products which may be substituted to any other Goods and/or Products after the date hereof.

2.2 Nature of the Collateral

The nature of the Collateral is described in Schedule 1 *(List of Pledged Goods and Products).*

2.3 Quantity of the Collateral

The quantity of the Collateral is described in Schedule 1 *(List of Pledged Goods and Products).*

2.4 Value of the Collateral

The value of the Collateral held under the relevant Warehouse Receipts shall, at any time so long as the Agreement or the Pledge is in force, combined with the cash balance held on the Local Collection Accounts and subject to the Pledge over Bank Accounts, be equal to or not less than one hundred and twenty five percent (125%) of the aggregate amount of outstanding Advances under the Facility, being the Borrowing Base Coverage Ratio tested by delivery by the Pledgor of the weekly Borrowing Base Report.

If the ratio outlined in the paragraph above is not met, the Pledgor undertakes before the next test date to either i) Pledge additional Goods and/or Products ii) pay an additional amount into the relevant Local Collection Account or iii) prepay an Advance, to ensure that the ratio is preserved by the next weekly Borrowing Base Report.

2.5 Designation of a Third Party Consignee

The Secured Party expressly entrusts the Collateral Manager with the custody of the Collateral. A Collateral Management Agreement dated on or about the date of this Agreement has been entered into between the Secured Party and the Collateral Manager, to this purpose.

2.6 Storage of the Collateral

The Collateral shall be stored at the Mac Z Facilities.

2.7 Insurance over the Collateral

The Collateral is insured with *(insert name of the insurance company)*. The details of the Insurance Policy are provided in Schedule 2 *(Insurance Policy)*.

In case of damage to the Collateral, the Secured Party shall be subrogated in any rights, action and privilege of the Pledgor with regards to any insurance indemnity related to the Collateral pursuant to the Insurance Policy, without an express delegation being necessary, and may, in case of a continuing Enforcement Event, directly perceive the amount of such indemnities within the limit of the Secured Obligations.

2.8 Exclusivity of the Pledge

It is expressly agreed that the Pledgor shall not create or permit the existence of any security interest in the Collateral, with the exception of the Pledge created hereby.

2.9 Rights under the Pledge

The Secured Party will benefit, at any time, all the rights and prerogatives, which it is entitled to under Morocco law, under this Pledge, and may exercise such rights and powers, including obtaining of the amounts due by the Pledge under the Secured Obligations."

131. Clause 3 of the Pledge is a covenant for further assurance:

"The Pledgor will promptly, at its own cost, do all such acts or execute all such documents as the Agent may specify (and in such form as the Agent may require):

3.1 to perfect the Pledge created or intended to be created under or evidenced by this Agreement;

3.2 for the exercise of any rights, powers and remedies of the Secured Party provided by pursuant to the Facility Agreement or by law; and

3.3 to facilitate the enforcement of the Pledge;

without such operation constituting in any manner a novation of the rights or security granted under this Agreement.

The Pledgor shall take all such actions reasonably requested by the Agent (including making all filings and registrations) necessary for the purpose of the creation, perfection, protection or maintenance of the Pledge conferred or intended to be conferred on the Agent by or pursuant to this Agreement."

132. Clause 4.2.1 includes a provision that upon the occurrence of an Enforcement Event (as defined) and service of the requisite notice, Scipion is *"entitled to exercise all rights*

and take all actions in relation to the Collateral as may be permitted by applicable law in Morocco, particularly articles 386 et seq. *of the Commerce Code".*

133. Clause 7 deals with registration:

> "This Agreement shall be registered as first ranking on the specific register held before the *Secretariat-greffe* of the Commerce Court, pursuant to article 381 of the Commerce Code.
>
> Upon expiry of the first period corresponding to the legal validity period of the Pledge and so long as any Secured Obligation is continuing, the Pledgor shall renew, in favour of the Secured Party, at its costs and expenses, the registration of the Pledge for a new legal validity period in compliance with article 384 of the Commerce Code.
>
> The Agent may, as the case may be, implement, at the costs and expenses of the Pledgor, any formalities, (including renewing the registration provided for in this Article 7) which may be necessary or useful to oppose the Pledge to third parties.
>
> All powers of attorney in view of registering the Pledge pursuant to this Article 7 or renewing such registration are given to that purpose to any holder of an original copy of the Agreement."

134. Finally, Schedule 1 is entitled "*List of Pledged Goods and Products*" and states:

> "Goods
>
> - Copper scrap
> - Copper products including wires, tubes and billets, whether finished or unfinished
>
> Quantity
>
> For as long as any amount is outstanding under the Finance Documents or the Facility is in force, the Borrower shall procure that the total aggregate value of the Goods and Products held under the relevant Warehouse Receipts as valued at the LME Copper Cash Buyer Price multiplied by the Inventory Percentage is equal to or not less than one hundred and twenty five per cent (125%) of the aggregate amount of outstanding Advances under the Facility."

135. On 30 October 2017 the Pledge was registered in the Trade Register of the Commercial Court at Rabat, Morocco. The entry in the register indicates that (in translation):

> "A deed constituting the Pledge of goods was filed on 30/10/2017 under the no. 81 in favour of Scipion Active Trading Fund Srl and Scipion Capital (UK) Ltd for the sum of 10,000,000 American dollars.

Situation: Subject to control [Sous réserve de controle]"

(3) Overview of relevant provisions of Moroccan law

136. Moroccan law is a civilian legal system influenced by French law. The following summary provided by the expert witness on Moroccan law called by Vallis, Ms Fassi-Fihri, was essentially common grounds between the experts:

> "Unfortunately, jurisprudence (and its study) is not as developed in Morocco as it is, for instance, in Europe. Relatively complex pieces of legislation were introduced in Morocco at the beginning of the 20th century during the French protectorate and most of the legislation regarding security interests did not change until the end of such century, or even until April 2019. Therefore, there is almost no authority or doctoral analysis available to us. Moreover, case law is not abundant as the development of complex business transactions is quite recent and remains limited in a developing country like Morocco. Furthermore, it is difficult to access such case law as it is generally not published and because there is no centralized (a fortiori, computerized) database of the same, not even a general index of the different decisions. In this respect, it is worth noting that the largest database, privately compiled, accounts for only 8,000 decisions (covering all fields of the law, from family law to criminal law, from public law to torts), with only a few of the decisions being commented on by scholars. This lack of access to case law is partly explainable because Morocco is a civil law country where case law (court rulings or decisions) are not as important as they are in common law countries as, from a purely legal stand point, they do not bear any authority outside the case on which they rule but have a mere influence on future cases tried (the higher the hierarchy of the court, the more influential the decision). Finally, in Morocco, practitioners rely more on the letter of the law than on decisions from courts (that are not particularly reliable in Morocco), with the exception of the Supreme Court, especially in matters relating to security interests as the provisions of the law are usually straightforward and precise.

137. The relevant starting point in chronological terms is the *Code des Obligations et Contrats* ("***DOC***") introduced on 12 August 1913, which (in Mr Hajji's words) aimed to organise all civil and commercial transactions through general principles of contract. DOC Title 11 (Articles 1170 to 1242) deals with the Pledge (*"nantissement"*). It is divided into two chapters. Chapter I (Articles 1170 to 1183) contains general provisions. Chapter II (Articles 1184 to 1242) relates to the *"nantissement mobilier ou Gage"*. *"Nantissement mobilier"* may be loosely translated as a Pledge over movables. *"Gage"* is used to refer to a pledge with dispossession, i.e. where the pledgee takes possession of the pledged item. The substantive provisions of Chapter II indicate that it is concerned entirely with pledges with dispossession. Whether Chapter I is also confined to pledges with dispossession is a matter in dispute.

138. The first Code of Commerce was also enacted on 12 August 1913 ("***the 1913 Code of Commerce***"). It contained three articles, Articles 61 to 63, dealing with the pledge with dispossession or *gage.*

139. On 20 March 1951, a new law or *dahir* made more detailed provisions relating to Pledges of certain products and materials ("***the 1951 dahir***"). They were, Ms Fassi-Fihri stated, almost identical to the provisions now contained in Articles 378 ff of the current 1996 Code of Commerce considered below.

140. An Order of the Director of Finances dated 20 July 1951 set out a list of the products and materials to which the 1951 dahir applied ("***the 1951 list***"). These included mining products, steel products and non-ferrous metals. *"Non-ferrous metals"* would appear apt to cover the copper scrap at issue in the present case.

141. After becoming a WTO member in 1995 and forming an association with the EU in February 1996, Morocco in 1996 reformed its commercial legislation, repealing various existing laws and replacing them with a composite Code of Commerce ("***the 1996 Code of Commerce***") pursuant to a dahir dated 1 August 1996. As part of this process, the 1913 Code of Commence and the 1951 dahir were repealed, as were *inter alia* a 1914 dahir on the sale and pledge of businesses and a 1956 dahir on the pledge of tools and equipment.

142. Article 2 of the 1996 Code of Commerce provides (in translation) that:-

> "**Article 2:** It is ruled in commercial matters in accordance with the laws, customs and business customs, or civil law insofar as it does not contradict the basic principles of commercial law."

143. Rules in relation to pledge *("le nantissement")* are set out in Articles 336 to 392. Article 336 explains (in translation) that:

> "**Article 336:** There are two kinds of pledges: a pledge that supposes the debtor's dispossession and a pledge that is without dispossession."

The French text reads:

> "Il y a deux sortes de nantissement: le gage qui suppose la dépossession du débiteur et le nantissement sans dépossession."

Thus as in the DOC, the term *gage* is used to denote a pledge with dispossession.

144. Chapter I (Articles 337 to 354) is headed *"Le gage"* and deals with pledges with dispossession. Article 337 states:

> "**Article 337**: The pledge constituted either by a trader, or by a non-trader as a commercial act, is governed by the general provisions of Articles 1184 to 1230 of the dahir of 9 ramadan 1331 (12 August 1913) forming the code of obligations and contracts and the special provisions of the first section below.

> The commercial pledge may take the special form of deposit in the general warehouse, which is subject to the provisions of Section II below."

145. The rest of Chapter I is divided into two sections, dealing respectively with *"Le gage commercial"* and *"Le dépôt en magasin général"* (storage in a general warehouse).

146. Chapter II is headed *"Le nantissement sans dépossession"* (the pledge without dispossession). There is no introductory paragraph. Section I, comprising Articles 355 to 377, relates to the pledging of tools and equipment. Section II, comprising Articles 378 to 392, relates to *"the Pledge of certain products and materials"*. Article 378 begins:

> "The products and materials indicated on a list drawn up by the authority may be Pledged by their owner under the conditions given in the present Chapter, not involving possession by the creditor."

147. It is common ground that no such list has been issued.

(4) Grounds on which Vallis alleges the Pledge was invalid

148. Vallis submits that the Pledge is invalid and/or unenforceable because, in summary:-

    i) the absence of the list contemplated by Article 378 means that no valid pledge can be created under Articles 378 ff;

    ii) in any event, the Pledge did not comply with the mandatory requirements of Article 379, therefore could not be a pledge *"under the conditions given in the present Chapter"* within Article 378;

    iii) the fact that the Pledge was subsequently registered is not determinative of, or evidence of, its validity; and

    iv) if the Pledge is not valid under Article 378 then it is invalid: it cannot be upheld on any other basis.

    Point (iii) above was common ground between the experts and it is not necessary to address it further.

(5) Absence of list contemplated by Article 378 of the Code of Commerce

149. The problem arising from the absence of a list did not form part of Vallis's original case. It was mentioned by Mr Hajji in his first report, dated 17 May 2019, in which he observed that it gave rise to some uncertainty about the list to which Article 378 refers.

150. Ms Fassi-Fihri stated in her first report, dated 19 June 2019, that in the absence of a list (and subject to the qualification mentioned in § 155 below) *"the special provisions of Articles 378 et seq. cannot be referred to nor used to govern a pledge as no products nor material may be subject to the same"*.

151. Vallis submits that it follows that the Pledge is invalid, with the result that Scipion has not suffered the loss claimed in §§ 32(b) and 33 of its Amended Particulars of Claim. Vallis accepts that that may be regarded as an unattractive conclusion, but says (correctly) that the court should not shy away from such a conclusion if logic dictates it. Vallis adds that:

    i) Article 378 is only one of a number of mechanisms under Moroccan law for granting a pledge. As Mr Hajji accepted, there are a number of other provisions, dealing with specific assets and with ongoing businesses generally, e.g., the pledge over general business assets ("*du fond de commerce"*) under Article 106 of the Commercial Code;

    ii) the evidence of Ms Fassi-Fihri, accepted by Mr Hajji, was that pledges under Article 378 are rare for reasons that include the legal uncertainty created by the absence of the required list (the onerous requirements of Article 379 being another): thus the court is not being asked to decide that a widely-used provision of the Commercial Code is in fact unusable; and

    iii) although the April 2019 Code is not before the Court, it appears that at least some of the difficulties that arose under Article 378 have been addressed by this new Code: so any problems with Article 378 are to a degree historic.

152. In response, Scipion first makes the general point that a Moroccan court would try to give effect to the parties' intention to create a valid Article 378 pledge. It submits that Ms Fassi-Fihri ultimately accepted this, although in fact her acceptance of the point was qualified:

> "Q. My question to you was simply: the court would try to make their intention effective, wouldn't it?
>
> A. I think so. And their intention was to enter into a valid 378 pledge, you are right. But there is a reason for that. The reason is that the pledge covered by article 378 gives a protection to the parties. The conditions are very strict, whether on the matters that are covered by this pledge or in the identification of the nature, the quantity and, you know, all those are legal requirements.
>
> The fact that the parties want to enter into a pledge covered and governed by those provisions rather than doing common law pledge governed by DOC articles, this is the intention of the parties. This is my opinion."

153. More specifically, Scipion submits that there are at least two routes by which a Moroccan court might have given effect to Article 378 notwithstanding the absence of a list, namely:

    i) to treat the 1951 list as applicable, or

    ii) to fill the gap by referring to the general provisions of the DOC, in particular the provision in DOC Article 1174:

> "Everything that may be validly sold may be subject to a pledge.
>
> Nevertheless, the pledging of a future, random object or an object which is not in our possession is considered valid; however, this pledge only confers on the creditor the right to demand delivery of the objects subject to the contract, as soon as this delivery can be made."

(a) Reference to the 1951 list

154. The possibility of relying on the 1951 list was touched on in Mr Hajji's first report, albeit the only issue at that stage relating to the Pledge concerned the effect and/or validity of its registration. Mr Hajji noted that a non-binding administrative document issued in 2004 by the Moroccan Ministry of Justice and Tax administration had referred to the *"Ministerial Decree"* (as he put it) of 20 March 1951 in such a way as to imply it remained effective. However, he did not pursue that point subsequently, and accepted in cross-examination that the reference in the 2004 document was not to the 1951 list but to the 1951 dahir, and was explicable on the basis that there might still be extant pledges registered under the 1951 dahir on which taxes were due.

155. The matter was taken up substantively in Ms Fassi-Fihri's first report, in which she stated:

> 25. That being said , in practice, the argument of the absence of effectiveness of the law may be convincing and, in order to render the law effective (the provisions of Articles 378 *et seq.*) one may want to refer to the 1951 list, even if the same was repealed in 1996.
>
> 26. As to whether that argument would be accepted if it were tested, unfortunately, to the best of my knowledge, no case law has yet specifically addressed this issue and no arguments were made before the relevant Moroccan court in this respect when the pledge governed by Articles 378 *et seq.*, and referred to in the judgment quoted in Mr. Hajji's report … was discussed."

