IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Coutinho & Ferrostaal GmbH v. Tracomex (Canada) Ltd.,* 2015 BCSC 787

Date: 20150513
Docket: S116044
Registry: Vancouver

2015 BCSC 787 (CanLII)

Between:

Coutinho & Ferrostaal GmbH

Plaintiff

And:

Tracomex (Canada) Ltd., Metales Tracomex Limitada, Jorge Mitarakis, Pola Namias, Super H. Holdings Ltd., Westcan Rail Ltd.

Defendants

\- and -

Docket: S120939
Registry: Vancouver

Between:

Imbamar S.A.

Plaintiff

And:

Coutinho & Ferrostaal GmbH

Defendant

\- and -

Docket: S122034
Registry: Vancouver

Between:

0291633 Manitoba Ltd.

Plaintiff

And:

Tracomex (Canada) Ltd., Metales Tracomex Limitada,
Coutinho & Ferrostaal GmbH, and
Imbamar S.A.

Defendants

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

Counsel for Coutinho & Ferrostaal GmbH:	Alex L. Eged David W.P. Moriarty
Counsel for Imbamar S.A.:	Michelle Tribe Rosalie Clark
Counsel for 0291633 Manitoba Ltd.:	Kieran Siddall Scott Boucher
Place and Date of Trial:	Vancouver, B.C. May 26-30, June 3-6, August 18-20, 2014, January 12-14, 16, 19-22, 27-30, 2015
Place and Date of Judgment:	Vancouver, B.C. May 13, 2015

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1) Introduction

[1] These reasons arise out of three separate actions that were tried at the same time:

1) In action No. S116044, Coutinho & Ferrostaal GmbH, ("C & F"), a German company, has sued several defendants including Tracomex (Canada) Ltd. ("Trac Canada"), Metales Tracomex Limited ("Trac Chile"), Jorge Mitarakis and his wife Pola Namias. Mr. Mitarakis was the president of both Tracomex companies. C & F alleges that in "back-to-back" contracts dated July 22, 2009 and August 6, 2009 respectively. C & F first bought 3,560 metric tonnes ("MT") of used steel scrap rails (the "Steel Rail"), from Trac Canada and then sold the Steel Rail to Trac Chile. It was a term of those contracts that the Steel Rail be shipped from a storage yard in Abbotsford, British Columbia to a terminal or storage facility near Tacoma, Washington. It is alleged, *inter alia*, that the defendants provided C & F with 155 bills of lading and other documents that fraudulently represented that the Steel Rail had been shipped across the United States' border when that was not so. C & F seeks, *inter alia*, rescission of the contract it made with Trac Chile (the "Trac Chile Contract"). Mr. Mitarakis passed away prior to the trial of this matter, and neither the Tracomex companies nor Ms. Namias participated at trial.

2) In action No. S120939, Imbamar S.A. ("Imbamar"), a Uruguayan company, has sued C & F. It alleges that it was advised by Mr. Bernd Krause, who it argues was C & F's agent in Chile, that Trac Chile, rather than C & F, had title to the Steel Rail. Moreover, it says it was told by Mr. Krause that C & F was not only aware of the fraudulent nature of the bills of lading and other commercial documents, but that C & F had actually

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overseen and directed the preparation of such fraudulent materials. It argues that it relied on Mr. Krause's representations, *qua* agent for C & F, that it purchased the Steel Rail *bona fide,* and for value in the ordinary course of Trac Chile's business, and that title to the Steel Rail passed to it.

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3) In action No. S122034, 0291633 Manitoba Ltd. ("029") has sued each of the Tracomex companies, Imbamar and C & F. 029 alleges that it loaned money to Trac Canada. Those loans were never repaid. During the course of the trial, 029 discontinued its action against C & F and it obtained default judgment against the two Tracomex companies. 029 argues that the agreement made between Imbamar and Trac Chile for the Steel Rail is, in substance, a security agreement, and that 029's registration of its interest in the Steel Rail takes priority over Imbamar's interest in that rail.

[2] A number of factual and legal issues arise from these three actions and the pleadings that were filed in respect of them. Several of these issues were either conceded or abandoned during the trial. The primary issues which remain are:

i. What is the relationship between the *United Nations Convention on Contracts for the International Sale of Goods*, 11 April 1980, 1489 UNTS 59, [*Convention*] and either or both of the *Sale of Goods Act*, R.S.B.C. 1996, c. 410 [*SGA*], and the *Personal Property Security Act*, R.S.B.C. 1996, c. 359 [*PPSA*]?

ii. Was Mr. Krause the agent of C & F?

iii. Is rescission of the Trac Chile Contract available to C & F?

iv. Was Imbamar a *bona fide* purchaser for value of the Steel Rail without notice of C & F's interests, or did Trac Chile's sale of the Steel Rail to Imbamar occur in the "ordinary course of its business"?

v. Was the Imbamar Contract, in substance, a security agreement; and

vi. Did Imbamar abandon possession of the Steel Rail so that 029's registration of its interest in the Steel Rail took priority over Imbamar's interests?

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2) <u>An Understanding of the Parties</u>

[3] C & F is a German company that was formed in 2008 as a result of the merger of three existing entities. It is one of the largest steel trading companies in the world. It trades approximately 2.2 million metric tonnes of steel annually. It generates revenues in excess of $1 billion annually, and it has more than 300 employees. Approximately $200 million to $300 million of its annual business is conducted in South America. It has offices in various locations throughout the world, but it has no offices in South America and, in particular, in Chile.

[4] Mr. Mitarakis and Ms. Namias were the shareholders of each of Trac Canada and Trac Chile. In the years leading into 2009, Mr. Mitarakis had been involved in the Latin American scrap-metal business. Trac Canada was apparently formed to access approximately 20,000 MT of used scrap rail that Canadian Pacific had put up for bid. Trac Canada was successful in its bid for that rail.

[5] Imbamar is a relatively small company that was incorporated in Uruguay. It had three employees in Uruguay and one in Chile. It was formed in 2007 to explore opportunities in various businesses, including businesses involved in steel plates and rails. It was incorporated in Uruguay to take advantage of various tax efficiencies. Its shareholders were Mr. Bezmalinovic and Mr. Solar, each of whom lives in Chile and each of whom was a witness at trial. Each is entrepreneurial by nature and each has a history of involvement in various businesses.

[6] Mr. Bezmalinovic had significantly more experience in the used rail business, and he had been involved in the sale and purchase of new and used rail, through a company called Excedindus, for almost 40 years. Mr. Solar had no involvement with scrap steel prior to the formation of Imbamar, and he had had only limited involvement with rails.

[7] 029 is a Manitoba company whose principal shareholder is Mr. Lazarus. Mr. Lazarus is a gentleman, likely in his 70s, who at one time owned and operated a scrapyard in Winnipeg, another in Montreal and two in Newfoundland. He and Mr. Mitarakis became friends. 029 made a series of loans to Trac Canada which are evidenced by various promissory notes and agreements that I will return to.

3) <u>Background and History</u>

[8] The history which follows develops a chronology that is largely uncontested. There are numerous facts, relevant to particular legal issues, which I intend to address more fully in the context of those issues.

[9] At some point in April 2009, Mr. Krause, who resides in Santiago, Chile, contacted a Mr. Schwarzhaupt, who worked within C & F, and advised him that Trac Chile was looking for financing to acquire approximately 20,000 MT of used rail from Canadian Pacific. Trac Canada had entered into a contract to acquire this rail from Canadian Pacific in April 2009.

[10] The matter was referred to Mr. Doelle. Mr. Doelle was one of two C & F representatives who gave evidence at trial. His 25-year work history has focused on international banking, credit facilities and import and export transactions. He had been employed by one of the entities that were merged into C & F when that company was formed in 2008 and, at that time, he became C & F's Managing Director. He has since become its Chief Financial Officer.

[11] Mr. Doelle explained that under German law, German companies cannot lend money. Accordingly, Mr. Doelle advised Mr. Krause that C & F could not provide financing to Trac Chile. It was, however, prepared to enter into a "back-to-back"

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transaction if it could obtain "credit insurance" for that transaction. Each component of this evidence requires explanation.

[12] A "back-to-back" transaction is a set of two contracts that are concluded in tandem. C & F will, for example, acquire steel through one contract and then, almost simultaneously, enter into a second contract with a purchaser for that same steel. These contracts are concluded concurrently to avoid price risk. Approximately 90% of C & F's business is conducted through "back-to-back" contracts. Approximately 70% of such "back-to-back" contracts involve an export component, meaning that the steel in question crosses an international border.

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[13] The Federal Republic of Germany, in support of German businesses that are involved in international trade, provides export insurance through a legislated product. Thus, C & F, as is the case with many other German companies, has in place a general insurance policy for transactions that involve an export component. The mandated broker for this government programme is an entity called Euler Hermes. Such export insurance covers a variety of risks such as war, conversion of the insured product, or the insolvency or non-payment by a customer. It is an essential pre-condition of such insurance, as "export insurance", that the goods in question cross an international border. It is C & F's policy to endeavour to obtain export insurance for all transactions where such insurance is available.

[14] Thus, in this case, C & F eventually entered into "back-to-back" contracts with the following components and requirements:

i. On July 22, 2009, Trac Canada and C & F entered into a contract for the purchase of the Steel Rail. C & F purchased the Steel Rail for $1,134,856.80 CA. This equates to $318.78 CA per MT. Importantly, this contract also required that certain documents, including bills of lading and a certificate of origin, would have to be provided to C & F before payment was made to Trac Canada.

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ii. On that same day, C & F sold the Steel Rail to Trac Chile for $1,252,586 CA as per the Trac Chile Contract. Trac Chile was provided 90 days to make payment. Under the terms of the Trac Chile Contract, though Trac Chile had possession of the Steel Rail, title to the Steel Rail remained with C & F until the Steel Rail was paid for.

iii. It was a term of these contracts that the Steel Rail be transported to Tacoma, Washington. The reality is that the Steel Rail was never shipped to Tacoma, Washington and it had, instead, remained in storage yards in Abbotsford, British Columbia.

iv. As part of the transaction with Trac Chile, C & F required the company to sign a "pagare". The precise nature and legal effect of a pagare is an issue I will return to. The position of C & F is that it is a promissory note that merely evidences a debt. The position of Imbamar is that it is a negotiable instrument provided in substitution for a primary obligation. Thus, for example, Imbamar says that, in this case, when Trac Chile provided the signed pagare to C & F, C & F's ownership interest in the Steel Rail came to an end, and its ability to sue Trac Chile for its outstanding obligations was limited to the pagare and did not extend to any obligation contained in the Trac Chile Contract.

v. C & F obtained credit insurance for €800,000, or between $1.1 - $1.2 million US for the Trac Chile Contract.

[15] It should be noted that in this "back-to-back" transaction both the seller of the Steel Rail to C & F, and the purchaser of the Steel Rail from C & F, were related companies. Mr. Doelle accepted that this was unusual. He had only been involved in a handful of such transactions in the past. Mr. Doelle said, however, and I accept, that this aspect of the transaction was expressly brought to the attention of Euler Hermes and did not cause the insurer any concern.

[16] Throughout early August 2009, C & F received, through Mr. Krause, various shipping documents such as a master bill of lading and packing lists. It understood and believed, based on these documents, that the Steel Rail had been shipped to Tacoma. Nevertheless, Ms. Jansen, a C & F trading manager, who was charged with overseeing this transaction and who gave evidence at trial, required that C & F be provided individual bills of lading. Until then, all of Ms. Jansen's interactions with Trac Canada and Trac Chile had been through Mr. Krause. Ms. Jansen was then supplied with 155 individual bills of lading from Mr. Mitarakis and Mr. Ocampo.

[17] Mr. Ocampo is a Chilean financier, associated with an entity named South World Kapital, who had endeavoured to assist Mr. Mitarakis to obtain financing. It appears that it was Mr. Ocampo who introduced Mr. Mitarakis to Mr. Krause. The master bill of lading, the 155 individual bills of lading, a "packing list", a document known as a certificate of origin, as well as other materials, were all consistent with the Steel Rail having been shipped to Tacoma, Washington. At that point, C & F paid Trac Canada for the Steel Rail under the first half of the "back-to-back" transaction.

[18] Trac Chile did not make the November 2009, payment for the Steel Rail that was required of it under the Trac Chile Contract. C & F provided Trac Chile with a new payment proposal that would have had Trac Chile pay the amount it owed C & F in three installments by mid-February 2010.

[19] The reality is that the financial circumstances of Mr. Mitarakis and of the Tracomex companies were extremely strained. Unbeknownst to C & F or Imbamar, 029 had made a series of loans to Trac Canada over the period from December 2008 to March 2009. Thereafter, Trac Canada and/or Trac Chile had provided 029 with various general security agreements purporting to charge all or part of the Steel Rail located in Abbotsford, British Columbia.

[20] Furthermore, C & F was unaware that, in the latter part of November 2009, Mr. Ocampo, on behalf of Mr. Mitarakis and the Tracomex companies, had discussions with Mr. Solar about obtaining financing to assist those companies with their businesses and to repay money, which Mr. Solar was told that a German

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company had either provided to facilitate the purchase of the Steel Rail or had lent to the Tracomex companies. Mr. Solar was also told that Mr. Mitarakis and/or Trac Canada had the exclusive right to purchase further significant quantities of used steel rail from Canadian Pacific.

[21] The detailed discussions that Mr. Solar had with Messrs. Mitarakis, Ocampo, Krause and others about the Steel Rail, and about Imbamar financing or purchasing those rails, are central to several of the legal issues that I identified earlier.

[22] What is important, for present purposes, is that very early on Mr. Solar, and the individuals he had retained to assist him with the transaction, identified various serious difficulties and concerns with both the documentation that underlay the C & F transaction with Trac Canada and Trac Chile as well as with the shipping, customs and other materials that were thereafter produced by the Tracomex companies. Mr. Mitarakis and Mr. Ocampo confirmed to Mr. Solar that these documents pertained to a “fictitious transaction” – that they were fraudulent. They said, however, that the “fictitious transaction” or the “fictitious documents” had been created not only with the accedence of C & F but at its instance.

[23] Mr. Solar, before being prepared to move forward with any transaction with Trac Chile, wanted confirmation of these facts. He was directed by Messrs. Ocampo and Mitarakis to Mr. Krause who, he was told, was C & F’s agent in Chile. In subsequent meetings and conversations with Mr. Krause, Mr. Solar and others were told by Mr. Krause that:

i.) C & F had initially orchestrated a fraudulent transaction in order to obtain export insurance for the Steel Rail. They were told C & F knew that the Steel Rail had never gone to Tacoma, and was aware of, or had been involved in, the creation of the fraudulent bills of lading and other documents; and

ii.) C & F had never had title to the Steel Rail and that it’s transaction with the Tracomex companies was, instead, in the

nature of a loan and that, in any event, Trac Chile had paid off the loan with a pagare.

[24] Following these discussions and various further investigations, Imbamar and Trac Chile entered into a contract in mid-January 2010, though the execution of that document was only completed on March 3, 2010, (the "Imbamar Contract"). The Imbamar Contract provided, *inter alia*, that Imbamar:

a) purchased 3,496.29 MT of steel rail from Trac Chile, that was then warehoused at the facilities of Super H. Holdings ("Super H"), in Abbotsford, for the price of $462,494.40 US; and

b) Trac Chile could repurchase that same steel rail within 185 days for a purchase price of $554,993.18 US.

[25] In February 2010, Track Chile made a single payment of $100,000 US to C & F. In June 2010, C & F "protested" or sued on the pagare. In early 2011, C & F began to make a claim on its export insurance with Euler Hermes. Euler Hermes required additional confirmation that the Steel Rail had moved over the U.S. border. On June 8, 2011, Ms. Jansen made further inquiries with Whizdom International Freight Services Inc. ("Whizdom"), the shipper named on the bills of lading that Ms. Jansen had earlier received, and asked for additional confirmation that the Steel Rail had "crossed the U.S. border".

[26] Ms. Carberry, who founded Whizdom with her husband, and who gave evidence at trial, advised Ms. Jansen that the goods described in the bills of lading had never been shipped, and that the bills of lading were improperly dated and signed. At trial, Ms. Carberry confirmed that in May or June 2009, Mr. Mitarakis had come to her office asking about shipping steel to the United States. She had given him a sample bill of lading, and she confirmed that she had never signed the document or included much of the information on it. She confirmed that there were numerous errors in the bills of lading that had been sent to C & F. She said that the documents were "fraudulently completed," that Whizdom had never shipped any

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steel for Trac Canada or Trac Chile, and that she never saw Mr. Mitarakis again after that first meeting.

[27] Ms. Jansen advised her superiors of what she learned. C & F retained Vancouver counsel, and on July 6, 2011, counsel wrote to the Tracomex companies and others, putting them on notice of C & F's ownership of the Steel Rail. C & F commenced its action on September 12, 2011.

4) Changes in Position

[28] The position of Imbamar changed in several ways during the course of the trial. First, and importantly, it was originally the position of Imbamar that C & F had engineered a fraud, and that it had directed that numerous documents be prepared that misrepresented the nature of the transaction it had entered into with the Tracomex companies. One aspect of this falsehood or fiction was that the agreement entered into between C & F and the Tracomex companies was, in fact, a loan rather than two separate sales contracts. The second focus of this fraudulent enterprise was directed to obtaining credit insurance from Euler Hermes in circumstances where such credit insurance would not normally be available. Thus, C & F engineered the creation of documents which would make it appear that Steel Rail had crossed the Canadian border into the United States when it knew, at all times, that this was not so.

[29] This position was succinctly captured in the cross-examination of Mr. Araya, the solicitor who was retained by Imbamar to first investigate, and then document, its transaction with Trac Chile:

> Q I know you didn't know how to prove it, Mr. Araya, but you knew that those sales documents were false documents and you told your client that.
>
> A I told my client that they -- the documents were anomalous; that they were not regular documents or normal documents. And then when we had the meeting with Mr. Mitarakis and Mr. Krause we were told that those documents had to do with a sale that had not taken place. Whether the purchase order from Coutinho was false or not there was no way that I could determine that.
>
> Q Well, you were told that.

A Yes, I was told that.

Q And you discussed that with Mr. Solar.

A Yes, I gave the information that I had, the conclusion that I came to after reviewing the documents and after interviews.

Q And you also knew that what was really going on here was a loan, not a sale.

A That -- I was told that and it corroborated the documents -- it was corroborated with the documents I was studying.

Q That's right, because of all the inconsistencies in the documents that you've told us about.

A Yes.

Q The inconsistencies in the documents, combined with the statements from Mitarakis, Krause, Pitters and Ocampo, was what convinced you that there was no sale and that this was a loan.

A That's correct, yes. It was mainly because of the conversations I had with those people.

Q And that all these documents, false documents, were created so that Ferrostaal could get credit insurance or export insurance from Euler Hermes on its loan.

A That's what people say.

Q And that's what you understood and that's what you discussed with Mr. Solar.

A What I have for Mr. Solar, yes.

Q Sorry, I didn't hear the answer.

A For Mr. Solar, yes.

Q Yes. You reached that conclusion and you told that conclusion to Mr. Solar.

A Correct.

Q And Mr. Solar understood you?

A Correct.

Q I just want to be sure about the timing here, Mr. Araya. After the meeting with Mr. Krause your understanding was confirmed that many false documents had been created for the purpose of evidencing a sale, when really what was happening was a loan by Tracomex -- was a loan by Coutinho & Ferrostaal to Tracomex (Canada) so it could purchase the steel from CP.

A Yes. This operation created a loan and that is what the operation was about.

Q And your understanding was also confirmed that the reason this was being done was so Coutinho & Ferrostaal could obtain credit insurance from Euler Hermes on its loan to Tracomex (Canada).

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A It was -- what I understood was that it was for Coutinho Ferrostaal to be able to get an insurance that would pay in case-- in case that Tracomex didn't pay. I don't know if this is a problem matter of translation, but I can get any number of insurance policies if you want to see.

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[30] Similar conclusions are expressed in a report authored by Mr. Araya for Imbamar in January 2010 (the "Araya Report"):

> *5.3 Other Documents that Accompany the Operations.*
>
> 5.3.1 There are numerous documents provided by the seller Metales Tracomex Ltda. which indicates that they are part of the sales/purchase activities accounted for in the above mentioned invoices. However, a quick review of them led to conclusions showing a reasonable doubt with regard to the assertions of the seller, and the real relationship of the buying and selling operations; either because of their content, description of the operations, conditions of the delivery locations, measurements, weights, etc. These documents are described below together with their particulars, the main conclusions that can be drawn from them, and their relationship with the operations. The assertions of the Grupo Tracomex representative, Jorge Mitarakis Lopez and his financial consultant, Rodrigo Ocampo do not represent the truth of the events.

[31] This same theme is reflected in the evidence of Mr. Solar who, on discovery, said:

> Q -- going into the meeting?
>
> A Yes. They told us that all these documents actually are not -- not part of a real sale, that actually we are talking about here about the loan of money from Ferrostaal to Tracomex (Canada) and that they use the — that Ferrostaal told them that they need to do this way, that induce them that they need to do this way in order that it should like -- it should like the export business in order that Ferrostaal can obtain insurance with Euler Hermes.

[32] The position that C & F was actively involved in a fraud was maintained by Imbamar throughout the trial and, indeed, in the final written submissions of Imbamar. This position was, however, abandoned on the last day of argument. The new position of Imbamar accepted that C & F was innocent of any fraud and that the

fraud, which is evidenced in numerous documents, had been undertaken by Messrs. Krause, Ocampo and Mitarakis. Imbamar continued to assert, however, that C & F was bound by the representations of its agent, Mr. Krause.

[33] I should say that it appears quite clear, on the objective record, that C & F was innocent of any fraud. I no longer need to review the evidence that supports this conclusion in any detail. It is clear, however, that Mr. Krause routinely misled C & F on his dealings with Mr. Mitarakis and that Mr. Krause was concurrently telling Imbamar's representatives, and others, one thing when he was telling C & F another. Two examples of this will suffice. Mr. Krause is said to have told Messrs. Solar and Araya in December 2009, and January 2010, that C & F had no title to the Steel Rail. In his email communications to C & F in mid-2010, Mr. Krause reported that he had reconfirmed C & F's interest and ownership of the Steel Rail to Mr. Mitarakis. In December 2009, Mr. Krause is said to have told Messrs. Solar and Araya that C & F knew the Steel Rail had never left Canada. In an email dated May 18, 2010, Mr. Krause raises the prospect of the Steel Rail still being in Canada with C & F and questions whether those rails had, perhaps, been returned to Canada from the United States by Trac Chile.

[34] Apart from accepting that C & F was innocent of any wrongdoing, Imbamar's position recognizes, as a fact, that Imbamar, in interacting and negotiating with Messrs. Ocampo, Krause and Mitarakis, knew these three individuals had been involved in and/or been prepared to proceed with a fraud. This recognition is also significant. It means that i) in addressing Mr. Krause's status as agent and ii) in assessing whether Imbamar acted "*bona fide*", or whether Trac Chile's interactions with it were "in the ordinary course of business", the starting point is that Imbamar knew that Messrs. Ocampo, Mitarakis and Krause were not honest individuals and that they were, at a minimum, prepared to be complicit in a fraud.

[35] Further, the acknowledgment that C & F was not part of any fraud means that the intended focus of the fraud shifts from C & F improperly trying to obtain export

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insurance, to C & F being duped into making a payment to Trac Canada, and to allowing Trac Chile to take possession of the Steel Rail.

[36] The second change in position on the part of Imbamar was more subtle. This trial was heard in three segments on May 26 to June 6, August 18-20, 2014, and intermittently from January 12 to 30, 2015. The early position of Imbamar, and the questions that were directed to C & F's representatives, seemed to recognize that a "fraud" had been intended. Certainly, the evidence of Mr. Solar, on discovery, was unequivocal.

> Q And I guess Mr. Krause also confirmed for you your sixth concern as expressed by Mr. Ocampo and Mr. Mitarakis, namely, that the whole purpose of the fabricated bills of ladings was to get credit insurance?
>
> A That's right.

[37] Over time, the emphasis from "fraudulent documents" appears to shift to "anomalous documents", or "strange documents", or "fictitious documents". Mr. Solar described various documents as "amateurish" or "Donald Duck" documents. Mr. Araya, at times, suggested that the documents contained errors, or that they were "poorly prepared" because the documents had been prepared "in a rush". There remained no doubt, however, that what was being discussed was a fraud or an intended fraud.

[38] I say "intended fraud" because this reflected the third shift in the focus of the evidence at trial. Imbamar's last two witnesses were Messrs. Solar and Araya. They testified that at a meeting on December 24, 2009, which several other individuals also attended (the "December 24 Meeting"), Mr. Krause showed them an email that had apparently been authored by Ms. Jansen. Messrs. Solar and Araya said that the email was in English and that Mr. Krause translated the email for them. Each of Messrs. Solar and Araya can read some English, and they said that they followed along as the email was being read to them. The email directed that the bills of lading, certificate of origin, and other documents that had been prepared, were not to be used in any way or shown to any third party. Mr. Solar said that after reading the

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email he understood, and Mr. Krause said, that C & F's planned action – the fraud – had been "aborted".

[39] No such document from Ms. Jansen was ever produced, and I do not accept that Ms. Jansen ever authored such a document. The proposition that Ms. Jansen had prepared such an email was never put to her. The communications between Mr. Krause and Ms. Jansen were overwhelmingly in German, not English. Furthermore, the contents of the email make no sense. The fact is that the fraudulent documents that Trac Chile had provided to C & F were delivered by C & F to Euler Hermes, and that C & F did thereafter obtain credit insurance. Finally, Imbamar's acceptance that C & F, and Mr. Doelle and Ms. Jansen, did not participate in any fraud is inconsistent with Ms. Jansen having authored such an email. There would be no basis for her to direct that such documents not be delivered or disclosed to third parties.

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[40] I do accept that Messrs. Solar and Araya were shown some document by Mr. Krause, which purported to be an instruction from C & F not to show the fraudulent materials to any third parties. The Araya Report refers to Mr. Araya having been shown such an email, albeit without any reference to Ms. Jansen. As a matter of inference, that email appears to have been part of the rather elaborate fraud that Mr. Mitarakis and Mr. Krause engaged in.

[41] The early parts of Imbamar's case said nothing about the intended fraud having been "aborted". When Imbamar still advanced the thesis that C & F had orchestrated a fraud, it was never suggested to C & F's witnesses that they had abandoned or aborted their intended fraud. Such evidence was also not referred to by earlier Imbamar witnesses and it is, in fact, inconsistent with their evidence. Still further, it is somewhat inconsistent with other objective evidence. In an early email from Mr. Ocampo to Mr. Solar dated November 28, 2009, Mr. Ocampo indicates that he had obtained a "Hermes-backed line of credit for Tracomex". In a January 3, 2010, email from Mr. Solar to his partner, Mr. Bezmalinovic, which would have been written on the heels of the December 24 Meeting, Mr. Solar reports:

> As regards to the funny B/L's and the "strange operation" of exporting the rails from Canada to the US they undertook, he told me that it was done under instructions from his superiors in Germany, because all their operations have to be insured by Euler Hermes, with standard export insurance to ensure that they are not incurring any risks…

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[42] Mr. Solar concluded the email with links to Euler Hermes' websites. There is nothing in this portion of the email, or in the balance of the email, which suggests that the intended use of the fraudulent documents was "aborted". Indeed, the document is far more consistent with Mr. Solar understanding that those documents had, in fact, made their way to Euler Hermes.

[43] What remains is some discomfort with the evidence of Messrs. Araya and Solar and, in particular, with those aspects of their evidence that emphasized the importance of both the Jansen email and of the Araya Report to Imbamar's decision to acquire the Steel Rail.

[44] It is clear, and not disputed, that the evidence relating to the Jansen email and the Araya Report were unknown to Imbamar's counsel until relatively late in the trial. The Araya Report was only produced after the second adjournment of the trial and after more than two-thirds of the evidence at trial had been adduced. It was never referred to by Mr. Solar during his examination for discovery. Furthermore, neither Mr. Bezmalinovic nor Mr. Pitters, both of whom gave evidence before Messrs. Solar and Araya, made reference to either the Jansen email, or to any instruction from C & F that the intended fraud was to be "aborted" or to the Araya report.

[45] I do not say that Messrs. Araya and Solar were dishonest as it relates to these issues. Mr. Araya is a lawyer in Chile and I do not consider that I need to make any adverse findings on his credibility. I will address Mr. Solar's credibility on other issues separately. I do consider, however, that both individuals sought to downplay, or make benign, the nature of the fraud that they had discovered. Both were reluctant to acknowledge the true nature of some of the documents that underlay the transaction between C & F and the Tracomex companies. The bills of

lading, for example, were not "an error", or "anomalous", or "childish" documents, or the product of either a lack of care or undue haste. They were completely fraudulent documents that contained forged signatures, false information, reflected transactions that had never occurred, and were intended to perpetrate a fraud on C & F. The ongoing unwillingness of Messrs. Solar and Araya, and indeed Mr. Bezmalinovic, to acknowledge these and other similar documents for what they were, and to overstate the importance of other materials, has affected my assessment of their evidence.

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5) _The United Nations Convention on Contracts for the International Sale of Goods_

[46] Counsel for C & F argues that, under the Trac Chile Contract, C & F retained title to the Steel Rail at all times. He further argues that because the Trac Chile contract was made subject to the *Convention*, and because the *Convention* does not protect the rights of third-party purchasers, even if such purchasers acted in good faith and without notice of any defect in title, it does not matter whether Mr. Krause was C & F's agent or what representations he may have made to Imbamar. Counsel argues that the reservation of title clause in the Trac Chile Contract, under the *Convention*, supersedes all such concerns. Counsel accepts that the interaction between reservation of title clauses and the *Convention* with domestic Sale of Goods or Personal Property Security legislation has not previously been expressly addressed by a Canadian court.

[47] The Trac Chile Contract contains several relevant terms. Clauses 5.1 and 5.2 under the heading "Retention of Title" state:

> 5.1 The Product shall remain the property of the Seller until full payment of the price has been received by Seller to his unrestricted disposal. Until _title_ passes the Buyer shall hold the Product _in trust for Seller_.
>
> 5.2 In case the above _reservation of title_ is not effective according to the law of the country wherein the Product is located, a security corresponding to the _reservation of title_ shall be deemed agreed upon. ... During the period of the _retention of title_ the Buyer shall on his own maintain the Product and insure the Product _for the benefit of the Seller_ against theft, breakage, fire, water and other risks. Buyer shall further take all measures to ensure, that Seller's title is in no way prejudiced or impaired.

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> [Emphasis added.]

[48] Clause 12.1 provides:

> This Contract shall be governed by and construed in accordance with the United Nations Convention on Contracts for the International Sales of Good [*sic*]…

[49] Canada, Chile and Germany are all "Contracting States" under art. 1 of the *Convention*. Section 3 of the *International Sale of Goods Act*, R.S.B.C. 1996, c. 236, [*ISGA*], states that the "Convention applies in British Columbia" and appends the *Convention* to the *ISGA* as a schedule.

i) *Romalpa* Clauses

[50] Clause 5.2 of the Trac Chile Contract, which speaks of a "reservation of title", requires some further description. Such clauses, within international commerce, are known as *Romalpa* clauses.

[51] A succinct summary of the legal nature on attributes of *Romalpa* clauses is found in M. Bridge et al, eds, *Benjamin's Sale of Goods*, 8th ed. (London, UK: Sweet & Maxwell, 2010):

> 5-141 *Romalpa clauses*. Reservation of the right of disposal of the goods greatly increased in importance as the result of the decision of the Court of Appeal in *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd*. … The Court of Appeal held that, by virtue of the relationship of bailor and bailee, and as expressly contemplated in the claimants' conditions, a fiduciary relationship arose and the claimants were entitled to trace and claim the proceeds of the sub-sales in priority to the general body of the defendants' creditors and in priority to the defendant's bankers under their debenture. As a result of this decision, it has become extremely common for sellers to insert in their standard conditions of sale a *Romalpa* clause which, as a minimum, stipulates that the seller is to retain ownership of the goods until payment of the price, but which may contain more extensive provisions.
>
> 5-142 Since *Romalpa* clauses may take many forms, and since the case-law on their validity and interpretation has become progressively complex and refined, this area of the law is, in the words of Staughton J., "presently a maze if not a minefield". It will therefore be necessary to consider separately the various provisions that may be inserted in such clauses.
>
> [Footnotes omitted.]