156. Article 733 of the 1996 Code of Commerce lists the instruments it repeals, which include the 1951 dahir. The 1951 list is not mentioned. However, the experts agreed in the Joint Memorandum that the list no longer exists following the repeal of the 1951 dahir.

157. Scipion suggests that a Moroccan court might nonetheless have resorted to the 1951 list in order to uphold the Pledge under Article 378, relying on Ms Fassi-Fihri's statements quoted in § 155 above to the effect that the point was arguable.

158. The 1951 list is contained in an Order whose material provisions are:

> **"Order of the director of finance dated 20 July 1951 relating to the enforcement of the Dahir of 20 March 1951 governing the pledge of certain products and materials**

> THE DIRECTOR OF FINANCES, …
>
> Having regard to the Dahir of 20 March governing the pledge of certain products and materials and notably its first article.
>
> ORDERS:
>
> SOLE Article. – The provisions of the aforementioned Dahir of 20 March 1951 shall apply to loans granted on the products and materials indicated below
>
> Raw sugar;
>
> Tin plate;
>
> Cellulose pulp;
>
> Raw bovine hides;
>
> Raw cotton, cotton yarn;
>
> Wool in bulk and woollen yarns;
>
> Raw jute;
>
> Hemp;
>
> Raw and yarn fibranne and rayon;
>
> Seeds, oleaginous fruits and crude vegetal oils;
>
> Cocoa;
>
> Alfa;
>
> Mining products;
>
> Petroleum products and lubricants;
>
> Steel products and non-ferrous metals;
>
> Raw rubber;
>
> Plasticisers;
>
> Refractory soil;
>
> Canned fish or fruit."

159. Clearly, therefore, the provisions of the Order containing the 1951 list were specific to the 1951 dahir. Scipion submits that a Moroccan court would nonetheless try to make effective the parties' intention to create a valid Article 378 pledge as expressed in the

Pledge Agreement itself. It refers to the qualified answer given by Ms Fassi-Fihri in cross-examination quoted in § 152 above.

160. Scipion also refers to the only available decided case relating to an Article 378 pledge, namely the Decision of the Moroccan Supreme Court (the highest appellate Court in Morocco) No. 422 dated 18 March 2010. That case concerned an Article 378 pledge over wheat, which was held to be valid despite not having been registered in accordance with Article 381 of the Commercial Code. Although the point does not appear to have been raised or argued, there is no suggestion in the judgment (which also records or summarises the parties' arguments) that the pledge might be invalid due to the absence of a list. Ms Fassi-Fihri stated in her evidence that it was not the role of the Moroccan court to raise any argument that had not been raised by the parties, and that (despite the principle *curia novit ius*) it is extremely rare for the court to do so.

161. The Supreme Court stated, in relation to the registration issue:

> "However, Article 381 of the Commercial Code did not institute any penalty for the failure to register the mortgage in the special register prepared for that purpose at the clerk's office of the court in whose jurisdiction the mortgaged products and materials are located. Indeed, the failure to register or define [sic: typo: renew] the mortgage in the special register results in the mortgage creditor losing its priority status among creditors. When explaining its decision, the court stated that: "*While this case pertains to a mortgage on products without a transfer of possession, the file contains no evidence indicating that this mortgage was registered in the special register prepared for that purpose at the court in accordance with the provisions of Article 381 of the Commercial Code. Having said that, the Legislation did not institute any penalty for violating these requirements... In addition, the failure to make or renew this registration does not cause the creditor to lose its status as a mortgage creditor. This is because these procedures guarantee the mortgage creditor a priority status among the rest of the creditors*." Based thereupon, Chapter 381 of the Code of Obligations and Contracts was applied correctly, and the legal effect of the failure to register the mortgage contract in the register prepared for that purpose is nothing more that the mortgage creditor's loss of its priority status among the creditors, all the while continuing to retain its capacity as a mortgage creditor. Accordingly, the decision is sufficiently justified and well-founded, and it has not violated the legal requirements it is alleged to have violated. Consequently, this argument must be disregarded."

162. Insofar as the Supreme Court upheld the validity of the pledge, albeit with a qualification, despite failure to comply with a statutory requirement, its decision can in a broad sense be regarded as consistent with Ms Fassi-Fihri's acceptance of the general point that a Moroccan court would try to give effect to the parties' intentions. The present question is whether it would be likely to do so by treating the reference in Article 378 to "*a list drawn up by the authority*" *("une liste établie par*

l'administration") as connoting the 1951 list, despite that list having (the experts agree) ceased to exist and having been worded specifically by reference to the 1951 dahir.

163. Literally speaking, the 1951 list was "*a list drawn up by the authority*". However, I consider there to be formidable difficulties in regarding Article 378 as referring to that list in circumstances where the experts have positively agreed that it has ceased to exist. Vallis cited the statement in Dicey, Collins & Morris *"The Conflict of Laws"* (15th ed.) § 9-016 that:

> "If the evidence of the expert witness as to the effect of the sources quoted by him is uncontradicted, "*it has been repeatedly said that the court should be reluctant to reject it*," and it has been held that where each party's expert witness agrees on the meaning and effect of the foreign law, the court is not entitled to reject such agreed evidence, at least on the basis of its own research into foreign law. But while the court will normally accept such evidence it will not do so if it is "*obviously false*," "*obscure*," "*extravagant*," lacking in obvious "*objectivity and impartiality*", or "*patently absurd*," or if "*he never applied his mind to the real point of law*", or if "*the matters stated by [the expert] did not support his conclusion according to any stated or implied process of reasoning*"; or if the relevant foreign court would not employ the reasoning of the expert even if it agreed with the conclusion." (footnote omitted)

164. One of the cases cited in the footnotes to this passage is *Bumper Development Corp v Commissioner of Police of the Metropolis* [1991] 1 WLR 1362 (CA), where the Court of Appeal summarised the applicable principles, so far as relevant, in this way:

> "In our judgment the following extracts from the notes in Dicey accurately set out the relevant aspects of English law in regard to the proof of a foreign law:-
>
> 1. An English Court will not conduct its own researches into foreign law – see *Di Sora v. Phillips* (1863) 10 HLC 624 per Lord Chelmsford at 640:-
>
> > "It seems, however, rather questionable whether the Judge has a right to resort to the foreign law itself for information when the evidence of the witnesses is not satisfactory to his mind. The witnesses are at liberty to adduce, in support or confirmation of their testimony, text books, decisions of foreign courts, or rather authorities, which, becoming a part of their evidence, may enable the Judge to form his own opinion upon the particular text of foreign law thus laid before him. But it seems contrary to the nature of the proof required in these cases, that the Judge should be at liberty to search for himself into the sources of knowledge from which the witnesses have drawn, and produce for himself the fact which is required to be proved as a part of the case before him. As my noble and learned friend, Lord Brougham, said in the

> *Sussex Peerage Case* (11 Clark and F.115) "*the judge has not organs to know and to deal with the text of the foreign law, and therefore requires the assistance of a lawyer who knows how to interpret it'.*"

2. If the evidence of expert witnesses conflicts as to the effect of the foreign sources, the court is entitled, and indeed bound, to look at those sources in order itself to decide between the conflicting testimony. See *Earl Nelson v. Lord Bridport* (supra) per Lord Langdale M.R. at page 537:-

> "Such I conceive to be the general rule; but the cases to which it is applicable admit of great variety. Though a knowledge of foreign law is not to be imputed to the judge, you may impute to him such a knowledge of the general art of reasoning as will enable him, with the assistance of the Bar, to discover where fallacies are probably concealed, and in what cases he ought to require testimony more or less strict. If the utmost strictness were required in every case, justice might often have to stand still; and I am not disposed to say, that there may not be cases, in which the Judge may, without impropriety, take upon himself to construe the words of a foreign law, and determine their application to the case in question, especially, if there should be a variance or want of clearness in the testimony."

This was the approach made by Scarman J. (as he then was) to a mass of conflicting expert evidence on German private international law in *The Estate of Fuld (decd) (No.3)* [1968] P.675 at pages 700-703."

165. *Bumper* was followed in the more recent decision of the Court of Appeal in *Harley v Smith* [2010] EWCA Civ 78, where the judge at first instance had held that, for the purposes of the limitation period under Article 222(1) of the Labour Law of Saudi Arabia, the effective termination of the relationship of the employer and employee did not necessarily mean the time at which the strict contractual period comes to an end. After summarising the judge's reasoning, the Court of Appeal said:

> "49. Reasonable as that approach might be in the eyes of an English lawyer, there was no evidence to support it. It was contradicted by the evidence of Mr Alissa [the defendant's expert]: whose view was that the change had been introduced to meet the case where the employment relation was terminated prior to the contractual term of the contract. And, as the judge recognised (at paragraph [81] of his judgment) Professor Amkhan [the claimant's expert] gave no direct evidence on the point. His view, which the judge did not accept, was that, on the facts, the contractual term had continued throughout the period of *ex gratia* payments: (transcript, 16 December 2008, pages 117–121, 124). On the question what meaning should be given to the phrase "work relation" in article 222(1), he went no further than to confirm (as article 4 of the Law provided in terms) that

> Labour Law "had to be interpreted and implemented in accordance with *Shari'ah* law." That, he said, meant that the term had to be interpreted with regard to the facts of the case.
>
> 50. In the absence of evidence that recognised principles of interpretation under *Shari'ah* law would require an extended meaning to be given to the phrase "work relation" in article 222(1), the judge, in effect, decided for himself what *Shari'ah* law would require. In that respect – as it seems to me - he went beyond what he could properly do under the guidance given by this Court in *Bumper Development Corporation Limited v Commissioner of Police for the Metropolis [1991] 1 WLR 1362*, 1368D-1371D. He purported to construe foreign legislation by applying principles of interpretation which had not been established by evidence."

166. In my view, there is, as the evidence has unfolded, no support in the experts' testimony for any principle of interpretation by which Article 378 could be construed as referring to the 1951 list. Nor, in any event, would such an approach be feasible in circumstances where the 1951 list no longer exists and was worded specifically by reference to the 1951 dahir.

(b) Reference to DOC to identify products covered by Article 378

167. Mr Hajji's evidence is that the absence of a list issued specifically in relation to Article 378 would be solved by reference back to the DOC, in reliance on the general provision in Code of Commerce Article 2 (quoted in § 142 above) that commercial matters are governed by the civil law insofar as it does not contradict the basic principles of commercial law. Mr Hajji refers, in particular, to the provision in DOC Article 1174 that *"Everything that may be validly sold may be subject to a pledge".* Thus, he says:

> "… the provisions of the … DOC, specifically the provisions of Articles 1170 *et seq.* relating to the ordinary pledge can be supplementary in certain conditions with the "commercial" pledge when the special law being the Code of Commerce is unclear or silent in certain points of law …" (Joint Memorandum § 11)
>
> "… Articles 1170 *et seq.* of the DOC, and in particular Articles 1174 *et seq.* of the DOC are applicable to the Pledge Agreement …" (Joint Memorandum § 13)
>
> "The legislator … affirmed in [Code of Commerce Article 2] that civil law applies to commercial matters where there is no contradiction." (2nd report § 6.6)
>
> "6.7. Based on the above, the Moroccan law (DOC with effect from August 12, 1913 and the code of Commerce with effect from October 3, 1996) recognises only two type of pledges:

(1) ***Commercial pledges without dispossession of the pledgor*** with two different modes: (i) the pledge over tools and equipment ("Nantissement de l'outillage et du material d'èquipement") from Article 355 to 377 of the Code of Commerce … and (ii) the pledge over certain products and materials ("nantissement de certains produits et matières") from Article 378 *et seq* of the Code of Commerce …. In addition, Articles 1170 to 1183 of DOC are the general principles applicable to a pledge and are therefore applicable to commercial pledges without dispossession of the pledger, provided they do not also contradict the specific Code of Commerce provisions detailed above.

(2) ***Commercial pledges with dispossession of the pledgor*** (Articles 337-354 of the Code of Commerce … and in addition, Articles 1184 – 1240 of DOC … are applicable to this form of pledge (as those provisions specifically apply to the "gage" i.e. a pledge with dispossession), again on the basis they do not contradict the specific Code of Commerce provisions detailed above.

6.8. As such and in both types of pledge, the provisions of DOC (the Moroccan civil law) are applicable insofar as those provisions do not contradict the specific provisions in the Code of Commerce (the Moroccan special law). More generally, where a Moroccan special law (as is the Code of Commerce) is silent or unclear on a matter of law, such discrepancies are resolved by referring to the "*droit commun*" (i.e. the civil law, which in this case is DOC). DOC regulates general principles of contract (in Articles 1 – 478) and also "named contracts" (in Articles 479 – 1250), and these "named contracts" include the pledge contract."

(2nd report §§ 6.7 and 6.8)

"… in reference to Moroccan law reasoning, when a special law as the Code of Commerce is lacking of any clear provision, it is necessary to refer to the common reference law which is DOC."

(2nd report § 8.1)

"9.1. SFF considers that the absence of a list referred to in Article 378 of the Code of Commerce means that *any* pledge granted pursuant to that Article is invalid (Joint Memorandum, paragraph 14). I do not agree. SFF's analysis would lead to an absurd result or it would render Moroccan law ineffective.

9.2. The reasoning to follow in order to respond to an issue which is not regulated by the special law (i.e. the Code of Commerce) is to search whether the civil law (i.e. DOC) addresses precisely or through a general principle such an issue.

> 9.3. The objective analysis in respect this issue by which effectively the 1951 list of products has been repealed by the Code of Commerce is to read and refer to Article 2 of the Code of Commerce and Article 1174 of the DOC. Those two aforesaid articles from the Code of Commerce and DOC are totally complementary and not contradictory. They provide for the legal solution to a simple administrative default in providing for a list of goods and products being wrongly viewed by SFF as a legal issue with the consequence of the invalidity of the Pledge.
>
> 9.4. It is important to note that the 1951 list no longer applies, but the goods and products may nevertheless be validly pledged under Article 378 of the Commerce Code because Article 1174 of DOC provides that anything that can be validly sold can be pledged. Therefore, in the absence of a list, *any* goods or products may be subject to a pledge under Article 378 of the Commercial Code. I should point out that the title of Article 378 is named "*Le Nantissement de certains produits et matières*" (which translates as "the pledge of certain products and materials") and also that Articles 386, 388 refer to the wording "*marchandises*" which means that there is no limited reference to products and materials knowing that the word "marchandise" is large and it may refer to any kind of goods which could be construed as being commercially dealt with."

168. The following points arise in relation to this approach.

169. First, Mr Hajji was challenged in cross-examination on the basis for his view. He explained that it was based on a general principle of Moroccan law:

> "Q. ... Now, you have not, Mr Hajji, identified any judicial case or any textbook authority for that opinion, have you, in your report?
> A. No, sir, but I always refer to the principle of Moroccan law which is the same as the French law, is that when the special law, as the commercial law is missing or is not fully -- I mean fully detailed in respect, the implementation of a form of contract has been pledged over goods and products, one necessarily has to go to the reference law, the DOC, which is called le droit commun, the common law in Moroccan law."
>
> "A. … To me, the reference to 1174 of the DOC reflects of a lawyer, any lawyer in Morocco, when a special law is missing any details with respect, the implementation of the same special law, one necessarily refers to the general principle of law which are contained in the DOC."
>
> "Q. Therefore if the Commercial Code requires that in order to qualify under article 378, the product or material must appear on a list, then that specific requirement must be complied with, does it not? You can't look back to some general provision --

> A. In Morocco, it is our reflex. When we do not find a solution for one point…"
>
> "A. It is our normal resolute in Morocco as I told you. When we do not have a response under the law, what do we do? We just break and we do nothing, or we try to find out what is the reference law saying, or providing, in respect one question which has no answer within this special law, as the Commercial Code."

170. This approach gains some support from the general point made by Ms Fassi-Fihri in her first report, quoted in § 155 above, that "*in practice, the argument of the absence of effectiveness of the law may be convincing*".

171. Secondly, Ms Fassi-Fihri pointed out that Articles 378 ff of the Code of Commerce do not cross-refer to any other provisions of Moroccan law. She contrasted them in this respect with Article 337 of the Code of Commerce, which deals with the *"gage"* or pledge with dispossession and states:

> "The pledge constituted whether by a trader, or by a non-trader as a commercial act, is governed by the general provisions of Articles 1184 to 1230 of the dahir of … 12 August 1913 forming the code of obligations and contracts and the special provisions of the first section below. …"

172. Ms Fassi-Fihri states: *"If the lawmakers made no reference to other provisions of the law for pledges of this kind, it is my opinion that such other provisions do not apply ... otherwise, why would lawmakers have introduced a special form of pledge governed by special (and specific) provisions?"*

173. However, as Mr Hajji pointed out in cross-examination, the specific cross-reference in Article 337 is explicable by the fact that the DOC provisions it mentions (Articles 1184 to 1230) comprise the section of DOC Title 11 that deals with the pledge with dispossession (see § 137 above), as distinct from the general provisions in DOC Articles 1170 to 1183. There is no corresponding section of DOC Title 11 dealing specifically with the pledge without dispossession, to which it would be logical to make particular reference. Nonetheless, by virtue of Article 2 of the Code of Commerce, relevant DOC provisions apply unless there is a contradiction. Ms Fassi-Fihri herself set out in her second report the general proposition:

> "Under Moroccan law, there is a general distinction between "non-professionals" (to which the D.O.C. only applies) and "professionals" (to which both the D.O.C. and the Code of Commerce apply, the provisions of the Code of Commerce superseding the provisions of the D.O.C. having the same purpose: see above paragraph 12). In the case at hand, as the parties acted as professionals, the Code of Commerce is applicable and, in the absence of provisions of the Code of Commerce, the D.O.C. is applicable. I assume that that is the reason why the parties intended to implement a pledge governed by the Code of Commerce (Article 378 *et seq.*) and not the DOC."

174. In cross-examination, Ms Fassi-Fihri ultimately accepted that the relevant question was simply whether reference to the DOC provisions would contradict Articles 378 ff of the Code of Commerce:

> "Q. … You can see in article 2 the reference to civil law which we agreed encompasses the DOC. Article 2 doesn't say that civil law applies only where it is expressly referred to in the Commercial Code; it says that civil law applies insofar as it does not contradict the basic principles?
>
> A. Exactly. So when they complement the Commercial Code, they can be applied. But when they deal with the same topics, they cannot apply because they contradict the Commercial Code. When the Commercial Code says that the pledge over certain materials and projects -- projects and materials are valid only with a list, you cannot go to the DOC and say: oh no, the pledge can be given over any materials. That is what I am saying. It is a contradiction."
>
> "Q. So there is only one principle in play here, not two, because before we had contradiction and a necessity to cross-refer, but I think you are agreeing with me now that really it just all boils down to the absence of contradiction?
>
> A. Okay, I agree with you."

175. In my judgment, given Article 2 and the general principle referred to by Mr Hajji mentioned in § 169 above, the absence of a specific cross-reference in Articles 378 ff to the DOC does not preclude reference to the DOC where appropriate, so long as there is no contradiction.

176. <u>Thirdly</u>, Mr Hajji's view was challenged on the basis that the general provisions in DOC Articles 1170 to 1183, thus including Article 1174, do not apply to pledges without dispossession.

177. In considering this point, a preliminary question is whether the pledge in the present case involved dispossession of Mac Z. At least on one view, as a matter of English law the CMA provided in recital C and clauses 2.1 and 2.2 for a transfer of possession from Mac Z to Vallis, which then held as bailee for Scipion having attorned to Scipion: see § 86 above.

178. However, whatever the position might be under English law, the Moroccan law experts in the present case both proceeded on the assumption that the Pledge did *not* involve dispossession of Mac Z. Thus, for example, Mr Hajji stated in his second report:

> "7.1. In respect of the Pledge, it is clearly referred in the preamble (c) that *"the Parties have agreed to enter into this Pledge over Goods and Products ("the "Agreement") subject to the provisions of Articles 378 et seq of Dahir n° 1-96-83 dated August 1, 1996 ("Commerce Code")"*, meaning that the Pledge is a pledge without dispossession (see paragraph 6.8(1) above)

> regulated by the aforesaid Code of Commerce provisions and also Articles 1170 - 1183 of DOC (subject to any contradiction).
>
> 7.2. It is absolutely clear that, under the Pledge, the Goods and Products were with the possession of MAC Z Group (as specified in Article 5.1 of the Pledge) and Vallis was designated to take into custody the Goods and Products, for and on behalf of Scipion (as defined in Article 2 of the Collateral Management Agreement of July 13, 2016 (the "CMA")."
>
> (§§ 7.1 and 7.2)

179. I do not therefore consider it to be open to me to proceed on any basis other than for Moroccan law purposes, the Pledge was a pledge without dispossession.

180. The question therefore arises whether the general provisions of DOC Articles 1170 to 1183 have any application to pledges without dispossession or are confined to pledges with dispossession. As already noted, Mr Hajji in his second report (§ 6.7(a)) made the point that these provisions do apply to commercial pledges without dispossession provided that they do not contradict the specific provisions of the Code of Commerce. He highlights in particular the second paragraph of DOC Article 1174:

> "Nevertheless, the pledging of a future, random object or an object which is not in our possession is considered valid; however, this pledge only confers on the creditor the right to demand delivery of the objects subject to the contract, as soon as this delivery can be made."

181. This topic was covered in the cross-examination of Mr Hajji in three passages which, though the third of them is rather long, it is necessary to set out in full:

> [1] "Q. Am I right, Mr Hajji, that article 378 that we see there is only one of two exceptions in Moroccan law to the principle that pledges over movables must involve dispossessing the pledgor. The first exception is the pledge over tools and equipment and the second exception is in article 378, the pledge of certain products and materials.
>
> A. Yes, there are two."
>
> [2] "Q. As we discussed a moment ago, article 378 is one of two exceptions to the principle that pledges over movable, tangible assets are to be made by dispossessing the pledgor; we agreed that a moment ago?
>
> A. Correct."
>
> [3] "Q. But I think we agree, Mr Hajji, that the references to nantissement or gage in the 1913 DOC, dealt with in articles 1170 and then in the second chapter, 1184 and following, they are concerned with pledges with dispossession?

A. Absolutely.

Q. And the pledge without dispossession, those two exceptions we talked about, were first given effect in the 1951 dahir?

A. Yes.

Q. And until the very recent law, were contained in the 1996 code?

A. Yes. But please, just one exception: the DOC civil law or Moroccan law provided for slightly -- but not in details -- about the pledge without dispossession.

Q. Is that right? Let's look first of all, if we may, at articles 1184. ...

Can we look first of all at article 1188? And I think we can see in article 1182, it provides that the pledge is complete by the effective handover of the object subject thereto.

So in the French, "par la remise effective de la chose qui en est l'objet au pouvoir". That is talking about a pledge with dispossession.

A. Yes, sir.

Q. And indeed, if we look on in this section to article 1204, …, we can see that article 1204 provides that the creditor must ensure the care and conservation of objects and the rights with which it is pledged.

A. Exact.

Q. And that is consistent with possession being transferred from the pledgor to the pledgee or to the creditor. So again, it is dealing with a pledge with dispossession, do you agree?

A. I agree.

Q. And if we look back at the general provisions, so the section starting from article 1070 --

MR JUSTICE HENSHAW: 1170?

MR EDWARDS: 1170 is the first article under these general provisions, can we look at article 1174 please.

This is the article that you have referred to. And we can see that it says: "Everything that may be validly sold may be subject to a pledge."

But it goes on to say:

"Nevertheless, the pledging of a future random object or an object which is not in our possession is considered valid. However, this pledge only confers on the creditor the right to demand delivery of the objects subject to the contract as soon as this delivery can be made."

So that article itself connotes that it is dealing with a pledge with dispossession?

A. Yes.

Q. And as I think we agreed a little while ago, under the 1913 DOC, the only type of pledge that existed at that time was a pledge with dispossession. The exceptions only came in later in 1951. Is that correct?

A. Yes. But if you read paragraph 2 of 1174, it refers to the concept of non-possession: nevertheless the pledging of a future random object, of an object which is not in our possession is considered valid.

The non-possession concept was at that time considered as entering within the concept of the pledge with the possession, but this is an exception.

Q. But you need to read, don't you, Mr Hajji, the rest of the paragraph because it goes on to say:

"However, this pledge only confers on the creditor the right to demand delivery of the object."

So it confers on the creditor a contractual right to ask for delivery of the goods which were being pledged, and the pledge will come into existence when the delivery is being made, and it is a pledge therefore with dispossession?

A. My understanding is that the pledge would be valid even though the -- I mean, the pledge enters into force at the time the parties agree for the pledge over goods which are not yet available, delivered to the creditor.

Q. If you are right, then the general provisions in title 11, chapter 1, are going rather further than what we see in chapter 2, because chapter 2, you have agreed, is concerned with pledges with dispossession; pledges over movables.

To be clear, what I am suggesting to you is that in 1913, before the two exceptions created by the 1951 dahir, the only type of pledge recognised under Moroccan law was a pledge with dispossession?

> A. Exact.
>
> MR COLLETT: That puts two propositions in one question, my Lord. I am not sure. Maybe that …
>
> MR EDWARDS: I think my learned friend will have an opportunity to re-examine. I have been putting these questions as fairly as I can."

182. It will be apparent that some of these answers are self-contradictory. I have already recorded my impression that at times Mr Hajji had a tendency sometimes to agree with propositions which appeared at odds with his view as expressed in his report or elsewhere in his cross-examination. In my judgment in the exchanges quoted above Mr Hajji was stating, consistently with his second report, that the general provisions in DOC Articles 1170 to 1183 *are* applicable to pledges without dispossession, even though they deal with such pledges only "*slightly*" and not in detail: as Mr Hajji put it later in his cross-examination, at the time the DOC was introduced *"the pledge without dispossession was not structured as it is now"*.

183. That view is consistent with (a) the fact that Title 11 is divided into (i) general provisions and (ii) provisions dealing specifically with the pledge with dispossession, and (b) the specific terms of certain of the general provisions. As to the latter, DOC Article 1174 states explicitly that a pledge can be validly made over a future object, a random (aleatory) object or an object *"not in our possession"*. The qualification – that such a pledge only confers on the creditor the right to delivery of the pledge item as soon as such delivery can be made – does not indicate that such a pledge comes into existence only if and when delivery actually occurs, and Mr Hajji specifically confirmed that in his opinion the pledge comes into existence at the outset. Even if this provision were construed as meaning that the pledge only arises when the object becomes *capable* of delivery, that would be sufficient for the purposes of the present case (since the alleged loss relates to copper scrap in existence at Mac Z's premises at the time of the loss).

184. Other parts of Title 11 Chapter 11 are also consistent with this view:

    i) Article 1170 refers to a pledge being created when the debtor "allocates" (*"affecte")* a tangible or intangible object as guarantee for an obligation, and confers on the creditor to take ownership of it if the debtor fails to comply, thus stopping short of requiring actual delivery;

    ii) Article 1177 provides that any pledgor does not lose the right to dispose of the object;

    iii) Article 1179 provides that the pledgor *"can do nothing that reduces the value of the object"*; and

    iv) Article 1183 makes provision for loss or damage caused by the debtor;

    all of which provisions are at least consistent with a pledge not necessarily requiring dispossession of the pledgor.

185. Fourthly, Mr Hajji accepted that as an "exception", Article 378 should be construed strictly:

> "Q. As we discussed a moment ago, article 378 is one of two exceptions to the principle that pledges over movable, tangible assets are to be made by dispossessing the pledgor; we agreed that a moment ago?
>
> A. Correct.
>
> Q. Do you agree that as it is an exception, it is appropriate to interpret article 378 strictly?
>
> A. I would say yes. Yes, I confirm."

186. Since, however, that acceptance was premised on the proposition that the general law on pledges does not allow pledges without dispossession – a proposition which as analysed above I do not consider to reflect Mr Hajji's actual view or the position in law – I treat this acceptance with caution. Ms Fassi-Fihri expressed the view in her first report that Articles 378 ff should be interpreted strictly, because they were exceptions to *"the principle that pledges over movable tangible assets shall be made by dispossessing the pledgor"*. However, having accepted Mr Hajji's evidence that DOC Title 11 Chapter 1 is capable of applying to pledges without dispossession, even though it makes no detailed rules for such pledges, I do not accept the premise for Ms Fassi-Fihri's evidence on this point.

187. Fifthly, however, the logical consequence of having recourse to DOC Article 1174 in order to supply the list required for Article 378 of the Code of Commence would appear to be that everything that may validly be sold can be the subject of a pledge under Article 378. That would cut across the scheme of the Code of Commerce, which distinguishes in different sections between pledges over different assets. Mr Hajji agreed that each of the sections imposed different requirements, and that each section of the 1996 Code of Commerce provides a free-standing regime for the assets and type of pledge with which it deals. Reading in the terms of Article 1174 would be inconsistent and in conflict with Article 378 itself and the legislative intent that it reflects. Article 378 provides that the products and materials, in order to be capable of being pledged under that particular article, must be contained on a list issued by the relevant authority and, implicitly (and consistently with the word "*certain*" in the title to the section), that not all products and materials can be the subject of an Article 378 pledge. The provision for a list would be rendered completely redundant or meaningless. Those are propositions with which Mr Hajji agreed.

188. As a result, I do not consider that Article 378 can be made to work by resorting to DOC Article 1174 in order to make good the absence of a promulgated list.

(c) Valid pledge under DOC?

189. It occurred to me during the course of the trial, that if the Pledge were not valid under Article 378 of the 1996 Code of Commerce, it might nonetheless be valid under the general provisions in Chapter One of Title 11 of the DOC, referred to in § 137 above:

i) DOC Title 11 Chapter 1 sets out the general principles applicable to a pledge, and applies to commercial pledges provided there is no contradiction with specific Code of Commerce provisions (see § 167 above).

ii) I have already concluded that Article 1174 (see § 153.ii) above), in particular, is capable of applying to a pledge without dispossession (see §§ 180-184 above), even on the footing that the present Pledge did not involve dispossession (see §§ 177-179 above).

iii) To uphold the Pledge under the DOC would be consistent with the general approach of the Moroccan courts described by Mr Hajji, as indicated in § 169 above, and would avoid (in Ms Fassi-Fihri's words) "*the absence of effectiveness of the law*" (§ 155 above).

iv) Applying Article 2 of the Code of Commerce (see §§ 142 and 173-175 above), there would be no inconsistency between upholding the Pledge and Articles 378 ff of the Code of Commerce in circumstances where the latter articles had in substance not been brought into effect because there was no list identifying the types of goods to which they applied.