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[52] In Canada, no such priority is given to *Romalpa* clauses. Instead, security interests are broadly addressed within the framework of the various pieces of provincial Personal Property Security legislation. This is confirmed in G.H.L. Fridman, *Sale of Goods in Canada*, 6th ed. (Toronto: Thomson Reuters Canada Ltd., 2013) at 291 [Fridman*, Sale of Goods*]:

> In England an attempt was made, in *Aluminium Industrie Vaassen B.V. v. Romalpa Aluminium Ltd.*, to create another way of protecting an unpaid seller in the event of the buyer's insolvency. This turned upon the inclusion in the contract of a "reservation of title" or similar clause. The approach that was adopted in that decision has not been followed in Canada.
>
> Provincial legislation has dealt with the problem of providing unpaid sellers with protection in the event that a buyer becomes insolvent, or disposes of the goods to a third party … in all provinces and territories by a Personal Property Security Act …
>
> [Footnotes omitted.]

ii) The Focus of the *Convention*

[53] Counsel for C & F argued that because C & F and Trac Chile agreed that their relations should be governed by the *Convention*, the retention of title clause in the Trac Chile Contract operates regardless of the existence of any potential third-party purchaser rights whether *bona fide* or not. Counsel argues that the *Convention* is notable because it does not codify the doctrine of *nemo dat quod non habet* or any of its exceptions. As such, it is argued that there is no means for a third party to obtain title to goods under the *Convention*.

[54] This is only partly correct. It is true that the *Convention* does not address third-party rights. Its focus is on the "formation of the contract of sale and the rights and obligations of the seller and buyer arising from such a contract"; see *Castel & Walker: Canadian Conflict of Laws*, loose-leaf, 6th ed. (Markham, Ont.: LexisNexis, 2005) vol. 2 at 31-30; see also *Convention*, art. 4. This does not, however, necessarily mean that a vendor who has "retained" title is immune from competing third-party claims. Fridman, *Sale of Goods* at 398-399, states:

> In light of the paucity of the case-law on this subject, it is difficult to do more than put forward tentative views. For this purpose, it may be necessary to differentiate claims to goods as between seller and buyer from claims to

> goods as between either of the parties to the original contract of sale of goods and some stranger, for example, a *bona fide* purchaser for value without notice of the prior contract, or the rights of the unpaid seller.

iii) The Interaction of *Romalpa* Clauses, The *Convention* and Domestic Law

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[55] Fridman, *Sale of Goods* at 400, further states:

> Where a third party is introduced, for example, where goods sold by S to B are then sold by S to X while S is in possession of them, despite the passing of property to B under the contract of sale, or where title is reserved in S but B has possession and purports to dispose of the goods to X, the question arises whether such third party acquires title as against B or S respectively, on the assumption that he would under one system of law, such as *lex situs* of the goods, but not under another, for example, the proper law of the original sale to B, the proper law of the contract between S and X or B and X, or the law of the original *situs* of the goods, where they have been moved between the time of the first transaction and the time of the subsequent sale by S or B to X. One view was that a title acquired by the *lex situs* (or the proper law if the *situs* is casual or unknown) will be good until displaced by a new title "acquired in accordance with the law of the country to which [the goods] are removed." The cases seem to suggest that, where divesting of title is concerned, for example, by seizure by creditors, stoppage *in transitu*, resale by the seller, and, where appropriate, by a sale in market overt, the *lex situs* governs, whatever the proper law of the original or any subsequent transaction may have been. If the seller in one country has reserved title in himself, a sale by the buyer in another country under the local law which does not recognize the reservation in the other jurisdiction, or has an overriding effect, thereby creating a title in the innocent third party, may effectively destroy the original seller's title. To determine the result, much may depend upon whether the court of the forum gives extra-territorial effect to the law of the original *situs* of the goods, in regard to the reservation of the seller's title, or gives paramount effect to its own law.
>
> [Footnotes omitted.]

[56] In Clemens W. Pauly, "Is Avoidance Under CISG Article 64 A Powerful Remedy? Comparison of The CISG Remedy With Third-Party Rights" (2004) [unpublished, archived at Pace Law School: CISG Database], online: <http://cpauly.com/wp-content/uploads/2011/12/CISG-essay-Pauly-October-2004.pdf>, the author addresses the interaction between retention of title clauses and third-party rights directly. The author also advances the following conclusions:

i) The *Convention* likely does not govern the rights of third parties who are not parties to the contract at issue (at 11);

ii) The effectiveness of title retention clauses "must be measured against the laws of the jurisdiction to which the goods have been delivered" (at 12); and

iii) The validity of title retention or *Romalpa* clauses are not governed by the *Convention*. Instead, domestic law governs the validity of such clauses (at 13).

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[57] The author thereafter addresses such clauses, and their efficacy, in each of the United States, Germany and France. Based on the case law reviewed, the author concludes that in Germany and France title retention clauses supersede the interests of third parties, in the United States they do not; at 15, 18.

[58] The efficacy of cls. 5.1 and 5.2, and of title retention clauses generally, as against intervening third-party rights, appear to be governed by the location of the Steel Rail or, in this case, the laws of British Columbia. This is consistent with the conclusions of the Pauly paper and with the "tentative views" of Professor Fridman in *Sale of Goods*. In addition, the opening words of cl. 5.2 are "[i]n case the above reservation of title is not effective according to the law of the country wherein the Product is located", thereby again directing or focusing the inquiry to the laws of this jurisdiction.

[59] Section 4 of the *ISGA* provides, "[i]f there is a conflict between this Act and any other enactment this Act prevails". The *Convention* does not, as I have said, expressly address either third-party rights or the efficacy of title retention clauses. Accordingly, to the extent that either the *SGA* or the *PPSA* address the rights of third-party purchasers in various circumstances, no "conflict" arises as between these enactments and the *ISGA* or the *Convention*.

iv) Is the Trac Chile Contract and/or the Title Reservation Clause Governed by the *PPSA*?

[60] I have focused on the *PPSA* rather than the *SGA* because it was this legislation that counsel for Imbamar relied on. The *PPSA* is drafted broadly to

capture conditional sales agreements as well as agreements that engage trust concepts:

> 1(1) In this Act:
>
> …
>
> *"Collateral"* means personal property that is subject to a security interest;
>
> …
>
> *"security interest"* means
>
> (a) an interest in goods, chattel paper, investment property, a document of title, an instrument, money or an intangible that secures payment or performance of an obligation, but does not include the interest of a seller who has shipped goods to a buyer under a negotiable bill of lading or its equivalent to the order of the seller or to the order of an agent of the seller, unless the parties have otherwise evidenced an intention to create or provide for a security interest in the goods, and
>
> …
>
> 2(1) Subject to section 4, this Act applies
>
> (a) to every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral, and
>
> (b) without limiting paragraph (a), to a chattel mortgage, a conditional sale, a floating charge, a pledge, a trust indenture, a trust receipt, an assignment, a consignment, a lease, a trust, and a transfer of chattel paper if they secure payment or performance of an obligation.

[61] When determining whether a particular interest falls within the scope of s. 2(1) of the *PPSA*, the court looks to the substance of the transaction (rather than its form), as revealed by: its purpose, the relationship between the parties, the practicality and commercial reality and the intention of the parties; *Manning Jamison Ltd. v. Registrar of Travel Services*, 1999 BCCA 185, at paras. 26-27. If it is sufficiently akin in substance to one of the enumerated interests in 2(1)(b), then it is considered to be a security agreement and will be governed by the *PPSA*; *Contech Enterprises Inc. (Re.)*, 2015 BCSC 129, at para. 61; rev'd on other grounds, 2015 BCCA 99.

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[62] The *PPSA* expressly identifies that, if used to secure payment, both conditional sales agreements (described as "an agreement by which a seller retains title to goods until the buyer pays the full price for the goods" in *In the Matter of the Bankruptcy of Anderson's Engineering Ltd.,* 2001 BCSC 1476, at para. 84), and trusts (considered in *Manning Jamison*), are security interests. These attributes capture the substance of the title retention clause and, as such, that clause would constitute a "security interest". I note that counsel for C & F accepted that the title retention clause in the Trac Chile Contract was in the nature of a conditional sales agreement.

v) Interests Under the *PPSA* that are not Registered

[63] Security interests, under the *PPSA,* are only enforceable against third parties if they have attached. Under s. 12, a security interest generally attaches when value is given, the debtor has rights in the collateral and the interest is enforceable under s. 10. Section 10(1) states, for example, that a security interest is only enforceable against a third party if:

> (d) the debtor has signed a security agreement that contains
>
> (i) a description of the collateral by item or kind, or by reference to one or more of the following: goods, investment property, instruments, documents of title, chattel paper, intangibles, money, crops or licences, …

[64] If a security interest has attached, it can also be perfected through other mechanisms set out in the *PPSA,* such as registration or possession, and then, once perfected, it would generally take priority over attached but unperfected interests; *PPSA*, ss. 19, 35.

vi) Conclusion

[65] *Romalpa* clauses generally establish that a seller retains title to goods covered by the clause and that the buyer of the goods holds them on trust for the seller; see *Benjamin's Sale of Goods* at 5-141 – 5-142. *Romalpa* clauses are not expressly recognized in Canadian law but, rather, are addressed under various provincial *Personal Property Security Acts*; Fridman, *Sale of Goods* at 291.

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[66] The substance of cls. 5.1 and 5.2 of the Trac Chile Contract create a security interest as defined in s. 2(1) of the *PPSA*; *Manning Jamison* at para. 26; *Contech* at para. 61; *Anderson's Engineering* at para. 84. They are therefore governed by the *PPSA.* C & F would need to establish that the Trac Chile Contract meets the requirements of attachment, as set out in ss. 10 and 12 of the *PPSA*, before it was enforceable as against third parties and, in this case, Imbamar.

[67] Attachment, without perfection, provides some limited rights as against third parties; however, that protection is limited as against third-party buyers of goods; *PPSA*, ss. 20, 30(2).

[68] Both the *SGA* and the *PPSA,* broadly speaking, seek to protect innocent third parties who purchase goods, either in good faith and without notice of any defect in title, or who do so in the ordinary course of the seller's business. These provisions are intended to enhance commercial certainty and are an essential part of the fabric of commercial activity in this jurisdiction.

[69] I do not, therefore, accept that either cls. 5.1 or 5.2 of the Trac Chile Contract or the *Convention* provide C & F with a right to rescission of the Trac Chile Contract that would be immune from any consideration of intervening third-party rights. Instead, I consider that the right to or remedy of rescission is circumscribed by either or both of the *SGA* and the *PPSA* to the extent that those enactments address the rights of third-party purchasers. Whether Imbamar falls within the relevant provisions of the *SGA* or the *PPSA,* in the circumstances of this case, is a separate question.

6) <u>Agency</u>

i) Imbamar's Position

[70] Imbamar argues that Mr. Krause was C & F's agent. This arises, it says, either expressly or impliedly from a letter agreement made between C & F and Mr. Krause on July 29, 2009, (the "Letter Agreement"), or by virtue of Mr. Krause's ostensible authority. If Mr. Krause was C & F's agent, C & F is bound, Imbamar argues, by Mr. Krause's various representations to it; see G.H.L. Fridman, *Canadian*

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Agency Law, 2d ed. (Markham, Ont.: LexisNexis Canada Inc., 2012), at para. 10.2, [Fridman, *Agency*]. Alternatively, Imbamar argues that it was reasonable for it to rely on what it was told by C & F's agent about the Steel Rail and, in particular, about the nature of C & F's interest in the Steel Rail. That, in turn, is relevant to determining whether Imbamar acted *bona fides,* and/or whether its transaction with Trac Chile took place in the ordinary course of Trac Chile's business.

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[71] The onus to prove that Mr. Krause had actual, or implied, or ostensible authority to act for C & F lies with Imbamar. To establish that Mr. Krause had ostensible authority to act for C & F, Imbamar must establish that C & F "deliberately, or intentionally, 'held out'" Mr. Krause as its agent; Fridman, *Agency,* at para. 3.24.

[72] Before addressing these alternative positions, I wish to turn to an initial matter that places these legal issues into context, and that prevents Imbamar from advancing the issue in the way that it wishes to.

[73] In the normal case, a principal is liable for the torts of an agent acting within the scope of their authority. This extends, for example, to an agent who, without the knowledge of his principal, but acting within the scope of their authority, makes a false statement that is intended to deceive; Fridman, *Agency,* at para. 8.10.

[74] This result aligns with the policy considerations that drive or underlie many issues of vicarious liability. In the leading case of *Bazley v. Curry,* [1999] 2 S.C.R. 534, those policy objectives, albeit in the context of master and servant, and in a non-commercial setting, are discussed at length. The Court in *Bazley* emphasized the need to work towards "a just and practical remedy"; at para. 29. Similar policy objectives underlie the vicarious liability of a principal for the acts of an agent who acts within the scope of their ostensible authority; *Thiessen v. Clarica Life Insurance Co.*, 2002 BCCA 501, at paras. 24, 36.

[75] Ultimately, these policy objectives align with the somewhat imprecise dictum in *Lickbarrow v. Mason* (1787), 2 T.R. 63 at 70, 100 E.R. 35, "wherever one or two

innocent persons must suffer by the acts of a third, he who has enabled such third party to occasion the loss must sustain it."

[76] I do not consider that the policy objectives which would normally support the liability of a principal for the acts of his/her agent have any place in circumstances where a third party purports to rely on the statements of an agent who the third party knows to be either dishonest or a fraudster. This extends, I would say, to those circumstances where the agent purports to have engaged in the fraud on the instructions of his or her principal.

[77] Simply put, Imbamar says it uncovered a fraud. It was then provided with various assurances by Messrs. Ocampo and Mitarakis, who it knew had been involved in some wrong. It did not fully trust these individuals, was dissatisfied with or unsure of what it was told, and it either asked to speak to Mr. Krause, *qua* the agent of C & F, or was directed to Mr. Krause by these two fraudsters. Mr. Solar gave the following answers at his examination for discovery about his meeting with Mr. Krause:

> Q Okay. Did you ask during the meeting who fabricated these documents?
>
> A I ask at the meeting. First I asked them who fabricated these documents and is it true. I asked Mr. Krause is it true that everything is done according to your instructions.
>
> Q Let's stick with the answer you got at the meeting --
>
> A Okay.
>
> Q -- about who fabricated them. Was there an answer to that?
>
> A They said -- they -- I mean, Mitarakis said that, "We did," but "we" was not clear, who is "we".
>
> Q So he -- you said, "Who fabricated these documents"?
>
> A And he says "we".
>
> Q Mr. Mitarakis says, "We did"?
>
> A Yeah, "We did."
>
> Q And you left it at that?
>
> A I asked them, I asked them again on the meeting who did that. He repeated that, "We did according to Ferrostaal instructions."
>
> Q So "we" included him, obviously?

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A Most probably, yeah.

Q He was part of the fraud, you understood?

A Definitely.

Q So before you purchased the steel you knew that there had been a fraud taken place involving the man you were purchasing the steel from?

A I was -- yes. Yes.

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[78] It is clear, on the whole of the evidence, that Mr. Solar understood, either that Mr. Krause had been involved in or had overseen this fraud, albeit, Mr. Krause said, at the direction of C & F. Thus, at a minimum, Mr. Solar also knew that Mr. Krause had been complicit in the intended fraud. I note, parenthetically, that the foregoing excerpt appears to be inconsistent with the fraud having been aborted. Even if, however, Mr. Solar was told that C & F decided to "abort" the fraudulent transaction, and to not make use of the fraudulent documents that had been created, this would not change things. Mr. Solar knew he was dealing with dishonest individuals who had been prepared to engage in a fraud.