190. I raised this possibility with Ms Fassi-Fihri during her oral evidence:

> "MR JUSTICE HENSHAW: Just before you leave that topic, are you saying that where parties have entered into a pledge, or tried to enter into a pledge, referring to article 378 and following, and if those articles simply don't apply because there is no list, that the pledge cannot take effect as a common law pledge under the DOC?
>
> A. Yes, my Lord.
>
> MR JUSTICE HENSHAW: Is that conclusion based on the legislation, or is that based on your interpretation of the parties' intention?
>
> A. This is my interpretation of article 2 of the DOC … What I am saying is that the parties have decided to enter into a pledge agreement governed by articles 378 which provides that a list must be -- you know, that the pledge must be granted over products, you know, listed in a list.
>
> The fact that there is no list and we have the DOC apply for exactly the same topic, for me that means that there is a contradiction. The DOC says that we can enter into a pledge agreement over any products that can be sold. And the Commercial Court says that we have to give -- grant a pledge over materials listed in our list.
>
> So for me, there is a contradiction on those two articles, and it is too easy to save an invalid pledge, where it was the intention of the parties to be covered and protected by this

pledge, to say: okay, it is invalid in Commercial Code, let's ignore the articles 378 and have the DOC applied. This is dangerous, my Lord, because that means that when the parties want to be protected by certain provisions that are strict, we can then save it and have it apply with other provisions that are, in my view and my opinion, contradictory to the Commercial Code.

MR JUSTICE HENSHAW: Thank you. If there is no list, how do we know whether any particular pledge would have fallen within article 378 or not?

A. Sorry, I cannot understand --

MR JUSTICE HENSHAW: If there is no list that tells you which types of goods article 378 applies to, then how do we know whether any given pledge, such as this pledge, is one that would have been subject to those provisions.

A. This is a very good question, my Lord. This is exactly a question that I questioned myself.

There is the intention of the parties, a will of the parties to enter into a 378 pledge, probably based on a previous list, because it was non-ferrous metals, but their intention was to enter into this pledge because it is a pledge that gives protection. And with very strict conditions on nature, quantity, and the fact -- and because the previous -- I mean, certain products and materials that are supposed to be precious or with high value, and the parties wanted to enter into this agreement to receive the protection of that pledge. That is what I am saying.

If you are going and -- and pretend that the pledge can be saved by the DOC agreement, then the parties do not receive the same protection.

This is one thing, and the second thing, all the DOC provisions which apply to pledges are only applied to pledges with the possession. So it is very difficult to save the pledge with other articles that cover pledges with different nature.

MR JUSTICE HENSHAW: Thank you."

191. It seems to me at least arguable that (a) the stipulated requirements for Article 378 are pre-requisites for validity rather than necessarily being protections for the parties and (b) in any event, the interests of parties who intended to enter into a pledge are better served by giving effect to it under the DOC than by striking it down altogether.

192. However, although in response to a question from me counsel for Scipion indicated that he would advance this argument *"if necessary",* he accepted that it was not the way in which Mr Hajji had put the matter. Mr Hajji had relied on the DOC solely in order to supply the 'list' absent from Article 378. Nor was this a case that Scipion had advanced

in its statements of case, or its opening and closing skeleton arguments. In addition to the authorities referred to in §§ 163-165 above, Vallis drew my attention to the passage in *Dicey* § 9-019 in a passage cited with approval by the Privy Council in *Alhamrani v Alhamrani* [2014] UKPC 37 § 19:

> "The function of the expert witness in relation to the interpretation of foreign statutes must be contrasted with his function in relation to the construction of foreign documents. In the former case, the expert tells the court what the statute means, explaining his opinion, if necessary, by reference to foreign rules of construction. In the latter case, the expert merely proves the foreign rules of construction, and the court itself, in light of these rules, determines the meaning of the documents" (emphasis added).

and, more generally, to *Dicey* § 9-015:

> "An English court will not conduct its own researches into foreign law; in the common law system, "the trial is not an inquisition into the content of relevant foreign law any more than it is an inquisition into other factual issues that the parties tender for decision by the court". But if an expert witness refers to foreign statutes, decisions or books, the court is entitled to look at them as part of his evidence. But the court is not entitled to go beyond this: thus if a witness cites a passage from a foreign law-book he does not put the whole book in evidence since he does not necessarily regard the whole book as accurate. Similarly, if the witness cites a section from a foreign code or a passage from a foreign decision the court will not look at other sections of the code or at other parts of the decision without the aid of the witness, since they may have been abrogated by subsequent legislation." (footnotes omitted)

193. It is established that where experts disagree on the interpretation of a foreign statute, the court is bound to apply its own mind, giving such weight to the expert opinions as it thinks appropriate and considering the text of the statute itself, in making up its mind as to which of them is correct: see *Rouyer Guillet et Compagnie v Rouyer Guillett & Co Ltd* [1949] 1 All ER 244. Vallis submits that it does not follow that the court can or should take points which the experts have not advanced themselves.

194. It appeared to me at one stage that, all the relevant statutory materials having been put before the court and their meaning explained by the experts, this was a case "*in which the Judge may, without impropriety, take upon himself to construe the words of a foreign law, and determine their application to the case in question, especially, if there should be a variance or want of clearness in the testimony*" (see the extract from *Earl Nelson* cited in *Bumper,* quoted in § 164 above). The present issue might reasonably be regarded as concerning the application of the foreign law, and not as involving advancing a point which neither expert has advanced.

195. On further reflection, I have concluded that it would not be proper to adopt this approach. First, in circumstances where neither expert has suggested that the Pledge

could be upheld simply under the DOC independently of the Code of Commerce, I could not be confident that all relevant legal principles had been explored and put before the court. Secondly, under ordinary principles, it would be unfair as between the parties for the court to reach a conclusion, on the application of Moroccan law to the facts, that Scipion had never pleaded in its statements of case, Scipion's expert had never advanced, and which Scipion had not sought to put forward in its skeleton arguments.

(d) Conclusion on this issue

196. For the reasons given under subheadings (a) and (b) above, I have concluded that the Pledge cannot be regarded as a valid Article 378 pledge, because the absence of any list renders that provision inapplicable and cannot be substituted by reference either to the 1951 list or to the general provisions of the DOC. As a result, the Pledge was not valid under Moroccan law.

(6) Compliance with Article 379 requirements/Pledge over future goods

197. In view of my conclusion in section (5) above, it is not strictly necessary for me to address this further ground on which Vallis alleged the Pledge was invalid, and I therefore do so only fairly briefly.

198. Article 379 provides (in translation):-

> "Article 379: The pledge must be recorded in a formally authenticated document or a private document that specifies that the Parties wish to be placed under the system of the provisions laid down in the present Chapter.
>
> This document must indicate the family name, the first name, the status and the domicile of the lender and the borrower, the amount and the term of the loan, the interest rate agreed, the nature, quality, quantity and value of the products that are to be used as security for the loan, a precise indication of the place where the security is located, together with the name and address of the insurer with which the product pledged is insured, if this is the case.
>
> The borrower must indicate in the document any pre-existing pledge over the same products and materials."

199. There was debate about whether failure to comply with these requirements made a pledge invalid. Ms Fassi-Fihri was of the view that the answer was yes. Mr Hajji in his first report referred to *"the mandatory key items provided for by the Article 379"*. In cross-examination he was asked about this, giving different answers on different occasions:

> [1] "Q. If we look at the second paragraph of article 379,
>
> I think we can see it says:
>
> "This document must indicate [a number of things]."

> And you would accept, Mr Hajji, that the use of the word "must" indicates that the requirements that we see there are mandatory. They have to be complied with?
>
> A. Yes."
>
> [2] "Q. Well, Mr Hajji, surely the parties can agree what they like, but they can't change Moroccan law, can they?
>
> A. No, no, of course. The law is the law.
>
> Q. Exactly. And the requirements of article 379 are the requirements of article 379, and they must be complied with. You agree?
>
> A. I agree. I agree with you, okay."
>
> [3] "Q. … Let me be more precise: they can't create a pledge which is valid under article 378 without complying with the mandatory requirements of article 379. Do you agree?
>
> A. I do not agree again, because again, when the law is restrictive, it doesn't mean that you cannot do except but the law. The law is there, and you have to comply with it. When the law with some -- with respect some situation or an object which is difficult to implement, the parties can agree for this. It is their commitment and they agree for this. If someone is not happy or he doesn't agree with this, and even though he agreed for this, he cannot come after with the court and say: this contract or this pledge is not valid because it is a contradiction with the law. It is something which is not in Moroccan system. We cannot be -- it is kind of principle of estoppel. We cannot say something and agree for something and after say it is our right to challenge or contest something we agreed upon."
>
> [4] "A. …There are some requirements which are not met, I agree with you, but -- I mean, requirements about the quantity, the quantity of the goods, the requirements about the list, the requirements about the special register we have not yet discussed --
>
> Q. So they are all not met?
>
> A. They are not met, but this does not mean that the pledge is not valid. This is my reading and my reasoning in respect of the Moroccan law."

200. I conclude that answer [1] was an example of Mr Hajji's unfortunate tendency sometimes immediately to agree to propositions put to him without adequate consideration as to whether they reflected what appeared (based on earlier or later answers) to be his real view. Answer [2] was to a fairly general question, which did

not focus on the consequences of any breach of Article 379. Having seen Mr Hajji give evidence, I consider that answers [3] and [4] represented Mr Hajji's actual, genuine opinion on the latter point, and not (for example) an attempt to row back from an earlier answer in order to seek to assist the case of the party calling him.

201. In these circumstances, I reject Vallis's contention that it is not open to Scipion to argue that a pledge can be valid despite a breach of an Article 379 requirement on the basis that neither expert advanced this proposition.

202. I would accept that insofar as Mr Hajji based his view on a form of 'estoppel', it should be treated with caution, given that pledges may obviously affect third parties. Nonetheless, the proposition that a breach of Article 379 is not fatal to the validity of a pledge does in fact receive significant support from two factors.

203. First, Article 379 does not specify any penalty or consequence if any of the matters referred to are not stated. As Ms Fassi-Fihri accepted, this is a notable omission compared with the provisions in relation to an Article 355 pledge over materials and equipment, in relation to which various matters are required to be done "*à peine de nullité*" i.e. under penalty of / subject to nullity, including the requirement under Article 356 (4th paragraph) that the document must mention that the funds paid by the lender are meant for the payment of the assets acquired.

204. Secondly, the Moroccan Supreme Court in the Decision referred to in §§ 160-162 above held that the lower court was correct to reject the appellant's argument that the pledge was invalid for lack of registration, on the ground that in the relevant Code article "*the Legislature did not institute any penalty for violating these requirements*". Ms Fassi-Fihri replied that a registration requirement was different, because (unlike a formality requirement) the consequence of nullity needed to be spelled out: but that does not meet the point that the Article 356 formal requirement referred to above is also expressly said to be on pain of nullity.

205. Ms Fassi-Fihri did not provide authority for the proposition that a breach of Article 379 resulted in nullity, and (as Scipion points out) gave no convincing reason why the failure to mention matters exclusively within the knowledge of the pledgor, such as whether there was a pre-existing pledge over the same products and materials, or whether the product pledged was insured, should result in nullity. She accepted that this would be a dangerous result, but sought to explain it only on the basis that "*unfortunately in Morocco you can experience a lot of absurdities*".

206. I would therefore have concluded, had the point arisen, that a breach of Article 379 does not result in nullity.

207. In any event, I would also have concluded that the requirements of Article 379 were met in the present case, for the reasons outlined below.

208. As regards the requirements to state the *"quantity"* and *"value"* of the goods to be used as security, clause 2.4 of the Pledge states:

> "The value of the Collateral held under the relevant Warehouse Receipts shall, at any time so long as the Agreement or the Pledge is in force, combined with the cash balance held on the

> Local Collection Accounts and subject to the Pledge over Bank Accounts, be equal to or not less than one hundred and twenty five per cent (125%) of the aggregate amount of outstanding Advances under the Facility, being the Borrowing Base Coverage Ratio tested by delivery by the Pledge of the weekly Borrowing Base Report.
>
> If the ratio outlined in the paragraph above is not met, the Pledgor undertakes before the next test date to either i) pledge additional Goods and/or Products ii) pay an additional amount into the Local Collection Account or iii) prepay an Advance, to ensure that the ratio is preserved by the next weekly Borrowing Base Report."

Schedule 1 to the Pledge is quoted in § 134 above.

209. Vallis points out that the Pledge contains no number, volume, weight or value for the quantity of pledged goods. The quantity and value are in fact inevitably variable under the Pledge, with the result that depending on movements in stock, the outstanding loan and the LME price, different amounts and identities of goods will be pledged at different times, and it will not be possible to identify, or to identify easily, which particular goods are pledged at any given time. Vallis submitted that its contention that these matters would make the Pledge invalid are supported by a presentation by the Moroccan Ministry of Economy and Finance on the new 2019 law. This presentation included the statement:

> "Facilitation of the constitution of movable securities:
>
> The draft law harmonised and simplified the rules applied to the regime of movable securities without dispossession (the pledge) enabling debtors to grant movable securities over all their assets, including those that are useful to their activity …"

and explained that the new law:

i) "*instruments ["consacre"] the option to pledge future things*". The court interpreter translated *"consacre"* as meaning 'dedicates', 'allocates' or 'attributes';

ii) *"opens the possibility"* of constituting a movable security over receivables *"where the amount is not yet determined or which could change over time";*

iii) *"introduces a regime of pledge over circulating assets"*;

iv) *"instruments the option to describe the objects encumbered generally, so as to enable a pledge to be constituted over a set of assets, present and future without the parties having to list the assets encumbered*"; and

v) *"recognises a general right of the parties to substitute one asset pledged for another, without this substitution giving rise to a new security".*

210. However, the document's author is unidentified, and (as Ms Fassi-Fihri accepted) it is not an authority. The presentation also gives no specific consideration to the pre-existing law. It is perfectly possible that the author (and others) considered there to be doubt about whether under the existing law pledges could be granted over future/circulating assets, but this court's task is to determine on the evidence what the relevant Moroccan law actually was (or, given that this issue arises as a facet of causation, and to the extent that there could be any difference between the two processes, to determine what conclusion the Moroccan courts would more likely than not have come to on the issue).

211. On the basis of the evidence as a whole, I see no reason to conclude that the requirements to specify the quantity and value of pledged goods preclude the use of a formulation, of the kind set out in the Pledge, referring to goods whose composition and value will vary over time. The language of the legislation does not in my view point to any such conclusion, and although Ms Fassi-Fihri referred in this context to a *"general principle under Moroccan law"*, the precise nature of any such principle was unclear.

212. Similar considerations arise in relation to the requirement to state the *"amount"* of the loan. The Pledge stated the maximum amount of the loan (US$10 million) and referred to the Facility Agreement for the terms and conditions of the loan. Clause 2.1 of the Pledge constituted the Pledge as security for the full repayment, discharge and performance of the Secured Obligations, which were defined as including the obligations under the Facility Agreement.

213. Ms Fassi-Fihri did not identify any provision of Article 379 that precluded the parties from specifying the amount of the loan and its duration and interest rate by referring to the Facility Agreement. Further, although Ms Fassi-Fihri did not accept this point, the inclusion of the interest rate among the matters referred to in Article 379 indicates in my view that the secured obligation can fluctuate over time.

214. For these reasons, I would have concluded that the Pledge complied with Article 379, and in any event that any non-compliance did not render it invalid.

(7) Conclusion

215. My overall conclusion is that the Pledge was invalid by reason of the lack of any published list of the kind contemplated by Article 378 of the Code of Commerce, it being in my view an essential pre-requisite for a pledge under Article 378 that it relate to a category of goods specified on such a list.

(G) CAUSATION: CONTROL IN PRACTICE AND LOSS OF A CHANCE

216. Scipion in its skeleton arguments advances two alternative submissions (in addition to its amended case considered earlier) as to why the invalidity of the Pledge does not preclude its claim:

i) The goods held by Vallis to Scipion's order were at all times, and remain, available to Scipion to secure sums outstanding under the Facility pursuant to the terms of the CMA. Moreover, at all times since October 2017, Scipion has exercised control, and a right of disposal, of the remaining goods, the majority

of which have been sold to Mac Z (who have never challenged Scipion's rights over those goods).

ii) Scipion has pleaded an alternative claim for damages for loss of the chance to secure performance of the facility, as pleaded in the Re-Amended Particulars of Claim §33. As it is a matter of speculation whether Mac Z would ever have taken the validity points which Ms Fassi-Fihri has raised, there would have been a high chance that Scipion could have relied upon the Pledge successfully.

217. Argument (i) is unpleaded, and (leaving aside Scipion's amended case based on possessory rights) Scipion's pleaded case on causation is premised on the validity of the Pledge: see Re-Amended Particulars of Claim § 32(b) quoted in § 124 above. The argument would have raised factual questions, on which evidence might have been required, about the extent to which this court could or should assume that Mac Z (and, possibly, third parties such as present and future creditors) would continue to treat the relevant goods and products as being secured in favour of Scipion even though the Pledge were invalid. Vallis points out, for example, that the existing evidence suggests that, both before and after the loss of copper scrap was discovered on 9 October 2017, Mac Z had no compunction about removing goods from the Site without Scipion's authorisation (see, e.g., the 20 June and 28 October 2017 granules losses). In any event, I do not consider it open to Scipion to advance such an argument simply on the basis of submissions.

218. As to argument (ii), Scipion has made no attempt to quantify the value of the chance alleged to have been lost, and has advanced no evidence in support of it. Mac Z's behaviour at least from late June 2017 onwards (when the first batch of granules went missing) suggests that it was willing to flout the CMA even regardless of Scipion's rights. If the question of the validity of the Pledge had arisen, it seems likely that Mac Z would have deployed any available argument as to its invalidity. Had Vallis not allowed the goods to go missing, there must be a significant chance that Mac Z (given its problems) would have begun to consider other ways round its apparent obligations. It is speculative to suggest that Mac Z would, over the intended life of the facility, never have focussed its mind on the point but would have simply assumed the Pledge to be valid. I do not consider Scipion to have established any quantifiable loss of a chance resulting from Vallis's breach.

(H) MEASURE OF LOSS

(1) Scipion's claims and the parties general submissions

219. Scipion claims:

i) The outstanding balance under the Facility of US$12,006,830.20, plus costs of £46,750, and statutory interest thereon which it has calculated at US$ 1,677,509.50 up to 20 January 2020. These sums, expressed in US$, total US$13,750,729.86. Scipion on 27 March 2018 obtained a judgment in this court against Mac Z and the Corporate Guarantor for the sum of US$12,006,830.20, comprising outstanding principal of US$10,389,602.91 plus interest (US$1,095,543.42), late payment commission (US$161,094.67) and post-default expenses (US$360,589.20), plus costs of £46,750;

ii) *less* credits for:

a) US$ 578,572.88 for the recoveries it has in fact made from the sales of goods and products since the copper scrap was lost;

b) US$ 877,826 for the value of the goods and products remaining at the CMA Site as at 4th December 2019; and

c) US$ 21,830.40 frozen in the pledged bank accounts;

iii) *plus* US$ 214,131.12 in collateral management fees and US$ 19,806.29 in travel and accommodation expenses.

220. Scipion's overall rationale for this claim is as follows:

i) Its loss is *prima facie* to be measured by the value of the lost goods.

ii) However, the parties' copper valuation experts agreed that the market value of the total goods and products that Vallis warranted that it was holding at the Site on 9 October 2017 was either US$ 15,162,981 (Vallis's expert) or US$ 13,540,972 (Scipion's expert). Both amounts exceed the amount outstanding under the Facility both as at 31 October 2017 (US$11,397,929.13) and under the judgment of 27 March 2018 (US$12,006,830.20).

iii) Accordingly, in order to avoid any need to account to Mac Z for a surplus, Scipion limits its claim to the amount due under the Facility, less credits but plus consequential losses, i.e. the calculation outlined in § 219 above.

221. Scipion contends that the appropriate date on which to value the remaining goods for which it must give credit is the date of trial. It states that it could not have sold those goods in October 2017 i.e. at or shortly after the date of Vallis's breach.

222. Vallis submits that on the footing that Scipion brings a claim based on its possessory interest in the lost goods, the measure of damages is the same as if Scipion were claiming as pledgee. It argues that:

i) *Swire v Leach* establishes that the measure of loss recoverable by a pledgee (irrespective of the amount the pledge is intended to secure) is to be calculated at the market value of the pledged goods, subject only to any pleaded recoverable consequential losses.

ii) The same applies to a claim founded on a possessory interest. Cases such as *The Winkfield* [1902] P 42, 54 per Collins MR and *The Jag Shakti* [1986] 1 AC 337, 348H establish that to compensate the holder of a possessory interest, the proper measure in law of the damages recoverable is the full value of the goods. As Hobhouse J stated in *The Sanix Ace* at p.469 "*it is the loss to the proprietary or possessory interest that is compensated, not some other or different economic loss*." The position is no different if the claim is brought in contract or bailment as opposed to in conversion.

iii) The value of the lost goods as at the date of breach was US$10,464,820.80.

iv) No relevant consequential losses exist here. Scipion has pleaded only two heads of consequential loss here, and cannot now plead or advance any others:

a) collateral management fees paid to Vallis up to the date of termination of the CMA, and to Ace Global Depository thereafter, to control, hold, supervise and store the remaining goods at the Site pending sale, amounting in total to US$214,131.12; and

b) travel and accommodation expenses of US$19,806.29 incurred by Scipion employees to oversee and secure actual and potential sales of the remaining goods.

However, such costs of preserving and realising the value of the remaining security do not flow from Vallis's breach. The collateral management fees would have been incurred whether or not there had been any breach by Vallis. The expenses were not consequential upon Vallis's breach or the loss of goods but upon Scipion investigating or selling goods that were unaffected by the breach.

v) *Swire v Leach* also indicates that the measure of loss is calculated by reference to the market value as at the date of the physical loss or seizure, which must have occurred by 9 October 2017 in this case, and not any later date.

(2) Date of assessment of loss/duty to mitigate

223. In *Swire v Leach*, Williams J (with Keating J's concurrence) stated that the plaintiff was entitled to recover *"the full value of the goods at the time of the wrongful seizure"*. Vallis submits that ordinary principles of assessment of loss also point to the date of the breach as the correct date on which to assess Scipion's loss, in relation to both the lost goods and the remaining goods. In relation to the lost goods:

i) The normal rule is that damages should be assessed at the time of the breach of contract: see *MacGregor On Damages* (20th ed.) § 26-096:

> "The general rule is that damages for breach of contract should be assessed as at the date when the cause of action arose, viz the date of the breach."

ii) The position is no different for losses in relation to property: see MacGregor § 20-002:

> "Where damages are awarded for a loss in relation to property, the normal measure is based on the market value of the property at the time of the wrong, whether tort or breach of contract."

iii) The appropriate date for the assessment of damage is 9 October 2017. The precise date of breach in this case is unknown but it must have been by no later than that date, when the loss of copper scrap was ascertained.

iv) The general rule is not absolute, and the court has the power not to follow it if by doing so it would give rise to injustice.

v) In the present case the normal rule should apply. The value of Scipion's security interests in the goods was always subject to fluctuations in the LME price. That price risk was inherent in the type of security taken and existed irrespective of any breach by Vallis. Vallis was responsible for the care of the goods, and it is liable because as a result of its breach the copper scrap was lost, but it is not responsible for price risk during the time it took Scipion to sell the remaining goods.

vi) The LME price for a valuation as at 9 October 2017 was US$ 6,639 per mt. It has not exceeded that price since the end of June 2018. As at 20 January 2020 it was US$ 6,276.50, and by 29 January 2020 it had fallen to US$ 5,698. Scipion has not adduced any evidence to show that it would have sold the lost copper scrap at a time when the LME price was higher than USD 6,639. Evidence would be required to support any allegation that Scipion has lost any opportunity to sell at a higher value: see MacGregor § 20-003; *Industria Azucarera Nacional SA v Empresa Exportado de Azucar* [1982] Com LR 171. Such an argument would be hopeless on the facts in any event, given that Scipion has not even yet sold all the remaining goods.

224. Similarly, in relation to the remaining goods Vallis submits that a valuation date of 9 October 2017 is appropriate because:

i) Scipion undertook an inevitable price risk in relation to the security for which Vallis is not responsible: see § 223.v) above;

ii) Scipion has been able to sell any of the goods that remained at the Site at any time both before and after 9 October 2017, and their value was unaffected by any breach on the part of Vallis;

iii) if these goods are assessed at a date which is different from the valuation date for the lost goods then the resulting calculation is unlikely to reflect the true 'net loss' to Scipion which was caused by Vallis's breach;

iv) in particular, if any credits for the values of the remaining goods at the Site are assessed after the end of June 2018 then the practical effect of this will be to hold Vallis liable for a fall in the LME price;

v) a date of assessment of 9 October 2017 eliminates the risk that any subsequent events unrelated to Vallis's breach, which have occurred in the intervening 27 month period, are built into Scipion's calculation of loss, such as :-

a) fluctuations in the LME price;

b) a loss of granules in October 2017, when Mac Z carried out its threat of procuring the removal of a further quantity of copper granules from the Site on 28 October 2017 without authorisation. Scipion tracked the removed granules to the Port of Casablanca but did not manage to receive any of the sale proceeds, amounting to some US$ 700,000, from Mac Z. Scipion brings no claim against Vallis for this, but because these granules were neither sold nor remain at the Site, then the effect of

Scipion's approach to calculating credit would be to hold Vallis responsible for this loss;

c) the failure of Scipion to insist on receiving full payment for certain anodes sold to Petroforce in December 2017: 107.784 mt of anodes sold on 9 December 2017 had a value as at that date of US$ 667,665.29, but Scipion gives credit only for US$ 533,000 (a shortfall of US$ 134,665.29), Scipion having apparently allowed Mac Z to retain the difference;

d) any subsequent failures to obtain market value on any of four later sales to Mac Z; and

e) Scipion's failure to mitigate its loss (see further section (I) below). If the remaining goods are valued as at 9 October 2017, then questions of mitigation of loss do not arise.

225. In relation to both the lost and the remaining goods, Vallis submits that in a case where the date of assessment has a significant impact on the quantum of the claim, the court should be slow to disapply the normal date of assessment unless there is a principled reason for doing so. Taking a later date of assessment means that (a) there is an increased amount outstanding under the Facility; (b) Scipion can argue that it need not give credit for the value of goods sold but only for the sums which Scipion happened to receive; and (c) less credit can be given for the unsold goods due to a fall in the LME price. There is no good or principled reason for taking this approach.

226. In reply, Scipion agrees that the lost goods should be valued as at 9 October 2017. In relation to the remaining goods, Scipion argues that Vallis's approach, whilst it appears to reflect the conventional approach to assessment of loss, in fact errs by treating the credit to be given in relation to the remaining goods as part of the calculation of Scipion's primary loss. The primary loss resulting from Vallis's breaches is in fact the loss of the lost goods. The value of the remaining goods does not diminish that primary loss. Scipion limits its claim to damages for that loss by reference to the sums outstanding under the Facility – thereby seeking to avoid the need to account to Mac Z for any surplus. In that context, Scipion accepts that the ability to recoup such outstanding sums from the remaining goods enables Scipion to mitigate its claim as so limited. However, since Vallis does not contend, and could not reasonably contend, that the remaining goods could have been sold on or shortly after 9 October 2017, it is illogical to take that date as the date on which to assess their value.

227. Thus, in relation to the further granules lost in October 2017, and the anodes sold to Petroforce in December 2017 for which Mac Z kept part of the sale proceeds, Scipion submits that the relevant question is simply whether their respective values were available to reduce the sums outstanding under the facility, to which the answer is that they were not, for reasons that were the fault of neither Scipion nor Vallis. The position is no different, Scipion says, from the position if some or all of the remaining goods had been struck by lightning. Whether they are taken into account in the loss calculation or not does not depend on whether Vallis accepted responsibility for fluctuations in value, or indeed for loss of goods where Vallis was not at fault. It depends simply on whether the goods in question have been, or reasonably could have been, taken into

account to reduce the sums outstanding under the Facility: a different question, and one which does not depend on Vallis's obligations or the allocation of risk.

228. If pursued to its logical conclusion, Scipion's argument might actually mean that even if Scipion could be regarded as at fault in some way in relation to (for example) the October 2017 loss of granules, those goods would still not be relevant to take into account when calculating Scipion's primary loss. If Mac Z itself took the benefit of the granules, then Mac Z could hardly contend as against Scipion that their value should be regarded as reducing (or an asset to be offset against) Mac Z's liability under the Facility. Mac Z's taking of the granules would leave Scipion with less security, and would mean that Mac Z could no longer argue that Scipion, as secured party, ought to have realised their value in order to reduce Mac Z's debt to Scipion.

229. I have not found this aspect of the case easy to determine. However, not without hesitation, I have come to the conclusion that Scipion's approach is correct. The case law considered earlier indicates that Scipion as possessor is entitled to recover the full value of the lost goods (and any consequential losses) without regard to any liability to account to a third party, here Mac Z, for any part of the proceeds. Scipion has chosen to limit its claim so as to avoid any question of having to account to Mac Z, and so the relevant question is to what extent the remaining goods and their value/proceeds would need to be taken into account as being available to reduce Mac Z's debt to Scipion. That question is not related to Vallis's assumption of risk – the risk Vallis assumed was in substance that if it negligently permitted goods to be lost, then it would have to restore their value.