[79] Apart from the fraudulent nature of the documents given by the Tracomex companies to C & F, there is significant other evidence of circumstances that should have cried out to Imbamar's representatives that they were dealing with dishonest individuals. Mr. Pitters' evidence, though he was not employed by Imbamar, was that Mr. Mitarakis was angry when he was asked for the documents that related to the C & F transaction. Mr. Araya's evidence was that Mr. Krause became angry when he learned that some of the fraudulent documents had been disclosed to Imbamar. Mr. Solar admitted that when he asked Mr. Krause to confirm, in writing, certain assurances or information that he had been given, Mr. Krause declined to do so. In May 2010, admittedly after Imbamar entered into its agreement with Trac Chile, Mr. Solar became aware of an email authored by Ms. Jansen in which she confirmed to Trac Chile that the Steel Rail continued to be the property of C & F. Mr. Solar said that Mr. Krause assured him that the email was only strategic and was intended to put pressure on Trac Chile. That email should, again, have caused Mr. Solar concern.

[80] I was advised by counsel for Imbamar that she had been unable to find any case law that addressed circumstances such as those that are present in this case. I am not surprised. It would be a curious result if third parties could rely on the assurances of an agent, known to them to be dishonest, in relation to the very transaction at issue, to bind an innocent principal.

[81] There is, however, considerable jurisprudence that militates against Imbamar's position. First, the broad guidance provided in various relevant texts does not support Imbamar. In H.G. Beale et al, eds.,*Chitty on Contracts*, 31st ed., (London, U.K.: Thomson Reuters, 2012), vol. 2, at para. 31-057, under the heading "Apparent Authority", the authors note that a third party cannot hold a principal liable for the representations of an agent in circumstances where the third party "was put on inquiry by the facts of the transaction".

[82] In *Bowstead and Reynolds on Agency,* 18th ed. (London, U.K.: Sweet & Maxwell, 2006), at para. 8-041, the author similarly confirms that the doctrine of apparent authority does not apply to a person who "is put on inquiry by the facts of the transaction".

[83] In *Houghton and Company v. Nothard, Lowe and Wills, Limited*, [1927] 1 K.B. 246 (C.A.), the court dealt with an agreement to apply the money of one company in payment of the debt of another, and concluded that the plaintiffs were put on inquiry to ascertain whether the person or persons making the contract had any authority in fact to do so. At 260, Bankes L.J. described the appropriate test as being that the person "must not have been put upon inquiry as to whether the transaction was in order." In concluding that the plaintiff should have been put on notice, Bankes L.J. said, "there was, I think, abundant cause for making Mr. Dart suspicious and putting him upon inquiry"; at 261.

[84] In *A.L. Underwood, Limited v. Bank of Liverpool*, [1924] 1 K.B. 776 (C.A.), a merchant who was the sole director of a company placed a cheque, made out in the name of the company, into his own account. The defendant bank argued it had

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acted on the apparent authority of the merchant to act for his company. Bankes L.J. said at 788-789:

> Now, what are the facts? The cheques were plainly, on the face of them, the property of the company. They were endorsed by Underwood as sole director, a fact which, instead of absolving the cashiers from inquiry, appears to me to demand the exercise of greater caution on their part, having regard to the fact that the cheques were being paid in to Underwood's private account. Many of the cheques were marked in a way which, of itself, ought to have put the cashiers on inquiry. I entirely accept the view of the learned judge with regard to the conduct of the cashiers, and I think his conclusion establishes not only negligence on their part, but such an absence of ordinary inquiry as to disentitle the appellants from relying on a defence founded on the ostensible authority of Underwood.

[85] In *Hazelwood v. West Coast Securities Ltd*. (1974), 49 D.L.R. (3d) 46 (B.C.S.C.), rev'd on other grounds, 68 D.L.R. (3d) 172 (B.C.C.A.), a director purported to act on behalf of a company with a third party. The transaction, for various reasons, was "unusual in nature". Fulton J., after referring to several authorities, said at 63:

> In the case before me, I have to ask whether, there being no express authority, the facts of these transactions were such as to put the plaintiffs on inquiry as to the actual authority of Hunter. There is no doubt in my mind that the transactions surrounding all four advances were of such a nature. They were unusual in a high degree. They conferred on the face of them no benefit upon the defendant: its obligation consisted exclusively of receiving and holding the moneys in trust. The defendant did not operate a trust or clients' account, nor is it usual for stockbrokers to do so. The payment of interest at the unusual rates in question – as high as 60% per annum – was guaranteed only by Ash Enterprises Ltd. and Benson Hunter, not by the defendant, a fact which on the face of it suggests that Benson Hunter had some personal interest in the transactions apart from his employer, which is hardly in keeping with the normal relationship of an agent and principal, whether that agent is a director or not of the principal. There is surely something very unusual in an agreement binding stockbrokers to hold money for investment as long as six months while one of their officers and one of his trading accounts guarantees the payment of interest. All of these facts were enough to – and should have – put the plaintiffs on inquiry as to whether the transactions were in fact entered into on behalf of the defendant within the limits of Hunter's authority, or were entered into by Hunter on his own and for his own benefit.

[86] Similar conclusions were expressed in each of *Jas Forwarding v. Int'l Fastline Forwarding Inc.*, 2002 BCSC 326, at para. 62, and in *Ulmer v. Schlang*, 2003 BCSC 1283, at para. 9.

[87] In none of these cases do the facts, which were considered by the court to be "unusual", come close to the circumstances of this case. This is so for two primary reasons. First, Imbamar, through Mr. Solar, had good and objective reason to be suspicious of each of Messrs. Ocampo, Mitarakis and Krause. He knew, at a minimum, that they had been prepared to engage in a fraud in relation to the Steel Rail. Second, and in a related vein, Imbamar knew that many of the documents that Trac Chile relied on to establish its title to the Steel Rail were fraudulent documents.

[88] The fact that Imbamar made further inquiries of Mr. Krause to confirm what Messrs. Ocampo and Mitarakis had told it does not advance matters. Imbamar effectively looked to one dishonest person to confirm the statements of other dishonest individuals. It was necessary, in such circumstances, to do more and, indeed, to speak to C & F. Nor do I consider the fact that Imbamar, through either Mr. Solar or Mr. Araya, made other inquiries, alters this conclusion. For example, Imbamar examined Trac Chile's accounts and financial records, and it searched property registries in British Columbia. The fact remains that it knew that the very foundation of Trac Chile's purported ownership of the Steel Rail was tainted.

[89] I turn to a further point. In *Thiesse,* at para. 31, the court quoted from the 1996 edition of Fridman, *Agency*, where the author, at 116, said:

> The fact that the agent was acting in his own interests does not affect this question. For 'the principal ... cannot escape from liability merely because the agent may have abused the authority or betrayed his trust.'
>
> But the agent must appear to be acting in a way in which a person in his position would normally act: otherwise it will not be possible to assert that to the outside world he quite reasonably appeared to have the necessary authority.

[90] This presupposes that there is nothing to the "outside world" that would be a source of obvious concern. In this case, it cannot be said that Mr. Krause acted "as a person in his position would normally act".

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[91] In *Thiessen,* the court also considered that the trial judge had focused only on the principal's perspective and not on the "vulnerable customer of that principal"; at para. 33. In this case, it cannot be said that Imbamar was vulnerable. It chose to do business with persons who it knew, from the outset, were dishonest.

[92] I consider that these conclusions are dispositive of Imbamar's assertion that C & F is bound by the representations of its "agent", Mr. Krause, at least on the basis that Mr. Krause had ostensible authority to act for C & F. Because it was I who raised this issue in argument, and because counsel for Imbamar had focused, instead, on the narrower question of whether Mr. Krause was C & F's agent, I have also addressed that issue.

7) <u>Was Mr. Krause C & F's Agent?</u>

[93] Imbamar argues, as I have said, that Mr. Krause was either C & F's actual agent, express or implied, or that he had ostensible authority to act for C & F.

[94] In *Keddie v. Canada Life Assurance Co.*, 1999 BCCA 541, at para. 24, Rowles J.A., for the court, said, "[a]ctual authority turns on the relationship between the principal and agent. Apparent or ostensible authority is concerned primarily with representations and manifestations made by the principal to third parties".

i) Actual Agency

[95] Express agency is created when a principal expressly appoints an agent "either by deed, by writing under hand, or by parol"; *Halsbury's Laws of Canada - Commercial Law III (Agency)* (Markham Ont.: LexisNexis Canada Inc., 2011) at 111, HAY-12; *Keddie,* at para. 23. Here Imbamar relies on the Letter Agreement that was made between Coditeq Maquinera S.A. (Coditeq) and C & F. Coditeq is a company that Mr. Krause appears to have had an interest in. The Letter Agreement, which is on C & F letterhead, states:

> Dear Mr. Krause,
>
> We herewith agree that you have assisted us in concluding the above mentioned order by informing us about Tracomex' requirement and arranging the contact between Tracomex and Coutinho & Ferrostaal.

> You will follow up the execution of the above mentioned order and support us in case problems may occur at no additional cost to us.
>
> For your service we will pay you a commission of CAD $/mt 6.40 (including all taxes, duties and dues, if any). This commission shall be paid in full and complete satisfaction as to any works and services to be rendered by yourself in connection with or relating to the preparation, development and implementation of the above mentioned order as well as covering the possible costs and expenses and no further claims shall be made by yourself against us.
>
> The commission shall become due and payable upon receipt of the payment by Tracomex to Coutinho & Ferrostaal GmbH covering the total price of the above-mentioned order and will be transferred to the account of Consulting Pro Ltda, …
>
> Germany has signed the "Convention on Combating Bribery of Foreign Public Officials in International Business Transactions" dated December 17, 1997 which was incorporated on February 15, 1999, into German law as "Act on Combating International Bribery" (hereinafter "ACIB") The Agent confirms that it will not take any action related to the performance of this Agreement in violation of the ACIB or that may be regarded as violation by Coutinho & Ferrostaal or any of its employees to criminal proceedings under German laws, regulations or administrative requirements related to the ACIB.
>
> Our cooperation is purely based on a case-to-case basis. The letter agreement is governed by German laws and the courts of Essen, Germany, shall be solely competent to decide any disputes arising out of or in connection herewith.
>
> Please confirm acceptance hereof by counter-signing this letter and returning it to us.

[96] Mr. Doelle confirmed that C & F provided Mr. Krause with no separate authority to make representations for C & F or to bind C & F to any contract. Nor did it provide him with any separate signing authority on behalf of C & F.

[97] Though the Letter Agreement states that it is to be interpreted according to the laws of Germany, no counsel addressed the agreement through this lens. Instead, all parties proceeded as though the laws of British Columbia governed the interpretation and legal consequences of the Letter Agreement.

[98] In addressing the Letter Agreement, I consider it appropriate to consider the surrounding circumstances, or factual matrix, in which that agreement was created. In doing so, I am mindful of the limitations to which such evidence can properly be used. In the second, *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R.

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570 at 574 (H.L.), Lord Wilberforce elaborated on the importance, to the interpretive process, of an understanding of the commercial circumstances underlying a contract:

> No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

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[99] A number of circumstances which properly constitute factual matrix evidence are relevant. Mr. Doelle said that C & F entered into the Letter Agreement with Mr. Krause because he had introduced the Tracomex opportunity to C & F. C & F had never made use of or dealt with Mr. Krause in the past, though Mr. Krause had previously done work for CCC Steel, a shareholder in C & F. C & F also had no existing or other relationship with Coditeq. In 2009, C & F had no offices in South America. Instead, it used "consultants" to assist it with the business it did there. Again, the volume of that business was some $200 - 300 million US annually. The Letter Agreement was in the nature of a standard document and it was described as being for a "single-purpose business", meaning that it was for a single transaction. C & F also had other forms of agreement that it used in circumstances that involved several different transactions or where the "consultant" provided assistance to C & F more regularly. The contents of such agreements were more detailed.

[100] Though Mr. Doelle and Ms. Jansen tended to use the word "consultant" in their evidence rather than "agent", the Letter Agreement does describe Mr. Krause as an "agent". Mr. Doelle explained, however, that the German understanding of these two concepts is similar.

[101] Mr. Doelle also said that the role of "consultants", such as Mr. Krause, was limited to communicating information to a third party and to then relaying such information back to C & F. Mr. Krause was, in a sense, a "postman".

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[102] In this case, I am satisfied that the Letter Agreement authorized Mr. Krause to interact with the Tracomex companies, or their principals, in relation to the single transaction identified in the documents. He was paid a finite commission for a finite task. His commission was limited to the single transaction identified in the Letter Agreement. He was only being retained on a "case-to-case" basis. There is, however, no express limitation in the Letter Agreement on Mr. Krause only being permitted to communicate what he was told to communicate. I do consider, therefore, that Mr. Krause was C & F's agent, albeit an agent with a limited or finite mandate.

[103] In this case, the question is whether the express terms of the Letter Agreement, or this limited mandate, authorized Mr. Krause to interact with, or negotiate with, or represent C & F with third parties who were interested in the Steel Rail.

[104] I do not consider that it did. Mr. Krause's role was to "follow up the execution" of the Trac Chile Contract and to support C & F in case of "problems" that might occur thereafter. Those problems clearly extended to Mr. Krause communicating with Trac Chile and Mr. Mitarakis in relation to its failure to pay C & F the monies it was owed. Those problems also arguably extended to thereafter commencing an action in Chile or to assisting C & F with collection proceedings. Interestingly, however, Mr. Krause was given a separate power of attorney by C & F to enable him to deal with Chilean counsel when C & F decided to sue on or "protest" the pagare it held. Mr. Krause's express authority did not extend to his interacting or negotiating with third parties who were interested in the Steel Rail.

ii) Implied Agency

[105] Fridman*, Agency* advances the following legal propositions:

> 3.10 It is possible, indeed in some instances necessary, to read into the agent's express authority a certain implied authority. This may be because what has been expressly stated when the agency relationship was created does not cover the acts performed or required to be performed by the agent. It may be because the only way of construing the document which contains the agent's express authority is by inferring necessary implications. …

> 3.11 If there is no statement which clarifies exactly what is the agent's authority, the only way of knowing what authority can properly be attributed to the agent is by inferring a certain implied authority. This is part of an agent's actual authority, which the principal has consented, by implication, that the agent should have. Where such an implication can be made, it is made on the basis that the principal has in fact consented to the agent's having authority to act in such a manner or as regards such a transaction. …
>
> 3.12 Every agent has implied authority to do everything necessary for, and ordinarily incidental to, carrying out his express authority according to the usual way in which such authority is executed.
>
> [Footnotes omitted.]

[106] In this case, there is no need to construe or to imply additional authority into the Letter Agreement in order for it to achieve its intended purpose. What Imbamar seeks is an "implied term" that would authorize Mr. Krause, on behalf of C & F, to deal with third parties, such as Imbamar, in relation to the Steel Rail. This would not reflect any implied authority – it would rewrite the Letter Agreement. What Imbamar really argues here is that Mr. Krause appeared to have authority to act for C & F or that he had ostensible authority to do so. This, however, is a different matter conceptually.

[107] There was no plea or evidence of any "customary authority", and I need not address this matter.

iii) Ostensible Authority

[108] Fridman, *Agency* describes the nature of apparent or ostensible authority in the following terms:

> 3.22 When the doctrine of agency by estoppel operates to give rise to an agency relationship, in the manner explained in the previous chapter, the agent is regarded as being endowed with what is termed the "apparent" or "ostensible" authority of the principal. Unlike the previous kinds of authority discussed, an agent's apparent or ostensible authority is not an actual or real authority. It does not result, as do express and implied authority, from the express or implied consent on the part of the principal that the agent should have any authority, or the kind of authority the agent has purported to exercise. Apparent or ostensible authority is the product of the principal's conduct, a representation that the person acting as an agent is authorized to act on his or her behalf. It is an authority which "apparently" exists, having regard to the conduct of the parties. In fact, it does not exist; but as a matter of law, arising out of the factual position, the agent is said to have authority.

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> 3.23 In *Freeman and Lockyer v. Buckhurst Park Properties (Mangal) Ltd*., a case that has frequently been cited and followed in Canada, Diplock L.J. explained that an "apparent" or "ostensible" authority was:
>
> > ... a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact: acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed on him by such contract.
>
> To the relationship that is created in this way the agent is a stranger. He need not be aware of the existence of the representation, though, often, he is. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract.
>
> [Footnotes omitted.]

[109] In this province the leading authorities which address the requirements and ambit of the ostensible authority of an agent are *Keddie* and *Thiessen*. In *Keddie*, Rowles J.A. said:

> [28] A finding of apparent authority depends on some representation through words or conduct on the part of the principal that leads a third party to believe that the agent has the authority in question. Apparent authority is a product of the principal's outward conduct with respect to third parties, not of the principal's internal agreements or arrangements with its agent.

[110] In this case, there were no direct statements or representations made by C & F to Imbamar about Mr. Krause's authority. Mr. Doelle said that C & F was unaware of the existence of Imbamar. Though this does not address the finite legal issue I am now considering, I note that during the period from November 2009, when Imbamar first became aware of Trac Chile and the Steel Rail, to January 2010, when Imbamar signed the Imbamar Contract, Ms. Jansen was ill and away from C & F's offices. There are simply no communications reflected in the exhibits at trial, or referred to in evidence, between Mr. Krause and C & F during this time which would have alerted C & F to Imbamar's existence.

[111] Imbamar argues, however, that there were representations or conduct "emanating from [C & F] which would suggest to persons in the position of [Imbamar] that [Mr. Krause] was acting as [C & F's] agent"; *Keddie* at para.31.

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[112] The evidence in relation to these representations was diverse and confused and often irrelevant to the legal issue I have identified. The following evidence of Mr. Araya reflects this:

> Q But my question, sir, is how your review of the public record satisfied you.
>
> A Because the public registry showed him as a partner in Coutinho Caro in Chile and he has a power of attorney to represent Coutinho Caro in Chile. He had photographs of Mr. — of himself and Mr. Benjamin Schroeder in his office, because he gave me a card saying that he was a representative of Coutinho & Ferrostaal, and because the logo on photographs of Coutinho & Ferrostaal were in his office, because Mr. Rodrigo Ocampo was the previous representative of Coutinho & Ferrostaal and Mr. Mitarakis told me that he dealt with Coutinho & Ferrostaal in Chile with him and because Mr. Pitters told me that he was in charge of Coutinho & Ferrostaal in Chile. So with all that information I didn't doubt that he was.

[113] The Araya Report contains similar evidence:

> 3.2.5 It is a German style house, with 8 to 10 interior parking slots and three stories of offices. In the reception area, foreign companies can be easily identified, with the names and logos of the company on the wall, desks and even magazines with information on the companies from the "Grupo Coutinho". Photographs of directors and executives of the Group in different facilities with political and government representatives can be observed. Staff walking around the offices; some of them clearly German, can be heard talking in the same language… The meetings with the representative of "Coutinho & Ferrostaal GmbH" Mr. Bernd Krause are held in these offices. He is a partner of "Coutinho Caro Co. International Trading GmbH" in the companies of the Group in Chile.

[114] Much of this evidence is simply inaccurate. Mr. Ocampo was never a representative of C & F. What Mr. Pitters, Trac Chile's controller, said to Mr. Araya is irrelevant. The fact that Mr. Araya saw various things that were written in German, or heard persons speaking German, or that the offices of Mr. Krause were in a German-style building, cannot usefully inform the present issue.

[115] Both Mr. Araya and Mr. Solar repeated a number of things that Mr. Krause had said to them about his authority and status. Thus, Messrs. Solar and Araya said that Mr. Krause told them he was C & F's agent in Chile. Mr. Pitters also said that Mr. Ocampo introduced Mr. Krause to him as C & F's representative in Chile. What

Mr. Krause or non-C & F representatives said to Imbamar's representatives or to others to bolster or elevate his status is not relevant.

[116] Next, there was much evidence about various other companies that Mr. Krause had some relationship with and that were somehow related to C & F. Thus, for example, Mr. Krause apparently is, or has been, an agent of CCC Steel. Mr. Araya believed CCC Steel to be the owner of C & F. It is, in fact, based on the evidence of Mr. Doelle, one of several shareholders of C & F. In any event, Mr. Araya said that he saw a grant of authority, at a public registry, from CCC Steel to Mr. Krause.

[117] I consider it largely irrelevant that subsidiary or related companies or shareholders of C & F may have given Mr. Krause some authority to act for them at different times. Mr. Solar is a relatively sophisticated businessman. Mr. Araya is a lawyer. The nature of separate corporate identity would be well-understood by both. More relevant and important was Mr. Araya's acknowledgment that he was unable to locate any grant of authority from C & F to Mr. Krause at the public registry that he searched.

[118] Similarly, Mr. Araya said that he had understood, from his review of various internet sites, that CCC Steel and Mr. Krause formed Coditeq, the company that signed the Letter Agreement with C & F. Even if I accepted that that was accurate, it would not, again, reflect any behaviour or conduct on the part of C & F that held out Mr. Krause as its agent. Mr. Solar gave similar evidence relating to his review of various internet sites.

[119] The most difficult aspect of this issue is the fact that both Messrs. Solar and Araya said that they were given business cards by Mr. Krause that had the C & F logo on it. In addition, when they went to Mr. Krause's office for the December 24 Meeting, the vehicles in the driveway to that office had a C & F logo on their side panels, and they saw C & F "banners" on the premises. Imbamar also called evidence to establish that these logos or banners continue to remain in place at Mr. Krause's offices to the present day.

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[120] This is, again, evidence that surfaced quite late in the trial. No such evidence was given by an earlier Imbamar witness, Mr. Pitters, who attended the December 24 Meeting. It is also clear that Imbamar's counsel had not been aware of these issues or this evidence at earlier stages of the trial.

[121] These issues are particularly troublesome because Mr. Doelle's direct evidence was that Mr. Krause was never given business cards, letterhead or signage. He also said there was no reference to Mr. Krause or to Coditeq on C & F's website. He was never cross-examined on these aspects of his evidence and the second aspect of his evidence, relating to C & F's website, remains uncontradicted.

[122] I accept that Messrs. Solar and Araya saw what they said they did at Mr. Krause's offices, and that they were given a business card with a C & F logo on it. I do not consider, however, that this evidence satisfies the onus that rests with Imbamar.

[123] A similar situation arose in *Keddie*. In that case, the purported agent for Canada Life had a "Canada Life folder" that the third-party plaintiff had seen. The court, however, observed at para. 34, "[i]t [the folder] does not appear to have been issued to him by Canada Life, as the company led evidence that these documents are closely guarded, even within the company organization." How the Canada Life folder had made its way to the purported agent apparently remained unknown.

[124] So too in this case, I accept that C & F never issued or authorized Mr. Krause to use materials with C & F's insignia. How or why Mr. Krause, an apparently brazen fraudster, came into possession of, or fabricated such corporate materials, is unknown.

[125] Imbamar relies on one last group of facts. Various documents were sent by C & F to Euler Hermes, which refer to Mr. Krause as C & F's "agent" or "representative". C & F objected to these documents being marked as exhibits. I considered, however, that they should go into evidence, and that they might provide

some circumstantial evidence on the issue of Mr. Krause's agency from which proper inferences might be drawn.

[126] My subsequent review of these documents does not, however, support Imbamar's position. They are not documents that Imbamar ever saw or was aware of, and they cannot establish a foundation for Mr. Krause's ostensible authority. I note that several of the relevant emails appear to be authored by persons not directly associated with C & F, and so the weight given to any assertion of Mr. Krause's legal status within such documents is questionable. Finally, and importantly, the assertion that Mr. Krause was C & F's agent, in the context of C & F's claim to Euler Hermes, accords with the findings I have made. I have said that Mr. Krause was C & F's agent, albeit for a limited or finite purpose. That limited purpose extended to C & F's dealings with the Tracomex companies and its efforts to secure payment for the Steel Rail from Trac Chile. It did not go beyond this, and did not extend to any dealings with third parties who were interested in the rails.

[127] Whether the apparent authority of an agent is established is a question of fact; *Québec Federated Co-op Co. v. Farmers Fence Co*., [1925] 2 D.L.R. 574, at 575 (S.C.C.). I find, as a fact, that Imbamar has not satisfied the burden of proof that rests with it, and that C & F did not represent that Mr. Krause had ostensible authority to act on its behalf.

iv) Agency and Section 26 of the *SGA*

[128] The foregoing conclusions are relevant to s. 26 of the *SGA* which was referred to by counsel for C & F and which provides:

> 26 (1) Subject to this Act, if goods are sold by a person who is not the owner of them, and who does sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner's conduct precludes the owner from denying the seller's authority to sell.

[129] Generally, this provision has relevance in circumstances where an owner has given a seller the appearance of acting as the owner's agent; Fridman, *Sale of Goods* at 109. Section 26 also pertains where an owner's agent, apart from the

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intended seller, appears to have authority to sell. These circumstances do not, based on the findings I have made, arise in this case.

[130] Imbamar did argue that C & F was estopped from denying Trac Chile's right to sell the Steel Rail, albeit without reference to s. 26 of the *SGA*, because it knew that Trac Chile was marketing the Steel Rail. While this is factually correct, I do not consider that this circumstance engages the operation of s. 26 of the *SGA*. First, the Trac Chile contract contained a "*Romalpa* Clause" with the legal significance and attributes that I have described. The very purpose of such clauses is to allow a purchaser to market the goods in its possession though title is, throughout, retained by the vendor.

[131] Furthermore, Fridman, *Sale of Goods* at 109, states:

> However, it would seem clear from the cases that the principle of estoppel is not confined to instances of apparent or ostensible *agency* but may extend to cases of apparent or ostensible *ownership* on the part of the seller of the goods, where such appearance results from the conduct of the true owner.
>
> [Footnotes omitted.]

[132] Professor Fridman, in explaining the ambit of this further aspect of s. 26 at 109, continues:

> Whether the seller is alleged to have the appearance of an agent or an owner, the cases show that something more than mere possession of the goods in question is required before estoppel can be pleaded. It is necessary for the seller to be armed "with some *indicia* which made it appear that he was either the owner or had the right to sell". The mere handing over of a chattel to another does not create an estoppel. There will be no estoppel unless the doctrine of ostensible ownership applies, for example, where the owner gives the recipient a document of title, or invests him with the *indicia* of ownership. If the owner of a car gives possession of it to another person, who is not a mercantile agent or purchaser, in respect of whom, as will be seen later, special, and different, considerations are applicable, he does not hold out or represent that other person as being entitled to sell.
>
> [Footnotes omitted.]

[133] In this case, Imbamar did not plead, or otherwise refer to s. 26 of the *SGA*. Imbamar's submissions did not suggest that C & F gave Trac Chile any "indicia of ownership" beyond allowing it to be in possession of the Steel Rail. Finally, Trac

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Chile was in the business of buying and selling used rail. Addressing Imbamar's right to the Steel Rail, as a third-party purchaser, is best addressed through other provisions of the *SGA* or the *PPSA*.

8) Is C & F Entitled to Rescission of the Trac Chile Contract?

[134] G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Thomson Reuters Canada Limited, 2011) at 291-292 [Fridman*, Contract*] states:

> Fraud has effects both at common law and in equity, and gives rise to remedies under the law of tort and the law of contract. A fraudulent misrepresentation amounts to the tort of deceit, for which the injured party will receive damages from the misrepresentor. A contract induced by fraud is voidable at the election of the defrauded party. It is not void *ab initio*; it is liable to be upset. Rescission may be granted. But the equitable remedy of rescission is discretionary.
>
> [Footnotes omitted.]

9) Did the Tracomex Companies Make a Fraudulent Misrepresentation to C & F that Induced it to Enter into the Trac Chile Contract?

[135] Both the facts and the law, in relation to this issue, are straightforward and were not challenged in any way. In *Catalyst Pulp and Paper Sales Inc. v. Universal Paper Export Company Ltd.*, 2009 BCCA 307, Bauman J.A., as he then was, said:

> [55] Counsel for UPE cited G.H.L. Fridman, *Law of Contract in Canada*, 4th ed. (Scarborough: Carswell, 1999) at 309-310, where the learned author described a case of fraudulent misrepresentation as consisting of four elements:
>
> (a) the wrongdoer must make a representation of fact to the victim;
>
> (b) the representation must be false in fact;
>
> (c) the party making the representation must have either known it was false or made it recklessly without knowing whether it was true or false; and
>
> (d) the victim must have been induced by the representation to enter into the contract.

[136] Each of these elements is readily established. The Tracomex companies, Mr. Mitarakis and his wife, Ms. Namias, who signed some of the documents in question, made a series of fraudulent representations to C & F. Those fraudulent

misrepresentations of fact included, *inter alia*, i) a fraudulently prepared master bill of lading and 155 fraudulently prepared bills of lading that indicated that the Steel Rail had been transported from Abbotsford, British Columbia, to Tacoma, Washington, between late July and early August 2009, when this was not so; ii) false correspondence indicating that the Steel Rail had been received "in conformity" with requirements; iii) various false packing lists that dealt with loading and unloading points in Abbotsford and Tacoma; and iv) a false certificate of origin.

[137] It is clear on the evidence that Mr. Mitarakis knew that the materials were false and fraudulent. The uncontradicted evidence of Ms. Jansen was that without these documents C & F would not have paid Trac Canada and would not have entered into the Trac Chile Contract.

10) Limits on Rescission

[138] There are several potential impediments to the remedy of rescission. The authors of Peter D. Maddaugh & John D. McCamus, *Law of Restitution*, loose-leaf (Toronto: Canada Law Book, 2014) vol. 1, 5-52 state:

> The availability of rescissionary relief is subject to a number of limitations. Apart from the *restitutio in integrum* requirement referred to above, those of general application appear to be three in number. Relief will not be allowed if the impugned the transaction has been affirmed, if there has been laches or undue delay in seeking relief, or if a third-party's rights have intervened.
>
> [Footnotes omitted.]

[139] Though Imbamar did not plead either laches or affirmation, it referred to both considerations in final argument.

i) Laches

[140] C & F's evidence, which I accept, was that it learned of the Tracomex fraud in June 2011. Its counsel wrote to the Tracomex companies and others alerting them of its concerns on July 6, 2011. It commenced this action in September 2011. The assertion of laches, thus, has no foundation. To the extent Imbamar argues that C & F should have been more diligent, or that it could have learned of the fraud

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earlier, it is clear that such considerations do not serve to ground an assertion of laches; Fridman, *Contract* at 293.

[141] Finally, and in any event, it would only be Trac Chile that could raise the issue of laches and not a third party to the Trac Chile Contract.

ii) Affirmation

[142] Imbamar also argues that because C & F first sued Trac Chile on the Trac Chile Contract, and only later amended its claim to seek rescission, it affirmed the Trac Chile Contract. Leaving aside the merits of this submission, it is again clear that only Trac Chile could advance this argument, rather than a third party to the Trac Chile Contract; see Dominic O'Sullivan, Steven Elliott & Rafal Zakrsewski, *The Law of Rescission* (New York: Oxford University Press, 2008) at paras. 23.54, 23.102, 23.103.

iii) Third-Party Rights

[143] The primary issue before me is whether it can be said that "third-party rights", here Imbamar's interest in the Steel Rail, have intervened. At common law, *a bona fide* purchaser of a legal title was given no protection. Instead, that *bona fide* purchaser only obtained the interest held by his vendor — the governing principle being *nemo dat quod non habet*: a man can transfer no more than he has; O'Sullivan, at para. 21.52.

[144] As a matter of commercial or mercantile necessity, however, it became apparent that commerce required the protection of persons who bought goods in good faith through a seller who might, in fact, have no right to sell.

[145] C & F relies on the *SGA* in its pleadings. In its argument it referred to and addressed each of s. 28, s. 30 and s. 59. These sections respectively provide:

> *Sale under voidable title*
>
> 28 When the seller of goods has a voidable title to them, but the seller's title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, if they are bought in good faith and without notice of the seller's defect of title.