230. Thus in the lightning example, goods which remained on site on 9 October 2017 but which were destroyed by lighting, say a month later, would not fall to be taken into account as available to reduce Mac Z's debt to Scipion, unless perhaps Mac Z were able to show that Scipion was in breach of duty for having failed to sell them earlier. The October 2017 granules, assuming them to have been taken by Mac Z, could not on any view be regarded as available to reduce Mac Z's debt to Scipion. At least at first blush it seems counterintuitive to think that Vallis's liability to Scipion should not be reduced by the value of those granules. However, the loss of the lost goods represented a loss of value – whether to Scipion or to Mac Z – caused by Vallis's breach. Scipion might simply have sued for the full value of the lost goods, accounting to Mac Z for any surplus (in the context of calculating which surplus the value of the October 2017 granules would not be counted as an available asset). Equally, Scipion might have taken the position that by choosing to limit its claim to the sums due to it under the Facility, Scipion was not thereby assuming a mitigation duty owed to Vallis to do its best to reduce Mac Z's outstanding debt by the use of other security in the form of the remaining assets. In the event, however, Scipion does accept that it had an opportunity to mitigate its loss by the use of the remaining goods. That is, as I understand it, why Scipion considers it necessary to submit that the October 2017 loss of the granules and December 2017 under-recovery of anode sale proceeds occurred without demonstrable fault on its part.

231. These considerations do not directly answer the question of the date at which the remaining goods should be valued. It was not suggested that Scipion would have owed a duty to Mac Z to realise any of the remaining goods instantly or shortly after 9 October 2017, and (by analogy) a mortgagee exercising a power of sale would have a duty to realise a proper price at the time of sale, but not a duty to sell at any particular time (see,

e.g., *China and South Sea Bank Ltd v Tan Soon Gin* [1990] A.C. 538). However, given Scipion's acceptance of a duty of mitigation in relation to the remaining goods, an earlier valuation date may be appropriate *if* Vallis shows that Scipion has failed to mitigate its loss by delaying in selling any particular assets.

232. Accordingly, the correct approach to Scipion's primary claim in my view is as follows:

i) The primary measure of Scipion's loss is the value of the lost goods.

ii) It is common ground that those goods are to be valued as at 9 October 2017, the accepted or assumed date of breach.

iii) Remaining goods that have been sold should be valued at the dates on which, and in the amounts for which, they have been sold unless Vallis shows Scipion has failed to mitigate its loss by delaying sale or otherwise failing to recover a proper value for the goods.

iv) Remaining goods that have not been sold should be valued as at the date of trial unless Vallis shows Scipion has failed to mitigate its loss by delaying sale.

(3) Consequential losses and interest under the facility

233. The *prima facie* measure of Scipion's loss, as noted above, is the value of the lost goods as at 9 October 2017 plus any consequential losses. How, if at all, should Scipion be compensated for the fact that it has been out of that money since then?

234. Vallis accepts that Scipion is entitled to statutory interest, at a rate which it is proposed I should determine following further argument after the handing down of this judgment. However, it says Scipion is precluded from alleging any further consequential losses over and above those referred in § 222.iv) above.

235. Scipion, by contrast, submits that if Scipion had had the value of the lost goods as at 9 October 2017, then the loan would have been paid down to the extent of that value on 9 October 2017 and there would have been no interest running on that part of the loan which would have been paid down. Therefore, it argues, the interest that has run on the sums outstanding under the loan from 9 October 2017 is a consequential loss which falls outside the 'cap' i.e. can be claimed in addition to the value of the lost goods as at that date.

236. Scipion has always claimed post 9 October 2017 contractual/Judgment Act interest as part of its case, so Vallis's pleading objection is in substance about whether Scipion should be permitted now to reclassify that claim as being one for consequential loss. Leaving that point to one side, it appears to me that post 9 October 2017 contractual/Judgment Act interest is not in reality a form of consequential loss here. I proceed for present purposes on the basis of Scipion's submission that, had the value of the lost goods been available on 9 October 2017, then the loan would have been paid down. Had that happened then, as Scipion says, no more contractual interest would have fallen due on that principal sum. As a result of the loss of the goods due to Vallis's breach, Scipion has lost the principal value of the lost goods, and has lost the use of that amount since 9 October 2017. However, the contractual/Judgment Act interest that has accrued since 9 October 2017 is not, or at least is not necessarily, the measure of the

lost use of the money since 9 October 2017. The lost use of money must, on Scipion's hypothesis, depend on what else Scipion would have done with the money had the loan been paid down on 9 October 2017. In the absence of any specific plea in that regard, statutory interest is in my view the appropriate vehicle for compensating Scipion for the lost use of the money since that date.

237. As to the claimed consequential losses, I agree with Vallis that collateral management fees paid to Vallis up to the date of termination of the CMA, and to Ace Global Depository thereafter, to control, hold, supervise and store the remaining goods pending sale, and travel and accommodation expenses incurred by Scipion employees to oversee and secure actual and potential sales of the remaining goods, are not consequential upon the loss of the lost goods. As at 9 October 2017, the amount outstanding under the Facility (around US$11.4 million) was more than the value of the lost goods at that date (agreed to be approximately US$10,464,820). So even if the lost goods had not disappeared, it would still have been necessary for Scipion to expend CMA fees and other expenses in relation to the storage and realisation of the remaining goods. Those expenses did, on the other hand, reduce the net value of the remaining goods to be applied in reduction of Mac Z's debt to Scipion, and can be taken into account in that part of the calculation (i.e., in working out the net amount outstanding under the Facility, to which Scipion has chosen to limit its claim).

238. Accordingly, Scipion's claim is capped at the amount of the value of the lost goods on 9 October 2017 (US$10,464,820) plus statutory interest at a rate to be determined following further argument, subject to the effect of the clause 8.2 exemption which I consider later.

(I) SPECIFIC ISSUES AS TO VALUATION AND MITIGATION

239. Following the agreement reached by the parties' experts, it is common ground that the remaining goods at the Site now, so far as they consist of scrap, stripped cables, work in progress and semi-finished goods, have a market value as at 4 December 2019, of US$149,667. The only dispute is as to the market value of the remaining 1,151.532 mt Maroc Telecom cable. As well as the valuation issue, the question arises whether Scipion failed to mitigate its loss by not accepting any of a number of offers made for this material.

240. Separately, mitigation issues also arise in relation to the granules lost in late October 2017 and the proceeds of the anodes sold in December 2017.

241. Before considering more detailed matters, it is necessary to address Scipion's argument by reference to clause 7.1(b) of the CMA, which provided:

> "[Vallis] shall indemnify SCIPION and keep SCIPION fully indemnified against all losses, damages, liabilities, costs (including all legal costs on a solicitors-and-clients' basis) and/or expenses of any nature whatsoever, howsoever incurred or sustained by SCIPION arising out of or in connection with any default by [Vallis] in either failing to provide the services in conformity with the provisions of [the CMA]…"

242. Scipion initially argued that the sums due under that indemnity were claimed by Scipion as a debt, and that there was thus no need in law for Scipion to mitigate its losses, citing *Royscot Commercial Leasing Ltd v Ismail* (CA, 29.4.93, unrptd.,), *The Codemasters Software Co Ltd v Automobile Club de L'Ouest* [2009] EWHC 3194 (Ch) § 32, and *ABN Amro Commercial Finance Plc v McGinn* [2014] EWHC 1674 (Comm), [2014] 2 Lloyd's Rep. 333 §§ 57-58. *Codemasters* also included at § 37 an expression of doubt that in an ordinary breach of contract case a failure to mitigate had anything to do with causation.

243. However, Scipion ultimately did not pursue that point, focussing instead on a point of construction arising from the fact that the indemnity applies to "*all losses, damages, liabilities, costs ... and/or expenses* <u>*of any nature whatsoever, howsoever incurred or sustained*</u> *by* <u>*SCIPION arising out of or in connection with*</u> *any default by [Vallis] ...*" (emphasis added). Scipion submitted in opening that this wording does not require a causal connection between Scipion's loss and Vallis's default, provided that there is a connection of some kind: see *Campbell v. Conoco (UK) Ltd* [2002] EWCA Civ 704 § 19. Consequently, Scipion submitted, Vallis is precluded from asserting that losses are irrecoverable because Scipion has failed to mitigate, or because of insufficient causal connection between the breach and the loss.

244. Scipion's modified position in closings was (a) to make clear that it accepts that the rules of mitigation are all aspects of the principles of causation (*Thai Airways International Public Company Ltd v. KI Holdings Co Ltd* [2015] EWHC 1250 (Comm) § 33), and (b) to contend that the words "*arising out of or in connection with*" in clause 7.1(b) connote the weakest conceivable connection between the loss claimed and the breach, and minimise Vallis's ability to contend that the causal connection between a particular sum being outstanding and its default has been broken by inaction on the part of Scipion in failing to sell remaining goods. There would, Scipion says, need to be something highly egregious on Scipion's part, a high degree of unreasonableness, to sever the chain of causation so as to render the indemnity inapplicable.

245. The words *"arising out of or in connection with"* make clear that the indemnity protects Scipion in relation to the <u>consequences</u> of a breach by Vallis, which on ordinary principles would not include losses caused by Scipion's own unreasonable action or inaction. The context in which the same words were used in *Campbell v Conoco* was markedly different from the present case. The indemnity there was one of two similar cross-indemnities in a contract between a contractor and a sub-contractor concerning the operation of a North Sea oil platform, effectively allocating responsibility between them for injuries to personnel. The relevant indemnity was in respect of injuries:

> "… as a result of or arising out of or in connection with the performance or non-performance of the Contract"

246. As Vallis points out, the question thus was whether the injury was sufficiently related to the performance or non-performance of the contract in question, that is, whether the work the injured individual was doing at the relevant time was concerned with the performance of that contract as opposed to something else. It is not surprising in these circumstances that Rix LJ stated that the words of the clause *"[i]n themselves ... do not express the need for a causal connection, although of course they do express a need for a connection of some kind"*. In the present case, the words do in my view require a

causal link between Vallis's breach and the loss claimed, and do not remove or attenuate the ordinary rules on mitigation in the way Scipion suggests.

(1) Maroc Telecom scrap

247. The bulk of the scrap left at the Site is the unstripped Maroc Telecom cable. Before the raw cable can be recycled, it requires a significant amount of processing involving cutting the cables down into manageable strips, stripping the outer plastic insulation from them, and then incineration to remove the remaining plastic sheathing.

248. There is no doubt that its realisation presented difficulties. Mr Macdonald of Scipion gave evidence that the two ways it could be disposed of were stripping it and converting into copper granules, which are more saleable, or selling it to a recycler or other person who would do the processing themselves, which Mr Macdonald considered unlikely.

249. Stripping and converting the cable into granules requires a large amount of manpower and equipment. Scipion had hoped to have dozens of workers organised by Mac Z for this purpose, but the activity appears to have been low on Mac Z's priorities, since Mr Macdonald stated that for extended periods Mac Z had failed to mobilise workers, at least in part due to complaints about lack of funding. He added that *"[Mr Lamdouar]/Mac Z always had their hand out for more money for nothing, and they always claimed deficient operating capital in order to function"*. The stripping process ground to a halt by October 2018 because Mac Z staff were not being paid. Mr Macdonald stated that Scipion had explored using offtake partners but could not find someone to carry out the work. Scipion investigated but rejected the idea of buying a cable-stripping machine itself, bearing in mind that its business is that of a finance house rather a metals recycler or trader.

250. The evidence indicates that various offers were made for this scrap:

i) in July 2018, by Mac Z itself;

ii) in July 2018, by Mr Cohen on behalf of Petroforce;

iii) in June 2019, by SV Overseas;

iv) in July 2019, by another third party; and

v) on an unknown date, by MTB.

I consider these in turn.

(a) July 2018 Mac Z offer

251. The documents indicate that in July 2018 Mac Z made an indicative offer for all the then remaining CMA stock, including the unstripped Maroc Telecom cable, for approximately US$ 2.23 million, to be bought and paid for in instalments over a year. It appears that the bid was based on a yield of 40% net copper and then applying 80.46% of the LME price to that yield, thus amounting overall to an offer for the stated gross tonnage of 32.2% of the LME price. This offer valued the unstripped Maroc Telecom cable at 28% of the LME copper price.

252. Mr Macdonald did not refer to this indicative offer in his witness statements. In cross-examination, he said he was aware of discussion about it, and said *"Obviously Mac Z have never followed through on their offer because they are impecunious. They don't have funds. So we can discount them out of hand. We have been selling to them on a piecemeal basis."*

253. Vallis does not submit that Mac Z's offer in July 2018 ought to have been accepted, but says it is important evidence because:-

    i) it indicates that Scipion did not consider this at the time to be an offer which could not be improved upon; and

    ii) it evidences the level at which offers for unstripped Maroc Telecom cable from processors within the domestic market of Morocco could be achieved as at that time. It also has the benefit of being made by the very processor who was familiar with the quality and the costs/time of stripping and also knew that Scipion would want to rid itself of the stock. It thus provides a realistic sense-check of the parties' valuation expert evidence because this offer takes into account all the same factors that they have had to in forming their opinions on valuation.

(b) July 2018 Petroforce offer

254. The other indicative offer in July 2018 was from Mr Cohen of Petroforce, who proposed US$ 1.89 million for the stripped and unstripped Maroc Telecom cable. A contemporary email indicates that Scipion told Mr Cohen about the Mac Z indicative offer, and he said he would try to readjust his offer in order to be in line with the Mac Z one; adding that *"Scipion believes that these offer can be improved and are following up with them both."* Mr Cohen in his own cross-examination initially said that both his valuation and his July 2018 soft bid (unlike subsequent offers received by Scipion) were for the domestic market, but later in the cross-examination denied having said that and stated that his soft bid had been for the export market.

255. There are no disclosed documents showing Scipion's follow up with Mr Cohen. Mr Macdonald did not refer to the Petroforce offer in his witness statements. In cross-examination he said Mr Cohen ended up having quality issues with the cable; that he wanted evidence of an export permit before he would firm up on his offer; and that he, or rather Petroforce, required delivery FOB Antwerp. The latter point does not tally with the disclosed indicative offer from Mr Cohen, for delivery "*FCA MAC Z Plant Skirat Morocco*" with payment against documents, unless there was a revised undocumented or undisclosed offer from Petroforce.

256. As with Mac Z's July 2018 offer, Vallis does not contend that Scipion should have accepted Mr Cohen's offer, but it may be relevant to valuation.

(c) June 2019 offer

257. On or about 16 June 2019 a proposal was received from SV Overseas of Singapore to purchase the Maroc Telecom cable, described in a contemporary email as follows:

> - "Here is what we came up with, subject to our (Scipion) confirmation
>
> - He will take all we've got, steel and copper not removed, at LME – 1600
>
> - A trial container of 25 MT to be dispatched as soon as possible to the Philippines including the 384 kilos of wire with steel content stripped out, which is all we have on hand. Once Andreas has confirmed, we can finalize a contract
>
> - 10/20% down payment for the trial container, balance upon arrival in Manila, against documents remitted on a DC basis"

258. The LME price stood at about 6,000 at this time, so LME – 1600 was 4,400 i.e. about 73% of the LME price. The prospective purchaser made clear that price was on a CFR Philippines basis *"hence all costs till the consignment reaches Philippines are to the cost of the supplier"*. Mr Macdonald in his third witness statement dated 30 September 2019 said:

> "The cost of preparing (stripping) the cable for transit however would involve another 10-20% deduction, so that total offer is approximately US $3,840 per mt, equating to an offer of approximately US $75,000 to US $100,000."

and, with reference to both this proposal and the July 2019 proposal discussed below, added:

> "Neither of these sales has yet been advanced any further on the basis that [Scipion] hopes to receive a better price."