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…

Seller or buyer in possession after sale

30 (1) If a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for that person, of the goods or documents of title under any sale, pledge or other disposition of them, or under any agreement for the sale, pledge or other disposition of them, to any person receiving the same in good faith and without notice of the previous sale has the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the delivery or transfer.

(2)Subsection (1) does not apply to a sale, pledge or other disposition of

(a) goods, or

(b) documents of title to goods, other than negotiable documents of title,

that is out of the ordinary course of business of the seller, pledger or disposer if, before the sale, pledge or disposition, the owner's interest in the goods is registered in the personal property registry in accordance with the regulations made under the Personal Property Security Act, and Part 4 of that Act applies to the registration.

…

Disposition by mercantile agent

59(1) If a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge or other disposition of the goods made by the mercantile agent when acting in the ordinary course of business of a mercantile agent is, subject to this Act, as valid as if the mercantile agent were expressly authorized by the owner of the goods to make the sale, pledge or other disposition, if the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make it.

(2) If a mercantile agent has, with the consent of the owner, been in possession of goods, or of the documents of title to goods, any sale, pledge or other disposition that would have been valid if the consent had continued is valid despite the termination of the consent, if the person taking under the disposition has not at that time notice that the consent has been terminated.

[146] Conversely, Imbamar, in its pleadings, referred to neither the *SGA* nor the *PPSA*. It argued, however, that because the Trac Chile Contract was a conditional sales agreement, a proposition that counsel for C & F accepts, the *PPSA* applies to that contract; *PPSA*, s. 2. Imbamar's submissions thus focussed primarily on s. 30(2) of the *PPSA*, which provides:

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> (2) A buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free of any perfected or unperfected security interest in the goods given by the seller or lessor or arising under section 28 or 29, whether or not the buyer or lessee knows of it, unless the buyer or lessee also knows that the sale or lease constitutes a breach of the security agreement under which the security interest was created.

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[147] To some extent then, the respective positions of the parties addressed different language in different statutory provisions. At bottom, however, counsel for Imbamar and C & F agreed that the legal issue before me was much the same in any event. Thus, ss. 28, 30 and 59 of the *SGA* each reference “the good faith” of the buyer, and ss. 30 and 59 of the *SGA* refer to the transaction being “in the ordinary course of business” of the vendor. Section 30(2) of the *PPSA* also relies on the transaction having been “in the ordinary course of business of the seller.”

[148] Counsel for Imbamar also agreed that the price paid for the goods in issue was relevant to both the “good faith” of the buyer and to whether a seller was acting “in the ordinary course of business”; see e.g. *Alberta Pacific Leasing Inc. v. Petro Equipment Sales Ltd.* (1995), 175 A.R. 175 at para. 11 (Q.B.).

[149] Counsel for Imbamar further accepted that case law from the sale of goods context, which addresses whether a transaction occurred “in the ordinary course” of a seller’s business, was pertinent to that same issue under the *PPSA.*

a) Ordinary Course of Business

[150] I propose to first address s. 30(2) of the *PPSA* and whether it can be said that the sale of the Steel Rail from Trac Chile to Imbamar was in the ordinary course of its business. In *Northwest Equipment Inc. v. Daewoo Heavy Industries America Corp*., 2002 ABCA 79, Fruman J.A., for the court, said:

> [14] Under s. 30(2), a buyer of goods sold in the ordinary course of the seller's business takes the goods free from any perfected or unperfected security interest given by the seller. Its purpose "is to avoid disruption to commerce and injustice to unsuspecting ordinary course buyers which would otherwise result if such buyers were required in every case to conduct a search of the Personal Property Registry before buying goods": Cuming and Wood, *supra*, at 213. The focus is on commercial practicality: *Fairline Boats Ltd. v. Leger* (1980), 1 P.P.S.A.C. 218 at 220-21 (Ont. H.C.J.). The ordinary

> course exception applies whether or not the buyer knew of the security interest, and even though the security agreement limited the seller's rights to dispose of the goods. The exception does not apply if the buyer was aware that the transaction was in breach of the security agreement.
>
> [15] Accordingly, if Trainer Bros. sold the excavator in the ordinary course of its business, Northwest would acquire it free from Daewoo's security interest. Sales in the ordinary course of business are usually "carried out under normal terms and consistent with general commercial practices": Cuming and Wood, *supra*, at 215.

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[151] Imbamar focuses on the fact that Trac Chile was in the business of selling scrap steel and that the sale of the Steel Rail to Imbamar was in the “ordinary course” of its business. This submission applies too narrow a lens to the issue.

[152] There was nothing about these transactions that were “carried out under normal terms” or that were “consistent with general commercial practice”. Nor can it be said that Imbamar was an “unsuspecting ordinary course buyer”. Imbamar was aware that it was dealing with individuals who were fraudsters or prepared to be fraudsters. As such, it knew it was dealing with persons who were dishonest and who it did not trust. Indeed, this is why Imbamar wanted to speak to Mr. Krause. It knew, however, that Mr. Krause had been complicit in these improper transactions. It also knew that the underlying documents that Trac Chile relied on to give it possession of the Steel Rails were fraudulent. It was aware that Mr. Mitarakis and Mr. Krause had intended that the fraudulent documents be kept a secret. It was further aware that the Tracomex companies and Mr. Mitarakis were in difficult financial circumstances, though Mr. Solar said that he believed that Mr. Mitarakis and his wife had other assets.

[153] In *St. John v. Horvat* (1994), 89 B.C.L.R. (2d) 61 (C.A.), a case that focuses on s. 58 of the *SGA*, Cumming J.A., for the court, addressed the requirements of s. 58, the policy objectives that underlie the provision and the factors that determine whether or not a transaction is in the “ordinary course of business”:

> 31 The policy issue underlying the doctrine of apparent authority, i.e. whether the principal who chose the agent, or the innocent third party, ought to bear the loss, calls for an objective test to determine whether the disposal of the goods was done "in the ordinary course of business of a mercantile agent". Would a reasonable person have believed that the mercantile agent

> was disposing of goods in the ordinary course of business? This test protects buyers where the mercantile agent appeared to have authority to sell the goods but in so doing was acting outside his or her actual authority. Likewise, it protects the initial owner of the goods where the circumstances surrounding the sale should have put a reasonable buyer on notice that the sale was not a transaction in the ordinary course of business.
>
> …
>
> 34 Section 58 was designed to deal with situations where a mercantile agent in possession with the consent of the owner acts improperly. The question, therefore, is "not whether the mercantile agent did something to take itself out of the category of mercantile agent disposing of goods in the ordinary course of business, but whether a reasonable person purchasing from the mercantile agent would have believed that the sale to him was a sale in the ordinary course of business. For example, in *Stadium Finance Ltd.*, supra, the sale of a used car without the ignition key and the documentation necessary to resister the vehicle was held not to be a sale in the ordinary course of business of a mercantile agent, presumably because a reasonable buyer would have expected to receive them if it were a sale in the ordinary course.
>
> 35 The mere fact that the mercantile agent has acted outside his or her actual authority does not take a sale out of the ordinary course of business; s.58 is designed to cure such a defect: see Atiyah, *The Sale of Goods*, 8th ed. (London: Pitman Publishers, 1990), at pp. 364-65. If the words "in the ordinary course of business of a mercantile agent" were defined in such a way that lack of authority to sell or fraud on the part of the mercantile agent would take the transaction out of s.58, the entire purpose of that provision – to promote efficiency in commercial transactions and protect buyers who, without any indication that the mercantile agent does not have authority to sell, purchase goods from one who does not have such authority – would be defeated. What takes a sale out of the ordinary course of business is conduct of the seller or other circumstances that would put a reasonable buyer on notice that this was not a sale in the ordinary course of business.

[154] I do not consider that, in the circumstances I have described, a reasonable buyer would consider that the sale of the Steel Rail from Trac Chile to Imbamar was a sale that took place in the "ordinary course of business". Nor do I consider that it can be said that there was "no indication" to Imbamar that Trac Chile might not have the ability to sell.

[155] At trial, a considerable amount of evidence was led from numerous witnesses to address the question of whether the price that Imbamar paid for the Steel Rails was fair or market-based. This issue was somewhat complicated by different witnesses using different currencies, by some witnesses referring to "short" tons,

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when others referred to metric tonnes, by some prices being “delivered” prices, and others not, and by fluctuating markets. Counsel for Imbamar also argued that the real question is whether the price Imbamar paid for the Steel Rail was “within the range” of what was fair-market value for those rails. I accept this proposition. It obviates the need for me to address the detailed evidence of individual witnesses with great precision or to make many of the calculations or conversions that would otherwise be necessary.

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[156] Nevertheless, there are considerable difficulties with the price that Imbamar paid Trac Chile for the Steel Rail – a price that was but a fraction of what Trac Chile had agreed to pay C & F approximately six months earlier.

[157] I do not propose to address all the evidence I heard, but rather, to address certain categories of evidence that have caused me to conclude that Imbamar did not pay Trac Chile fair-market value for the Steel Rail.

i) Imbamar agreed to pay Trac Chile the equivalent of $136 CA per MT for the Steel Rail in January 2010. Trac Canada had paid Canadian Pacific $275 CA per MT in August 2009. Between July 2009 and January 2010, the price for scrap steel in the North American market, albeit with some fluctuation, increased by perhaps 20 - 25%.

ii) C & F purchased the Steel Rail from Trac Canada for $318 CA per MT. It sold the Steel Rail to Trac Chile for $352 CA per MT. Each of Mr. Doelle and Ms. Jansen indicated that those prices were referable to market prices. Ms. Jansen said she had referred to market sources, albeit European sources, to confirm that the original contract price paid to Trac Canada was reasonable. The Trac Chile Contract price was then determined with reference to C & F’s costs and a reasonable profit for itself. Euler Hermes provided credit insurance for the Steel Rail for an amount that was slightly less than these values, though what inquiries about market values, if any, Euler Hermes may have made before insuring the Steel Rail is unknown.

iii) The correspondence from Mr. Ocampo to Mr. Solar, which introduced the opportunity for Imbamar to acquire the Steel Rail, and which I will return to later in these reasons, purported to offer the Steel Rail for about half of its market value.

iv) Much of Imbamar's evidence focused on the price for scrap steel in Chile – its thesis being that those prices were low, and that with the very significant transportation costs that would be incurred in transporting the Steel Rail from Vancouver to Chile, the price that Imbamar could pay was also low. There is no question that Imbamar turned its mind to the price of Chilean scrap steel. There is also no doubt, however, based on the evidence of Mr. Solar that Imbamar did not expect to sell the Steel Rail to a purchaser in Chile – for the very reason that the freight costs attendant to such a sale would be very significant. Accordingly, I consider invoices for what scrap steel was selling for in Chile to be unpersuasive.

v) The evidence of Messrs. Solar and Bezmalinovic, who said that they had spoken about the price to be paid for the Steel Rail before the Imbamar Contract was signed, was inconsistent on how the price that Imbamar ultimately decided to pay was determined. Mr. Bezmalinovic said that the market price in Chile for scrap steel in December 2009, was $250 US per MT. The cost to transport steel to Chile would be approximately $110 US per MT. That cost would include cutting the steel, transporting it to port, and then shipping the steel to Chile. Mr. Solar said he had used a value of $180 US per MT, including shipping costs of $60 US and that, accordingly, he was prepared to pay $120 US per MT. The concern that the two principals of Imbamar purported to have used different calculations, though they said they had discussed the matter, is exacerbated by the fact that I do not consider that Mr. Solar was forthright with respect to this part of his evidence. He sought to revisit the $60 figure he had provided on his discovery by saying that that figure only referred to shipping costs and not to the cost of cutting or transporting the rail to port. Having regard to that

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discovery evidence and its context, I do not consider that that evidence is credible.

vi) Still further, Mr. Mesquita, who gave evidence at trial, and who is a person whose profession it is to buy and sell rail, primarily in the North and South-American markets, said he had been contacted by Mr. Bezmalinovic in connection with the Steel Rail and was asked to make various inquiries. He said that he had told Mr. Bezmalinovic that the American Metal Market ("AMM") prices, a standard industry source, for the Steel Rail would be approximately $300 US per MT on a delivered basis. He also appeared to indicate that he believed the value of the Steel Rail in Vancouver to be that same $300 US per MT figure. He further told Mr. Bezmalinovic that he expected the price to cut, truck and ship the Steel Rail to Peru or Chile would be about $200 US per MT. Obviously, such costs, and in particular such shipping costs, again made the prospect of shipping the Steel Rail to Chile unrealistic. Furthermore, the inconsistencies between the evidence of Mr. Mesquita, and the evidence of Mr. Bezmalinovic and Mr. Solar on a question as basic as how the price for the Steel Rail was established, again, detracted from the confidence I had in the evidence of Messrs. Bezmalinovic and Solar.

vii) C & F led evidence from Mr. Dungee, the former comptroller of Amix Salvage & Sales Ltd. ("Amix"). Amix was the largest scrap-metal dealer in British Columbia in 2009 - 2010. It has since been acquired by another company. It traded approximately 300,000 tons of scrap annually and approximately 75,000 tons of that volume was rail-like material. Mr. Dungee said that Amix was paying between $180 - $280 CA per short ton for such scrap metal at the time. On a MT basis, this would be about $200 - $310 CA. Later, in his cross-examination, he said that the low end might reach $150 - $160 CA per short ton or $165 - $180 CA per metric tonne. Mr. Dungee confirmed that these were delivered prices, and he

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confirmed that material, such as the Steel Rail, simply did not trade in the $120 CA per MT range.

viii) C & F also filed an expert report from Mr. Parker, who spent much of his life processing and acquiring scrap rail and other products. Mr. Parker's report contained various prices for various scenarios. Mr. Parker confirms, based on his inquiries, that the average price paid for scrap rail in July 2009 - July 2010 in Abbotsford was $288 US per MT.

ix) Mr. Solar obtained insurance for the Steel Rail located at the Super H yard. He had endeavoured to obtain insurance for $1.7 million CA, could not do so, and obtained insurance for $900,000 CA. Mr. Solar sought to explain that this $900,000 figure accounted for a possible increase in the value of the rails and for his bringing more rails into the Super H facility in the future. This latter evidence, again, did not accord with Mr. Solar's earlier discovery evidence, and I do not accept his explanation for the differences in his evidence.

[158] At bottom, though there is variation in the figures and values before me, and though no single body of evidence on its own is conclusive, the reality is that none of these indicia of the value of the Steel Rail aligns with what Imbamar paid for those rails. Nor do I consider that what Imbamar paid for the Steel Rail is "generally in line" with the market value for those rails.

[159] One last set of considerations pertains to the issue of whether Trac Chile's transaction with Imbamar was in its "ordinary course of business". The witnesses called by Imbamar, almost without exception, agreed that the transaction was out of the ordinary course of business. Mr. Pitters, an accountant in Chile, accepted that the use of fraudulent documents was not part of any ordinary commercial transaction. Mr. Bezmalinovic accepted that he had never before been involved in a transaction with fraudulent documents. Mr. Solar also accepted that the use of fraudulent documents was not part of any ordinary commercial transaction.

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[160] The question of whether Trac Chile's sale of the Steel Rail took place in the ordinary course of its business is a question of fact. Based on the circumstances and considerations I have described, I do not consider that it was.

b) The "Good Faith" Issue

[161] I turn briefly to the "good faith" standard referred to by C & F, and in the provisions of the *SGA* that I have identified. If a seller of goods, here Trac Chile, has voidable title to them, "he will pass good title to a purchaser from him who buys in good faith and without notice of the seller's defective title"; Fridman, *Sale of Goods* at 118.

[162] Section 2 of the *SGA* confirms that an act is done in good faith if done "honestly" whether or not it is done negligently. The test of good faith is objective and from the perspective of a reasonable purchaser; Fridman, *Sale of Goods* at 120.