259. The post-stripping figure of approximately US$ 3,840 per mt would still be about 64% of the LME price. In cross-examination, Mr Macdonald said this was, however, no more than an expression of interest as regards the stock over and above the trial container. He continued:

> "A. … We were very excited when we saw this. In fact, this was an introduction to Scipion by myself so I was more excited than most, actually, but they were good enough to actually go out to Morocco and send a technical person out from China, actually, to go and inspect the site and look at the quality.
>
> But once they did that, the inevitable horse trading began, and it became very clear that they had quality issues with the stock, they were expecting Scipion to -- well, their hope was that Scipion would finance the acquisition of the stock by themselves, which of course was not appealing to us. They expected Scipion to bear the cost of delivery of the stock, so freight and insurance and whatever the processing, ie bagging

costs etc that would be incurred. Scipion to bear all that cost all the way to the Philippines which is a known risky jurisdiction, with a balloon payment of 95% of the price on delivery in the Philippines.

…

The processing costs will be higher because we require the cooperation of Mac Z/Adnane Lamdouar to procure an export permit for this material, which is not assured because there is a restriction on export of unprocessed Maroc Telecom because of environmental issues. I think this whole discussion is a completely moot point. I think unless the telecom is processed, stripped, granulated in country, you will not get it out of the country. I think it is a completely moot point.

So these discussions -- and they were nothing more than discussions, they were not a firm offer, they were an indicative offer -- with this Intramex crowd would have inevitably fallen over.

…

So my position, not as a commercial person, but as someone who distils information from commercial people in my team, is that this offer was fantasy. It would never have arrived. We would no doubt have sold this stock in the Philippines and run the very grave risk that the stock goes missing and we receive 5%, and I would be sitting here today, having this discussion, saying: why have we been so neglectful with valuable stock that could have been sold for a better price, for the money, and to reduce the loss of your client."

260. Self-evidently this evidence was a substantial addition to, and indeed departure from, Mr Macdonald's witness statement, which had said merely that Scipion hoped to receive a better offer. Mr Macdonald accepted that his witness statement was *"deficient"* in this respect, but insisted that *"What I can tell you now is this offer went no further, and it went no further for all the reasons I have elaborated, and there may be others."*

261. On the specific question of export permits, Mr Cohen's evidence was that it is *"almost impossible"* to export unstripped Maroc Telecom cable because it is considered as a dangerous waste material. He referred to, and exhibited to his written answers to questions posed by Vallis's solicitors, Moroccan Decree No. 2-07-253 relating to the classification of waste and establishing a list of hazardous waste on which is included, at section 17.4.10, "*cables containing hydrocarbons, tar or other dangerous substances*". Mr Cohen did not provide the substantive provisions for the purpose of which this list is established, but in his written answer said *"It is not clear if the Maroc telecom stock falls into this category. To obtain export authorization especially from a*

foreign company (Scipion is holding the stock) to export the material is not easy." He agreed in cross-examination that he was not an expert in Moroccan law, but said as a trader he should be aware of export restrictions and *"I found out that it was very difficult, almost impossible to export it"*. Ms Campbell said in cross-examination that she was not in a position to say that Mr Cohen's evidence was wrong on this point. Both valuation experts valued Maroc Telecom cable for a domestic sale. I conclude that the unstripped Maroc Telecom would be difficult to export.

262. Nonetheless, Scipion's evidence in relation to the June 2019 proposal is unsatisfactory. That is so both because of the change in Mr Macdonald's evidence from his witness statement to his oral evidence, and because of the lack of documentation. As Vallis points out, the June and July 2019 offers seem very likely to have formed part of a wider email correspondence which has not been disclosed by Scipion; nor has Scipion disclosed any internal evaluations of the proposals, or subsequent communications with the bidders to reveal why these sales did not ultimately go ahead. It would be surprising if none of the numerous problems about the June 2019 offer put forward by Mr Macdonald in his oral evidence quoted above had appeared in contemporary emails or other documents. As it is, Mr Macdonald's testimony on this point cannot be corroborated by reference to the documents, nor is there corroboration from other witnesses.

263. Having seen and heard Mr Macdonald give evidence, I do not consider he was telling anything other than the truth as he saw it, but (as I have already noted) he was prone to adopt a position of advocating Scipion's case when giving evidence, and there is a risk that his feelings about this case have led him to overstate matters. Viewing the matter in the round, and taking account of the export licence problem, I do not consider that Vallis has established that Scipion failed to mitigate by not following through with the June 2019 offer, or that that proposal if followed through would have led to a successful sale. At the same time, I consider that I should treat Scipion's evidence in relation to this issue in general (efforts to dispose of the Maroc Telecom stock) with a degree of caution.

(d) July 2019 offer

264. In July 2019, another third party expressed interest in the Maroc Telecom cable, and Scipion tried to improve the proposal by telling the third party about the June 2019 proposal. The July 2019 third party indicated that *"We can bid 790 € (885 $) pmt delivered on truck to Lyon valid COB today"*.

265. In his third witness statement, Mr Macdonald explained that as the gross weight of this scrap was 1,133 mt, it was assumed that transport costs would be US$3,000 per truck for approximately 46 trucks carrying 25mt each, giving a total of US138,000. The offer value net of transport costs was therefore US$864,705. At the then prevailing LME price of USD 5,874 (3 July 2019), that equated to 15% of the LME price.

266. In his oral evidence, Mr Macdonald said:

> "Q. And that would -- when you take into account transport, that
> would get you $864,000-odd?

> A. Yes, it looks good on its face, but it faces the same problems, sir, because this is delivery at Lyon, so we would have all the costs of delivery at Lyon, and all the risks associated with that.
>
> Q. You have taken into account transport cost of $3,000 per truck. So that is taken into account.
>
> A. I am sure there will be other transport costs, sir, and then there will be insurance. And then there will be -- I do not recall the balloon payment was as severe on this one, but it was still payment on delivery.
>
> Again, it is a completely moot point because unprocessed Maroc Telecom cannot be exported"

267. On the topic of exporting material, Mr Macdonald added this:

> "A. I think what you see in my witness statement is that we have tried to mitigate the position by my second trip to Morocco in April --
>
> Q. April which year?
>
> A. 2018. I went along to see His Excellency Thomas Reilly, the UK ambassador to Morocco, to explain the predicament that we have.
>
> Q. Just pausing there, April 2018 would be what, that is almost 20 months ago?
>
> A. Absolutely. He is a busy guy so we don't get a regular audience, but we put it on his radar that we have this difficulty of getting this stock, which is very low-grade stock that requires a lot of processing, out of the country to try to monetise it. We explained the difficulty and it was, you know, we have done what we can to get around the legal regime that exists in Morocco."

268. Mr Cohen regarded the July 2019 offer as a very low one, and based on the expert evidence to which I refer below I consider that it was a low offer. In the light of this, and the difficulty about exporting unstripped Maroc Telecom scrap, I conclude that Vallis has not shown that Scipion ought to have accepted this offer.

(e) MTB offer

269. The documents include an undated document headed *"MTB Offer Summary"* in which it is evident that Scipion was evaluating an offer from a French recycling company for stripped and unstripped Maroc Telecom cable to be shipped to Marseilles. At the values stated in this document, the offer was to purchase unstripped cable at around 24.4% of LME price and the stripped cable at around 62.5% of LME price, representing a total offer of approximately US$ 1.8 million. Mr Cohen agreed that after transport costs the proposal involved paying about 23.8% for the unstripped cable.

270. Mr Macdonald did not refer to this proposal in his witness statement. His evidence in cross-examination was, at first, that he believed there had been a commercial discussion but could not confirm whether there was an offer. A short time later he said *"No firm offer has been received. No viable, bankable offer has been received. The economics have all been deficient."* It is unclear in what respect the economics were deficient, as Mr Macdonald accepted that an offer for US$ 1.8 million would be well in excess of the current value of the material as calculated by Mr Cohen, viz US$877,000. However, Mr Macdonald also stated that the proposal was not accepted due to:

> "Again difficulties no doubt with the quality of the Maroc Telecom; difficulties exporting; difficulties, if not impossibility, of exporting the Maroc Telecom; and the rest, I cannot really shed any light on other than I am sure this would have been just a talking point. It would have been a negotiating point"

(f) Overall position on offers received

271. Vallis alleges that in order to mitigate its loss Scipion should have accepted the June 2019 or July 2019 offer. For the reasons given above, Vallis has not established that to be the case. In addition, I do not consider Vallis has established its more general point that the mere fact that the Maroc Telecom cable remains unrealised now shows that Scipion has failure to mitigate. It was and is not easily realisable for the reasons outlined in §§ 248 and 249 above.

272. However, I have also drawn attention to the unsatisfactory nature of some of Scipion's evidence on this topic, including the surprising paucity of disclosed documents. There is a general lack of documents relating to Scipion's efforts to sell the remaining stock. As Vallis points out, Scipion has had internal and external advice during the whole litigation process, and for that reason alone one would expect attempts to sell to have been documented. Mr Cohen said he would have expected to see information being provided to potential buyers if Scipion were actively seeking bids. Communications with Mac Z also appear to have occurred by email. Moreover, there is a lack of documentation showing Scipion's consideration internally of the position, including minutes/papers of relevant committees, and of Scipion's communications with its investors about the position. I consider it likely that more documents, even leaving aside privileged documents, will have existed in relation to these matters but have not been located or produced. This factor is part of the context against which it is appropriate to assess the expert evidence as to the value of the remaining Maroc Telecom scrap, to which I now turn.

(g) Value of the remaining unstripped Maroc Telecom scrap

273. Both parties' valuation experts have valued this material on the basis of a sale on the domestic (i.e. Moroccan) market.

274. It is common ground that the Maroc Telecom cable can be processed into granules and sold at approximately 90% of the LME copper price.

275. In the opinion of Scipion's expert, Mr Cohen, the appropriate valuation method for this stock is 36% of LME copper price, to reflect the copper content of the cable, x 30% (i.e. a discount of 70% to the price of the copper content) to reflect processing costs.

That results in a value of 10.8% of the LME copper price. As at 4 December 2019, for example, that would value the remaining unstripped Maroc Telecom cable at US$ 728,160.

276. The opinion of Vallis's expert, Ms Campbell, is that the Maroc Telecom scrap should be valued at 27.5% of the LME price. Since Ms Campbell assumes essentially the same 35.9% copper content as Mr Cohen does, her valuation can be analysed as involving a discount of around 23%, compared to Mr Cohen's 70%, in respect of the processing costs. As at 4 December 2019, her approach would value the remaining unstripped Maroc Telecom cable at US$ 2,003,777.46.

277. I discuss the two experts' approaches in turn.

278. Mr Cohen in his first report, having explained the way in which copper is priced in the market in general, moves on to the copper scrap market in Morocco and explains that most of this is exported but that there is also a local recycling consumption. He says three local recyclers, one of which is Mac Z, buy copper scrap in order to melt inside induction furnaces to manufacture either semi-finished products in the form of granules or anodes, or finished products such as tubes and wires.

279. Specifically in relation to unstripped Maroc Telcom cable, he says:

> "The Maroc Telecom Cable stock is sold domestically and is valued at a lower percentage of 30% of the LME price. This is because the stock is not homogenous, the cables are very difficult to strip and the stock is mixed with iron and other hazardous materials. Maroc Telecom Cable stock is not exported so I have only provided the domestic value in this report."

280. It subsequently became clear that what Mr Cohen meant here was 30% of the LME price in respect of the copper content of the cables (around 36%), and therefore about 10.8% of the LME price. Mr Cohen's report did not state whether the 30% figure was based on observed prices (and, if so, in relation to what transactions) or was his own estimate (and, if so, how it had been calculated).

281. In his supplementary report, Mr Cohen said:

> "The Maroc telecom stock is not homogenous. The cables are mixed with aluminium and steel which makes more difficult the process to stripped them. I understand that the best quality cables from the initial stock were already stripped and consumed and the worst quality is what is remaining in the current stock.
>
> Scipion has sent me two offers they have received for those cables. These offers of $885 per MT and LME minus 1500 or 1600 are in line with my estimations.
>
> Miss Lesley Campbell is correctly benchmarking the price of this type of cable to the prices for similar quality in USA. However I don't think that prices in USA can apply to prices in Moroccan Market. In the local Market, as well as the offers

> Scipion has received, I have made confidential enquiries which confirm the prices are in line with my value estimation.
>
> I also noticed that in order to be exported this material needs an export licence which is not easy to obtain.
>
> From the offers Scipion has received and my confidential enquiries, the cargo appears to be perceived in the Market as a distress cargo, so it has a further discount. Plus there is also the freight cost, finance cost, logistic costs, and cost of Insurance to be included in order to export this material (assuming it can be exported."

282. The offers received by Scipion to which Mr Cohen referred were the June and July 2019 proposals discussed earlier. It is hard to see how the former bid could have been in line with Mr Cohen's estimate, and in oral examination in chief he clarified that those proposals were for export whereas his valuation (and his own soft bid for the stock) were for the domestic market.

283. As Scipion points out, Mr Cohen has direct experience of trading in the Moroccan market, and his evidence relates directly to the value of the stock on that domestic market. On the other hand, Mr Cohen's evidence cannot in my view be regarded as satisfactory. I have already made the point that he had himself made a bid, on behalf of his then employer Petroforce, for the very same stock: yet he made no mention of that fact in this report. Nor did he mention the July 2018 Mac Z proposal with which he was being invited to compete: a highly relevant proposal on Mr Cohen's approach, given that it was for the domestic market. In addition, Mr Cohen accepted that he had been informed, in the course of these discussions, that by an email of 24 July 2018 Scipion had told him Mac Z was offering 80% of the LME price based on a copper content of 40% (rather than 36%), thus equating overall to 32% of the LME price. That too would have been a material matter to mention and to consider as part of the valuation exercise.

284. There were other unsatisfactory aspects of Mr Cohen's evidence:

   i) He did not take account of the fact that Scipion and Mac Z had themselves priced the scrap, for the purpose of their own records under the CMA, as 88% of LME price on a copper content of 35.9%, equating overall to 31.6% of the LME copper price.

   ii) As mentioned earlier, Mr Cohen stated at first (in examination in chief) that his soft bid for the scrap had been for the domestic market, but later denied saying that and stated that it had been for export.

   iii) He disclosed in his report that he had purchased copper anodes and granules from Mac Z, but not that they were part of the CMA stock that he was being asked, as an expert, to value. His response was that he *"did not think it was useful to mention these details"*, having disclosed that he had a commercial relationship with Mac Z, and it was *"a very small world where everybody knows everybody"*.

iv) In answer to the question whether Mr Cohen was asked to help Scipion on a number of occasions, he replied that *"we had some communication, and we discussed the case on an off-the-record basis because we have a relationship, and we had in the past a commercial relationship, and I have a certain knowledge of the Moroccan market";* but then immediately appeared to contradict himself by stating that he had never discussed the case with Scipion.

v) When explaining his 30% estimate of processing costs, Mr Cohen said in cross-examination:

> "the 30% takes into account the potential loss because you can be in a situation where, for example, you have in this case 400 tonnes of copper, but when you process it you have losses in the process. When you melt that copper, you put this copper on the furnace, you make 3, 5, 6% losses and that has to be included in the 30% which is the processing cost."

Mr Cohen accepted that he made no mention of this point in his report.

285. Mr Cohen accepted that the July 2018 Mac Z offer (about 28.1% of LME price), his own soft bid (about 25.9% of the LME price) and the MTB proposal (about 23.8% of LME price after transport costs) were in the same range as Ms Campbell's valuation of 27.5%. However, he discounted the Mac Z bid on the basis that it was not a realistic offer, as *"Mac Z never bought the stock and was not even able to treat it, apparently"*; and the latter two proposals on the basis that the scrap was difficult or impossible to export.

286. Ms Campbell states that industry practice is for buyers of insulated telecom cable scrap to bid a significant discount, usually in the region of 30%, to the LME price applied to the total tonnage including the plastic insulation. She notes that the Vallis daily reports assumed a copper content of 35.9% which was then valued at 88% of the LME price (thus equating overall to 31.59% of the LME copper price), and states: *"I believe this is reasonable for a utility-grade telecommunications cable as it corresponds to my observations of bilateral contracts in the industry"*. She initially valued the unstripped stock at 30% of the LME price.

287. In her supplemental report Ms Campbell elaborates to a degree on her methodology, explaining that she has studied a number of bilateral contracts for similar material and looked at published data on cable with comparable specifications. As a result she first forms the view that 30% of the LME price was likely to be within the reasonable range for the Maroc Telecom cable although no specific third party data on its value, or on Moroccan domestic prices, was available.

288. Ms Campbell then takes on board Mr Cohen's point, made in discussions to prepare the Joint Memorandum, that the quality of the Maroc Telecom scrap appeared to be particularly variable. Having studied the data, she concludes that her assessment of the acceptable price range should be lowered from 30% as a mid point to 27.5% as a mid point. This figure is derived by analysing three qualities of comparable scrap, and discounting the material in the lowest band further than the copper content might indicate in view of the likely reduced profit margins. Ms Campbell adds that stripping telecom cable and selling the copper is a high volume low margin business, and that

buyers of such material generally have the equipment, expertise and staff to enable them to carry it out.

289. In cross-examination, Mrs Campbell accepted that:

i) she was not in a position to say whether Mr Cohen was wrong about the difficulty in exporting unstripped Maroc Telecom cable from Morocco;

ii) it is likely that a processor of Maroc Telecom cable in Morocco would be reliant on manual labour, bearing in mind that a new granulating machine might well cost US$1.25 million, but she was not able to help with the cost of manual labour to do the processing in Morocco;

iii) the domestic market in Morocco is very limited, and that she was not in a position to add to Mr Cohen's evidence that there are only three recyclers in Morocco (one of which is Mac Z) and that the market in Morocco is very different from the large and mature recycling market in the UK or Spain;

iv) the unstripped Maroc Telecom cable was a distressed cargo, and this would depress the price;

v) she had included pricing data for various unstripped cable in the exhibit to her supplemental report and had calculated the relative LME prices, which came out at an average of 12.9%, indicating that some of the prices for unstripped cable relative to the LME price can quite easily be in the range of 12% of the LME. However, this data was, Ms Campbell said, not representative of all cables that are traded, nor of the highest or the lowest, but a random sample that she took in order to help her to understand and to put in context the data that she had on the Maroc Telecom cable. She did not have enough information about the particular types of cable included in that list to be able to assume they were either similar to or dissimilar from the Maroc Telecom cable; and

vi) in the light of the foregoing considerations and having regard to her limited knowledge of the Moroccan market she could not say that Mr Cohen's 30% of 35.9% (i.e. 10.8%) valuation was outside the reasonable range of values for this product.

290. Ms Campbell agreed that copper granules (into which the scrap can be processed) should be valued at less than anodes or billets, and that 90% of the LME price was in a reasonable range for granules in Morocco. Her estimate of 27.5% of LME price assuming copper content of 35.9% meant paying about 77% of the LME price on the gross tonnage of cable. As a result, the processing costs to convert the cable into granules would need to be no more than 13% (of the LME price times the gross tonnage) in order for the process to be viable.

291. Whilst Ms Campbell was willing to accept that Mr Cohen's figure of 10.8% of the LME price was not outside the range of reasonable values for the product, it does not follow that it is the correct figure to apply, in the sense of being the value which on the balance of probabilities the court should find to have been established. Quite apart from the deficiencies in Mr Cohen's evidence that I have already mentioned, the basis on which he arrived at his 30% figure (in other words, a 70% discount from the LME price even

on the assumed copper content) has never been clearly elaborated. By contrast, Ms Campbell has sought to apply a methodical approach in arriving at her initial 30% figure and then in adjusting it downwards to 27.5% due to doubts about the quality of the scrap. In addition, Ms Campbell's figure is roughly in line both with the price the parties used when operating the CMA, as well as with (i) the two proposals put forward by Mac Z in July 2018, and with (ii) Mr Cohen's own offer and the MTB proposal, albeit only limited weight can be placed on (i) (given Mac Z's position) or (ii) (given that those proposals were apparently for export).

292. Further, in circumstances where Scipion's documentary and other evidence about its attempts to dispose of the Maroc Telecom cable is unsatisfactory in the ways I have outlined earlier, I am not inclined to reject Ms Campbell's approach on the basis that it represents a theoretical calculation rather than reflecting what Scipion could actually get on a sale of the cable.

293. In all the circumstances, I consider it right to treat Ms Campbell's 27.5% figure as a starting point, but to discount it to a degree to reflect the factors which she accepted could depress the price listed in § 289(i)-(v) above. Since it appears that not all of these factors have been taken into account in arriving at the 27.5% figure, it is logical to discount it some way towards the 12.9% figure referred to in § 289(v) above, but not all the way down to that figure because Ms Campbell was clear that that was not intended to be representative data set. It seems unavoidable, given the state of the evidence, that I must do this on a fairly broad brush basis, and in all the circumstances I can do no better than to take a figure roughly half way between those figures. I conclude, applying the considerations outlined above, that 20% of LME price is the appropriate value to attribute to the remaining unstripped Maroc Telecom stock.

(2) Lost granules in late October 2017

294. As discussed in §§ 51, 224.v)b) and 227-230 above, on 28 October 2017 Mac Z procured the removal of a further quantity of copper granules from the Site without authorisation. Scipion tracked the removed granules to the Port of Casablanca but did not manage to receive any of the sale proceeds, amounting to some US$ 700,000, from Mac Z.

295. Mr Clavel's oral evidence in cross-examination was that after discovering the removal, he had taken the next available flight (on a Sunday) to Rabat and made contact with the British embassy and the Swiss embassy. The latter called SGS and Panalpina, Swiss companies in the port of Casablanca, who stated the goods were in the port. Scipion was unfortunately unable to access the port itself. Mr Clavel suggested that a notice be sent to ESTA (a Russian offtaker and the proposed purchaser) to the effect that the cargos belonged to Scipion and the proceeds should be paid to no-one else. The documents indicate that a message was sent to Mr Lamdouar of Mac Z to that effect, but do not include a message to ESTA. However, Mr Clavel said he believed contact had been made with ESTA too, and was not challenged on that point. He added that he suspected ESTA had pre-paid for the goods and Mac Z was honouring their contract with ESTA. He later found out that the proceeds had been about US$700,000. Scipion subsequently negotiated with Mac Z with a view to recovering a percentage of that amount, but Mr Clavel could not recall whether anything was recovered.

296. I see no reason to believe that, having taken the trouble to fly Mr Clavel to Rabat and having taken the various steps indicated above, Scipion would not have done everything reasonably in its power to recover this stock. I do not consider it to have been established that Scipion was at fault by failing to mitigate in this regard.

(3) Anode sale in December 2017

297. As indicated in § 224.v)c) above, Scipion sold a quantity of anodes to Petroforce on 9 December 2017, from CMA stock. The documents are not entirely clear as to the exact tonnage, but Mr Macdonald in his third witness statement states that 107.784 mt were sold, and that quantity matches a release instruction given by Scipion to Vallis on 20 December 2017. 107.784 mt would have had a value as at 9 December 2017 of US$ 667,665.29 (95% of the LME price of US$ 6,530.50).

298. The documents indicate that on 13 December 2017 Mac Z told Scipion that it was selling 104mt for US$627,000, and was willing to deliver 85% of that amount or US$533,000 into the collection account. The documents also indicate that Scipion was willing to let Mac Z have a 'share' comprising the 15% difference between those sums, but only once certain mortgages had been registered: presumably referring to mortgages over real property which Mac Z had offered Scipion. It appears that Scipion's investors *"categorically refuse[d]"* to let Mac Z keep the proceeds of the granules taken on 28 October 2017 as well as 15% of the anodes proceeds without *"compensation"*.

299. However, it appears that Mac Z then contacted Mr Rogers of Scipion, whose recommendation was that Scipion accept Mac Z's position on this point. As a result, Mr Clavel of Scipion wrote to Mac Z on 18 December 2017:

> "In order for you to meet your contractual obligations to Petroforce, we will agree to the release against:
>
> 1. 85% of the money owed by Petroforce in the Collection Account at BMCE (108 MT)
>
> …
>
> Once you have shipped those we will re-visit how we move forward on the rest, e.g. switch of products, granules, etc …, once we have received evidence of the "redress decision" and appointment of a Syndic and generally more information on that process as Pierre has already discussed with you last Thursday."

300. In cross-examination, Mr Rogers of Scipion said:

> "A. Yes, that is what I say, and putting it into the context of continuing discussions with Mr Lamdouar, with Adnane Lamdouar, hopefully as a prelude to getting discussions going and putting together a recovery plan. Yes.
>
> Q. But on the face of it, we have a situation with a loan in default, correct?
>
> A. Yes.

> Q. With pledged stock remaining, proceeds of sale which Scipion is entitled to to defray the outstanding loan, and Mr Lamdouar is being allowed to keep 15%?
>
> A. Well, he is not being allowed to. I say -- my email reads that this is perhaps a reasonable consideration in the context of our ongoing discussions to get things unblocked. An awful lot has happened in the end of 2017. I do not want to get ahead of myself, but we will see in January and February, a lot more work was done to try to get the train back on the rails, and I do not say that this is the final word. ...."

301. It would be easy to criticise this, with the benefit of hindsight, as a mistaken recommendation and decision. However, having seen and heard Mr Rogers' evidence as a whole, I am satisfied that he was seeking to retrieve the best feasibly result from a very difficult situation. It is evident that he perceived this transaction as one where making a relatively small concession to Mac Z might in the longer term assist in getting 'the train back on the rails' and mitigating Scipion's overall loss. In all the circumstances, I am not satisfied that Vallis has shown a failure to mitigate in relation to this matter.

(J) CLAUSE 8.2 EXEMPTION

302. CMA clause 8.2 provides that:

> "In the event of bulk product, there shall be an exemption of all claims for the first 3 (three) per cent of the total quantity of product held in any one warehouse at any one time and, notwithstanding any other terms in [the CMA], [Vallis] shall not be liable for any indirect or consequential damages, including damages for loss of profits, incurred by [Mac Z], whether in contract or tort."

303. Vallis pleads that it is therefore entitled to *"an exemption for the first 3% of the total quantity of Goods and Product held at the Site"*.

304. Scipion submitted that the value of the Goods and Products that would, but for Vallis's breach of the CMA, have been at the Site pursuant to the CMA exceeds by more than 3% the balance due to Scipion under the Facility. As a result, the exemption of the first 3% does not affect or reduce the sums claimed by Scipion in this action. Further and in any event, Vallis had not pleaded any case as to the value of the exemption.

305. In its opening skeleton argument Vallis calculated the value of the exemption as being 3% of the value of the remaining stock as at 9 October 2017, i.e. 3% of US$4,089,482, or US$122,684. In its written closing it revises this approach, submitting that the exemption relates to 3% of all the copper scrap held at the CMA site, including the lost goods. On that basis, the exemption is said to be worth US$325,756, being the value of 59.117 tonnes.

306. It was common ground that the "*warehouse*" for these should be taken to mean the ordinary copper scrap held in the 'scrapyard', not including the Maroc Telecom scrap or works in progress.

307. Vallis submitted, and I agree, that clause 8.2 does not operate by making Vallis liable for the full loss once it exceeds 3% of the total goods supposed to have been present. It contrasts in that regard with clause 9.3, which provided that Vallis would not be liable *"if the quantity of goods and products lost or damaged due to unexplained reasons does not exceed 2%"*.

308. Scipion's point appears to be that the loss of the first 3% of the total goods would not have given rise to a liability (from which clause 8.2 would provide an exemption) in any event, because the total value of the goods immediately prior to the loss was more than enough – by at least 3% – to cover Mac Z's liability to Scipion. In other words, the loss of *"the first three (3) per cent"* was not causative in any event, so there is no relevant liability to which the exemption can apply.

309. Although this too is in my view a point of some difficulty, I have concluded that Vallis is correct. The *"claims"* from which clause 8.2 provides an exemption include claims for the loss of goods. The likely commercial purpose of the clause is, as Vallis submits, to cater for the fact that there are often likely to be shortages when dealing with bulk products, by in effect allowing the contractor (Vallis) relief from liability for the first 59 tonnes (in this case) of shortage. The *"first three ... percent"* refers, in the context of loss of goods, to the first portion of the lost goods. On Scipion's approach, Vallis would not in fact receive an exemption for the first 59 tonnes of shortage, because the exempt 3% would in effect be allocated to surplus goods that would not have been needed in order to secure Scipion's exposure to Mac Z. The exemption would confer no actual benefit on Vallis unless Scipion needed as security more than 97% of the goods in the warehouse. That should in practice rarely occur, since Mac Z was required to keep CMA assets (as a whole) of at least 125% of the outstanding debt (see § 30 above).

310. Another way of viewing this point is that on the footing that Scipion's primary claim is for the loss of the lost goods, based on Scipion's possessory rights to such goods, that claim must be regarded as qualified by clause 8.2 such as to relieve Vallis from liability for the first 3% of that loss. (It would make no sense, for example, to say the exemption should not bite so long as at least 3% of the original quantity of goods remained in the warehouse: Vallis would not then be receiving any exemption from the first 3% of lost goods.) On this approach, the application of clause 8.2 is clear, and the position under the Facility as between Scipion and Vallis comes into the picture only at the second stage, namely as a limit on the portion of the primary loss for which Scipion is entitled to claim without having to account to Mac Z for a surplus.

311. Accordingly, I conclude that Vallis is entitled to an exemption equal to the value of 3% of the goods that should be taken to have existed in the 'warehouse' immediately prior to the loss of the lost goods.

(K) CONCLUSIONS

312. For the reasons set out above Scipion's claim succeeds in part. It is entitled to recover from Vallis:

i) damages equal to the value of the lost goods as at 9 October 2017;

ii) subject to a deduction by reference to the value of the clause 8.2 exemption;

iii) together with statutory interest at a rate and basis, and on an amount, to be the subject of further argument;

iv) but subject to a limit represented by the amount now outstanding under the facility (including interest) net of recoveries received to date (those recoveries themselves being net of the collateral management fees and expenses referred to in §§ 222(iv)(a) and (b) and 237 above), less the value of the remaining goods and products including the remaining unstripped Maroc Telecom scrap valued at 20% of the LME copper price.

313. Given the complexity of the matter, I shall hear any further submissions as to whether any aspect of the summary set out in the preceding paragraph requires adjustment in the light of my findings as a whole.

314. I am grateful to the legal teams on both sides for their extremely lucid and helpful submissions.