[163] There are a number of cases that provide useful guidance, both in terms of the broad standard that is relevant, and in terms of the types of markers or indicia of impropriety that ought to have been a source of concern for Imbamar. In *Whitehorn Brothers v. Davison*, [1911] 1 KB 463 at 478 (C.A.), Vaughan Williams L.J. said:

> In order to prove absence of good faith, you must either prove notice, or the fact that there was dishonesty, or shew that there is evidence that the defendant himself suspected the security which was being offered to him. I really think that, if the jury had been asked whether there was any evidence that the defendant suspected the goodness of the security that he was accepting, they would not have arrived at the answer which they gave. I will not lengthen my judgment by referring in detail to the passage in the judgment of Lord Blackburn in *Jones v. Gordon* (1), in which he points out the sort of evidence you must have before you can come to the conclusion in such a case that there is notice or an absence of good faith, but, putting it shortly, it comes to this, that you will be justified in finding that there was notice, or an absence of good faith, if you find anything to shew that the person taking the security made no inquiries about it, or where it came from, because he feared the answer which he might get, and feared that he might get an answer which shewed that something was wrong.

[164] In *Heap v. Motorists Advisory Agency, Limited*, [1922] 1 KB 577 at 590-591, a case involving the *Sale of Goods Act*, 1893 and the fraudulent transfer of a motor vehicle, Lush J. identified the following indicia of an absence of good faith:

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a) the purchase of the car at "considerably under value";

b) the known use by the fraudster/purported car owner of an intermediary to effect the sale;

c) the purchaser's suspicions about the manner in which the sale was taking place;

d) the lack of a registration book;

e) the fraudster pressing the purchaser for payment of money at once; and

f) the fraudster's request for an open cheque.

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[165] Lush J. went on to state in *Heap* at 591:

> All these circumstances were, in my opinion, enough to put the defendants on their guard and to fix them with notice. I do not say that they wickedly shut their eyes to an obvious fraud, but I do say that they did not do what any reasonable man would have done in this case – namely, decline to buy this car without knowing more about it. They thought it was a good bargain and made up their minds too easily to buy the car. I think they must be taken to have had notice of some want of authority in those who purported to sell it to them. Their manager told me in evidence that he felt rather uncomfortable and suspicious about the sale. In my view the defendants ought not in the circumstances to have bought the car.

[166] The existence of extraordinary documentation was a factor in concluding that there was a lack of *bona fides* on the part of the purchaser in *International Alpaca Management Pty. Ltd. v. Ensor* (1995), 133 A.L.R. 561, at para. 100 (F.C.A.). In that case, the majority of Australian Federal Court was considerably influenced by the fact that the contract in issue was to be kept “secret”; at paras. 89, 100.

[167] The following “red flags” or indicia of concern have been identified in various cases:

> i.) was the purchaser aware of any fact that would cast doubt on the right of the seller to sell in good faith (*St. John* at paras. 31, 44);
>
> ii.) was the purchaser aware of any fact that would prompt further inquiry into the rights of the seller or provenance of the goods (*Manning v. Algard Estate*, 2008 BCSC 1129 at para. 56);
>
> iii.) was there anything to show the purchaser made no inquiries for fear of the answer he might get (*Whitehorn* at 478; *Manning* at para. 55);

iv.) were the goods purchased at "considerably under value" (*Heap* at 590);

v.) whether the purchaser had suspicions about the manner in which the sale was being conducted (*Heap* at 591);

vi.) whether the transaction lacked documentation normally available (*Heap* at 591);

vii.) whether the vendor required a particular method of payment (*Heap* at 591);

viii.) was the purchaser aware of potential duplicity by the vendor (*International Alpaca* at paras. 91, 100);

ix.) whether extraordinary documentation existed (*International Alpaca* at para. 100); and

x.) whether the transaction took place in the ordinary course of business (*St. John* at para. 31, *Heap* at 590).

[168] Similar factors pertain to the question of Imbamar's good faith, many of which I have identified earlier. It knew it was dealing with dishonest individuals. It did not trust those individuals. It knew the documents Trac Chile relied on were fraudulent. It understood those documents were to be kept secret and were not to be disclosed to third parties. It knew Mr. Krause was unprepared to confirm his statements in writing. It knew the price that Trac Chile was prepared to accept for the Steel Rail, in the marketplace where those rails were located, was well under market value. It knew Trac Chile and Mr. Mitarakis were pressed for funds and delinquent in the payments they owed to others. I also observe that several of the payments made to Trac Chile under the Imbamar Contract were cash payments. Still further, under the repurchase option in the Imbamar Contract, which I will return to later in these Reasons, Trac Chile was to repurchase the Steel Rail from Imbamar for a cash payment of more than $500,000 US. In such circumstances, it cannot be said that Imbamar's conduct was undertaken in good faith.

[169] I should address two further-related issues that Imbamar pressed with some vigor. First, it argues that it relied on the Araya Report. It says it obtained and relied on legal advice from Mr. Araya that it could acquire good title to the Steel Rail, and it asks what more a purchaser could do to establish its good faith than to secure such

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an opinion. In many circumstances such evidence would be persuasive. In this case, that evidence suffers from several deficiencies.

[170] One aspect of these deficiencies arises from the various inconsistencies in the Araya Report and, in fact, in Mr. Araya's evidence. These inconsistencies arose, I believe, because Mr. Araya and Imbamar sought to walk a tightrope through the various difficulties with the theory of Imbamar's case. That theory is incoherent.

[171] I have earlier identified, at para. 29, that Mr. Araya initially accepted that he understood, and had communicated to Mr. Solar, that the transaction between C & F and the Tracomex companies was in the nature of a loan. Following the break in the evidence and the production of the Araya Report, Mr. Araya's evidence appeared to shift. Mr. Araya now said:

> Q I'll ask you again. You were of the understanding that Coutinho & Ferrostaal never acquired the steel but just loaned money to Tracomex (Canada) so it could purchase the steel from CP?
>
> A And I say again that is something that I was told.
>
> Q Yes, but that was your belief. You believed them. You said you earlier, you had no reason to not believe them?
>
> A I didn't think they were lying, no.
>
> Q Okay. So you believed them when they said they had never acquired the steel, they just loaned the money; right?
>
> A I didn't think that they were lying, but then I wasn't sure that they were telling me the truth.
>
> Q Okay. It was your belief that Coutinho & Ferrostaal never acquired the steel, it just loaned money so Tracomex (Canada) could purchase the steel?
>
> A No, I believed that a buy and sell operation had taken place.

[172] The foregoing evidence is significant, not just because of the inconsistency in Mr. Araya's evidence, but also because of Mr. Araya's comment that he was not certain he was being told the truth. I have earlier referred to a portion of the Araya Report, at para. 5.3.1, where Mr. Araya concluded "the assertions of … Mitarakis and … Ocampo do not represent the truth of the events." It is clear from the context of the foregoing evidence that this uncertainty extended to what Mr. Krause was saying to Messrs. Solar and Araya. This evidence belies any unequivocal assertion

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of reliance on Mr. Krause. It also, again, properly frames Imbamar's dealings with Messrs. Krause, Ocampo and Mitarakis. Imbamar was dealing with a collection of individuals who, at a minimum, had been prepared to perpetrate a fraud and who it could not be "sure were … telling … the truth".

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[173] Still further, if Mr. Araya did believe a "buy-and-sell" operation had taken place, when he accepts that he and Mr. Solar were being told that the transaction was really a loan, then it is self-evident he did not believe Messrs. Ocampo, Mitarakis and Krause and what he was told by them.

[174] The other reason that this evidence is important is because if the transaction between C & F and the Tracomex companies was a loan, as Imbamar was being told, then there was no documentation to reflect this loan. The entire "real" transaction, for practical purposes, lacked any documentary foundation. Nor is it clear, in concept, how title to the Steel Rail would have moved from Trac Canada, who acquired that rail from Canadian Pacific, to Trac Chile. If the transaction was truly a loan, ownership of the Steel Rail would never have moved to C & F, and C & F would have been unable to pass title to Trac Chile.

[175] Mr. Araya's evidence on this further issue was also inconsistent. He stated, at one point, that there was no transfer of ownership from Trac Canada to C & F. At a later time, he said that C & F had, in fact, acquired ownership of the Steel Rail.

[176] Let me turn to the second matter that Imbamar relies on. It argues that in Chile a "pagare" can be used to pay off a principal obligation, and that that pagare thereafter becomes a freestanding obligation that can be independently enforced. Its legal consequence is described in the Araya Report as a form of novation. It says that Trac Chile paid off the invoice that C & F delivered to it for the Steel Rail with a pagare, that Trac Chile acquired title, and that C & F's recourse to Trac Chile for non-payment thereafter was limited to enforcement of the pagare.

[177] C & F, who undertakes transactions in South America worth hundreds of millions of dollars annually, and who uses pagares in virtually all such transactions,

advanced a very different understanding of the legal nature of a pagare. It is simply a promissory note. It is an additional form of security that supplements a primary obligation. C & F's receipt of a pagare from Trac Chile would not, therefore, have extinguished C & F's title to the Steel Rail until that rail was actually paid for. The email communications between Mr. Krause and C & F are consistent with the position of C & F, that being that C & F continued to retain title to the rail after receipt of the pagare. I observe that the translation I received for a pagare was, in fact, a "promissory note". I also note that Imbamar did not pay Trac Chile for the Steel Rail with a pagare but, rather, it paid by cash and other more conventional forms of payment.

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[178] Finally, I note that I received no expert evidence on the legal nature or effect of a pagare in Chile, or elsewhere, and that the Trac Chile Contract had a choice of law provision within it that made the law of Switzerland relevant to that contract. No party raised this issue before me.

[179] Imbamar argues, however, that the true legal nature of a pagare is not directly relevant. What is relevant is that Imbamar and its principals understood, from their own commercial experience, and were advised by Mr. Araya, that the pagare Trac Chile gave to C & F paid off its obligation to C & F. The evidence of a number of Imbamar's witnesses on the legal effect of a pagare, all such evidence being tendered as relevant to Imbamar's state of mind, was consistent with the description I have given. These witnesses also said that when an invoice is signed by a seller, this too confirms that the invoice has been paid. In this case, C & F's invoice to Trac Chile was signed by C & F.

[180] Imbamar's assertion that it honestly believed the pagare and the signed invoice had the legal effect it contends ties back to the problems with Mr. Araya's evidence and with the Araya Report. If the transaction was, in fact, in the nature of a loan, the sales invoice that C & F delivered to Trac Chile was part of the "fiction", part of the illusion that a sale of the Steel Rail from C & F to Trac Chile had

occurred. What value would a fraudulent document that had been signed have? How could an honest third-party purchaser take any comfort from such a document?

[181] At one point in his evidence, Mr. Araya appeared to accept that the invoice C & F had delivered to Trac Chile was a "false" document. He then suggested, instead, that it was a "fictitious" document. He explained the difference between these two things in the following terms: "to me false is something that has to be adulterated and is fraudulent. And fictitious is something that looks like, or appears like but is not real". Mr. Araya later explained that a "fictitious" document is one that "contains information that is not real". Still later, he accepted that a "fictitious" document is "one that does not represent the true state of affairs". For present purposes, the difference between "false" and "fictitious" is thus more apparent than real.

[182] Later, Mr. Araya confirmed that he believed numerous documents were "fictitious", but he now said that this did not include the invoice that C & F delivered to Trac Chile. It is not clear that this evidence accords with the Araya Report:

> 5.4.4.14 The representative "Coutinho & Ferrostaal GmbH" pointed out that he was not displaying the promissory note, but that it was a negotiable instrument in the Chilean market, and issued 'to the order'; and that it does not indicate any relationship with Sales Invoice number 5900923516/90206877 to Metales Tracomex Ltda. by reason that the operation they carried out was a loan that originated with the payment of the invoice to the seller, "Coutinho & Ferrostaal GmbH", since the merchandise was always the property of the Tracomex Group of companies.
>
> 5.4.4.15 With regards to the conditions and other facts included in the Offer of Merchandise, the Confirmation of Offer, the purchase order, the Cargo Manifests or "Bill of Lading" and the sales invoice, both parties acknowledge that they do not coincide with the events that took place and that were indicated and called for in the sales contract; taking into account that it would be impossible that some of the demands made in the buying and selling contract would have taken place. However, considering that this situation affects only the relationship between the parties, as it actually happened, and not as the documents show, by virtue that neither has claimed any non-compliance by the other, and that such is allowed in the buying and sales contract since the business purpose is uppermost in the way the operation was contracted.

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[Emphasis added.]

[183] The references in para. 5.4.4.14 confirms that Imbamar was told by the C & F representative, Mr. Krause, that the transaction was in the nature of a loan, and that C & F never acquired title to the Steel Rail. This gives rise to the issues I have already identified.

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[184] The underlined portion of para. 5.4.4.15 appears to refer to a "fictitious" invoice as defined by Mr. Araya. If it refers to the invoice between Trac Canada and C & F, this would confirm that Mr. Araya knew the first aspect of the back-to-back agreement was fabricated. If this were so, the second part of that agreement would be without any foundation. If the reference is to the invoice between C & F and Trac Chile, it would give rise to a further inconsistency in Mr. Araya's evidence.

[185] The explanation in the latter part of para. 5.4.4.15 appears to relate to other evidence given by Mr. Araya, and to other portions of the Araya Report, to the effect that the Trac Chile Contract contained a severance clause, and that that clause could be used to sever the defective portions of "fictitious" documents. Leaving aside any choice of law issues, or the choice of law provision in the Trac Chile Contract, the question of the extent to which a severance clause can be used to save an illegal contract, or to sever the objectionable parts of such a contract, is complicated; Fridman, *Contract* at 410-413.

[186] For present purposes, if the due diligence of a prospective purchaser of goods requires that the "fictitious" or "fraudulent" parts of various contracts or other documents have to be severed in order to make sense of those documents, or to preserve some portions of them, the analysis of the honesty or good faith of that purchaser becomes unreasonably strained. The question before me is not whether some path can be created to uphold the validity of a transaction. The question is whether the prospective purchaser of goods, here Imbamar, acted in good faith.

[187] I return to where I started. The fact that Imbamar received the Araya Report, which supports Trac Chile's title to the Steel Rail, is some evidence of its honesty or

good faith. It is not, however, determinative of the issue. In *International Alpaca*, the fact that a lawyer had been involved on behalf of the purchaser did not establish the *bona fides* of that purchaser. The Araya Report, and its inherent difficulties, have to be weighed together with the other detailed evidence that I have earlier identified, including the central realities that i) Imbamar knew that much of the paperwork that underlay Trac Chile's possession/ownership of the Steel Rail was "fictitious", ii) Imbamar and Mr. Araya knew they were dealing with dishonest people whom they did not fully believe or trust, and iii) Imbamar paid less than market value for the Steel Rail. In light of these central realities, I do not consider that Imbamar acted in good faith.

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[188] Since I have concluded that Imbamar did not act in good faith, and that the sale of the Steel Rail to Imbamar was not in the ordinary course of Trac Chile's business, the statutory third-party rights in ss. 28, 30 and 59 of the *SGA* and s. 30(2) of the *PPSA* are not engaged and are not an impediment to C & F seeking and obtaining the remedy of rescission.

11) Does the Imbamar Contract Create a Security Interest that is Subject to the *PPSA*?

[189] Counsel for 029 accepts that if C & F is entitled to rescission of the Trac Chile Contract and it retained title to the Steel Rail, the nature of Imbamar's interest under the Imbamar Contract becomes academic. Counsel asked, however, that in the interest of completeness, I address this issue.

[190] Imbamar and 029 filed an agreed statement of facts which detailed the various specific loans, promissory notes, guarantees, general security agreements, and other agreements that were made between 029 and the Tracomex companies. At trial, I granted 029 default judgment against Trac Chile and Trac Canada in the amount of $2,673,273.53, plus costs on a solicitor and client basis to be assessed.

[191] Of note, for present purposes, is that Trac Canada and Trac Chile provided general security agreements ("GSAs") to 029 on March 5, 2009, and July 28, 2010,

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respectively. Those agreements were then registered in the Personal Property Registry on June 15, 2010, and July 29, 2010, respectively.

i) The Analytical Framework

[192] 029 argues that it is the substance, and not the form, of a transaction that determines whether that transaction creates a security interest. Earlier, at para. 60 of these Reasons, I referred to the language of ss. 1(1) and 2(1) of the *PPSA.*

[193] Imbamar's primary conceptual response to the issue raised by 029 is that the Imbamar Contract transferred title to the Steel Rail to Imbamar. It argues that such a transfer of title is inherently inconsistent with the nature of a security interest and, accordingly, the Imbamar Contract falls outside of the ambit of the *PPSA*.

[194] I do not consider that this blunt assertion is correct. It is inconsistent with that portion of s. 2(1) of the *PPSA* which emphasizes that the determination of whether a transaction creates a security interest is determined "without regard to the person who has title to the collateral".

[195] Imbamar's position is also inconsistent with the relevant case law. In *Griffin (Re)*, [1998] 1 S.C.R. 91, Iacobucci J., speaking for the Court, said:

> 26 The Court of Appeal did not recognize that the provincial legislature, in enacting the *PPSA*, has set aside the traditional concepts of title and ownership to a certain extent. T.M. Buckwold and R.C.C. Cuming, in their article "The *Personal Property Security Act* and the *Bankruptcy and Insolvency Act:* Two Solitudes or Complementary Systems?" (1997), 12 *Banking & Finance L. Rev.* 457, at pp. 469-70, underline the fact that provincial legislatures, in enacting personal property security regimes, have redefined traditional concepts of rights in property:
>
> > Simply put, the property rights of persons subject to provincial legislation are what the legislature determines them to be. While a statutory definition of rights may incorporate common law concepts in whole or in part, it is open to the legislature to redefine or revise those concepts as may be required to meet the objectives of its legislation. This was done in the provincial *PPSA*s which implement a new conceptual approach to the definition and assertion of rights in and to personal property falling within their scope. The priority and realization provisions of the Acts revolve around the central statutory concept of "security interest". *The rights of parties to a transaction that creates a security interest are explicitly not dependent upon either the form of*

> *the transaction or upon traditional questions of title.* Rather, they are defined by the Act itself.

[196] The position of Imbamar is also conceptually inaccurate. Perhaps no clearer example can be found than in a mortgage which, historically, operated as a conveyance of land that was subject to the proviso that upon repayment of the debt, title to the land was returned to the grantor. Equity subsequently grafted further rights onto this relationship; Walter M. Traud, ed., loose-leaf, 5th ed., *Falconbridge on Mortgages* (Toronto: Thomson Reuters Canada Limited, 2013) at 1-1 - 1-4. Section 231 of the *Land Title Act*, R.S.B.C. 1996, c. 250, only recently confirmed that a mortgage "operates to charge the estate or interest of the mortgagor … whether or not the mortgage contains words of transfer or charge subject to a proviso for redemption."

[197] Finally, the position of Imbamar is at odds with the *PPSA*'s driving principle that substance, and not form, determines when a transaction creates a security interest. The facts of each case will determine the nature of the transaction, and the intentions of the parties will be relevant factors in objectively determining the substance of the transaction; *Manning Jamison* at paras. 26 - 27.

[198] The court's task is, therefore, to determine the true nature of the transaction quite apart from its form; *Manning Jamison,* at paras. 16, 26; *Anderson's Engineering,* at para. 85. In *Kaak v. Bank of Montreal*, [2003] O.J. No. 1728, at para. 8 (S.C.J.), aff'd [2003] O.J. No. 3662 (C.A.), citing *Re Speedrack Limited* (1980), 33 C.B.R. (N.S.) 209, at 213-214 (Ont. S.C.), the court said:

> The nature of the transaction may be apparent on the face of the instruments, but if it is not, the court must determine its nature for purposes of s. 2 of the Personal Property Security Act from the surrounding circumstances. It is not merely a question of construing the agreement between the parties, which may be quite clear. It is a question of determining the intention of the parties, notwithstanding the form used in setting up the transaction. For this, extrinsic evidence may be relevant and admissible, and it is so in this case. The court's task is to determine the essence of the transaction in spite of its form, as prescribed in s. 2. It must determine, on the balance of probabilities, and on a practical and common-sense view of the evidence, whether the parties negotiated a loan or advance on security, or a standard lease of property, not by way of security, from the lessor to the bankrupt.

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> ...the issue before me ... is whether the transaction as a whole creates a security interest ...
>
> [Emphasis added.]

[199] The following passages from Richard H. McLaren, *Secured Transactions in Personal Property in Canada*, loose-leaf, 2d ed. (Toronto: Thomson Canada Limited, 1989) vol. 1, at 1-27 - 1-29, 1-37, were cited with approval in *Kaak,* at para. 31, in the context of characterizing a particular transaction:

> Section 2(a)(ii) of the prior Act included only those transaction which were "intended as security". In interpreting the phrase "intended as security" the courts focused on the intention of the parties to the transaction. While the revised Act has replaced that phrase with the more objective test of "secures payment or performance of an obligation", it is suggested that the parties' intentions will still be a relevant consideration under the revised Act in the proper characterization of assignments, leases and consignments. However, it is an objective view of the parties' intentions by the courts which will characterize the transaction. …
>
> …
>
> Three factors have been enumerated in the past by the court to aid in the analysis: the role of the parties, the intent of the parties, and the effect of the transaction. Although the three factors overlap, it is the intention of the parties which dictates the role that each assumes, and is evidenced by the effect of the transaction. The courts also appear willing to admit and consider evidence extrinsic to the transaction documents. It would appear that an objective standard will be used to determine the intention of the parties. …
>
> …
>
> It is hoped that the amendment to the Act, moving away from the reference to "intended as security", will dispel any lingering views that any analysis of intention is meant to be subjective in nature as to whether the parties intended the Act to apply.
>
> [Emphasis added. Footnote omitted.]

ii) Proper Sources of Evidence

[200] Different types of evidence, including factual matrix evidence, can be useful in interpreting the language in a contract. Such evidence can "throw light on what the parties must have meant by the words they chose to express their intention"; *Glaswegian Enterprises Inc. v. BC Tel Mobility Cellular Inc.* (1997), 49 B.C.L.R. (3d) 317, at para. 18 (C.A.). Factual matrix evidence can also "assist in resolving any difficulties in what certain words of the contract refer to"; *Gainers Inc. v. Pocklington*

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*Financial Corp*oration, 2000 ABCA 151, at para. 21. Normally, factual matrix evidence does not include evidence of negotiations; Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2d ed. (Markham, Ont.: LexisNexis Canada, 2012) at 27.

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[201] In this case, factual matrix evidence and other evidence relating to the context or aim of the transaction between Trac Chile and Imbamar, is not directed at the language of the Imbamar Contract. That language is clear. The Imbamar Contract has 23 clauses – many of them boilerplate in nature. Clauses 13-17, and parts of clause 18, address Trac Chile's right to repurchase the Steel Rail and the terms of that right. The express language of the agreement is, however, the language of purchase and sale. Clause 2 specifies that the "material purpose of the contract is the sale of the following material …". The agreement does not refer to loans, to interest payments, to security, or to other like language.

[202] Ascertaining the "substance of a transaction", on an objective basis, gives rise to a different exercise. This exercise is not directed to what particular words or a particular clause in the Imbamar Contract mean. Instead, the exercise seeks, at least in part, to determine the broader commercial objectives of the parties. It seeks to ascertain what the true essence or substance of the transaction is. In this context, different considerations apply and evidence relating to the "genesis", and in particular, the "aim" of the transaction, both of which properly fall within factual matrix evidence, assume a different role and greater importance.

[203] Evidence that the parties to a contract were engaged in negotiations, and the reasons for those negotiations, may also be admissible evidence of the commercial objectives of the parties as part of the surrounding circumstances. In *Langley Lo-Cost Builders Ltd. v. 474835 BC Ltd.*, 2000 BCCA 365, the court stated:

> [29] In considering this question it is important to remember that negotiations between the parties are not relevant in determining the meaning of the language used by the parties. This is because parties often change their views and positions during negotiations. The fact that the parties were in negotiations, and the reasons for these negotiations, however, including the commercial objectives of the parties is relevant as a part of the factual matrix,

> or factual underpinning of the agreement: *Prenn v. Simmonds*, [1971] 3 All E.R. 237 (H.L.).

[204] Similarly, in *Re. Boughton Colliers Ltd*., [1944] 1 D.L.R. 530, at 538-539 (N.S.C.A.), the majority of the court confirmed that pre-contract correspondence may be admissible to establish the aim of a transaction:

> This drives us to look at the circumstances under which the contract is made. Our sole knowledge of those circumstances is derived from the agreement and the correspondence. Counsel for the respondent objected at the argument to the use of the letters because they were not set out in the stated case submitted at Chambers but they were read to the Judge and by agreement were included in the printed case on appeal. They form part of the record before us. In any case, they are admissible. Viscount Haldane L.C. said in *Charrington & Co. v. Wooder*,[1914] A.C. 71 at p. 77: "If there are circumstances which the parties must be taken to have had in view when entering into the contract, it is necessary that the Court which construes the contract should have these circumstances before it.
>
> And Lord Davey in another Privy Council case. *Bank of New Zealand v. Simpson*, [1900] A.C.182 at p. 187 said: “Extrinsic evidence is always admissible, not to contradict or vary the contract, but to apply it to the facts which the parties had in their minds and were negotiating about."

iii) The Purpose of the Imbamar Contract

[205] The genesis of the Imbamar Contract was a financing opportunity that was presented by Mr. Ocampo to Mr. Solar. Mr. Ocampo was, Mr. Solar said, a “financier”. Mr. Solar knew that Mr. Ocampo had been retained by the Tracomex companies to find financing for them. He knew the companies were under significant liquidity pressure. He knew very early on that they owed money to a “large German company” and were being pressured to pay that debt.

[206] The chronology which follows relies on the written submissions of counsel for 029. Mr. Ocampo first presented the opportunity discussed with Mr. Solar in an email to Mr. Solar dated November 28, 2009, titled “REPO opportunity on used steel rails in Canada”. The email included the following passages:

> Scrap rails, per the American Metals Market (AMM) are currently trading at USD 355/MT. ...
>
> As I explained, Tracomex is under severe liquidity pressure, having recently missed a payment with a large German trading and financing house with whom I obtained an Hermes-backed line of credit for Tracomex. As such,

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> they are willing to enter in a Sale and Repurchase Agreement whereby you and your partner could purchase, say, 3,000 MT of the rails at Abbotsford (which I personally inspected, together with a specialist hired by the Germans during July) at half the current AMM price for rail scrap.
>
> In this manner, you would disburse USD 532,500 and Tracomex would invoice to you 3,000 MT of the rails. After 180 days, Tracomex would repurchase the rails at 110% of the original price, offering you an implied interest gain of 20% p.a. on the operation.

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[207] Mr. Solar testified that he understood the term “REPO” to refer to repurchase agreement. He was familiar with “REPO” agreements and had some limited involvement with them in the past. He accepted that the basic structure of the transaction presented by Mr. Ocampo was a “financing deal”. He accepted that that basic structure consisted of the following components:

(i) the parties would enter into a sale and repurchase agreement whereby Imbamar would purchase around 3,000 MT of the Steel Rail from Trac Chile at half of the AMM price;

(ii) Imbamar would advance $532,500 US to Trac Chile and Trac Chile would invoice 3,000 MT of the Steel Rail to Imbamar; and

(iii) after 180 days (the “Repurchase Period”), Trac Chile would repurchase the Steel Rail at 110% of the original price, offering Imbamar an implied interest gain of 20%.

[208] On December 2, 2009, Mr. Ocampo forwarded an email to Mr. Solar from Mr. Mitarakis, the principal of the Tracomex companies, describing the Steel Rail. The subject line of the email is “Short-term financing”.

[209] On the same date, in the same email string, Mr. Solar responded to Mr. Ocampo attaching the comments of Mr. Bezmalinovic, the other principal of Imbamar, regarding the Steel Rail. Mr. Solar stated:

> I’m attaching my partner’s comments. In summary, for the deal to be interesting to us, the same format you proposed must be adjusted to the new reality. If your client is still interested and wants to reach an agreement (drastically changed) with us, we hope to receive a new proposal from him (or you) as soon as possible[.]

[210] Mr. Solar agreed on cross-examination that the reference in the email to "drastically changed" was a reference to the price of the Steel Rail.

[211] Mr. Ocampo responded to Mr. Solar by email, again on the same date and the same email string, stating:

> I get the gist of what you're saying but I am not clear on how to translate it into $$$. Could you please set in black and white what alterations would be made to the Tracomex proposal?

[212] Mr. Solar responded to Mr. Ocampo's email, again on the same date and on the same email string, stating:

> In actual fact, this is what you proposed, if I understood it well.
>
> 1. To buy from Tracomex 3,000 MT of used rails (rail scrap), at half the actual value. However, today the real value is no higher than USD$ 180 per kg. ($90,000), as in Chile. Therefore, half of it would be USD 90 MT x 3,000 MT = USD$ 270,000.00. To reach USD$ 500,000 Tracomex should sell twice what they have. ...
>
> …
>
> 3. After 180 days Tracomex can buy back the rails at a price 20% higher than they sold them to us (for example, they sold us 3,000 MT for USD$ 270,000 and now to recover them they must pay us USD $324,000). In the event they cannot do this, the rails would be at our free disposition.
>
> If this is so, I would thank you to confirm it. I also need you to let us know how we would ensure ownership of the rails (which Tracomex owns and are not seized by someone else) and how the whole operation would be performed.

[213] Mr. Ocampo responded to Mr. Solar by email dated December 6, 2009, and said:

> So he tells me he could do the operation as you are proposing (180 days financing at a 20% rate) provided he gets an improvement in price of at least USD $240, which would yield a disbursement value (at 2 x 1) of USD $120/MT. In this case, he could sell the Abbotsford and 4,000 MT and 1,000MT in Thunder Bay, for a transaction of USD $600,000.
>
> …
>
> Operationally, Tracomex would invoice you 5,000MT for the rails at USD$ 600,000, which would be repurchased in a maximum period of 180 days at a price of USD$ 720,000. Of course, Tracomex wants to reserve for itself the possibility of repurchasing the rails within this REPO in order to lower the cost of financing to the time actually used.
>
> If this is acceptable to you, let me know to proceed with the documentation.

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[214] Mr. Solar testified that he did not respond in writing to this email, but that he told Mr. Ocampo, probably in person, that "we continue to look [at] the price and we need to meet Mr. Mitarakis, we need to see the rate set."

[215] On December 16, 2009, Mr. Ocampo wrote the following email to Mr. Solar:

> As per our conversation, attached please find the investment structure for the financing of the Tracomex rails in Canada. Given the need of the company to fix its situation with our initial investors ... we have been able to design something very attractive for you. This is reflected, above all, in the value at which the rails are being taken in the REPO. While 500 MT are being assessed at half the market price ... the other 3,370 MT are being taken at a value of US$ 120, when the market price is US$ 395 (a 30%)...

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[216] Mr. Ocampo's email attached a memorandum which explained the nature of the proposal being made to Imbamar, and which included the following language:

> [Trac Chile], a Chilean company, needs short-term financing through a 180 days REPO and would be willing to pay an interest rate of 20% plus related expenses over that period.

[217] On December 19, 2009, Mr. Solar forwarded Mr. Ocampo's December 16, 2009, email to Mr. Bezmalinovic with the following comments:

> Dear Augusto,
>
> I appreciate your comments and suggestions. They look good to me with two caveats:
>
> 1. We would have to travel to Canada (one of us or both) to verify the existence of rails, coordinate and transfer them to a chosen depot contracted by us (but this payment must on the account of Tracomex).
> 2. We should include prepayment penalty of three months (to negotiate and bring it down to two months).
>
> Regards,
>
> Damir

[218] Mr. Solar also agreed on cross-examination that the parties were negotiating the inclusion of a pre-payment penalty as part of the transaction.

[219] On January 4, 2010, Mr. Ocampo sent another email to Mr. Solar, attached to which was a memorandum that again set out the proposal as follows:

> Tracomex will have to invoice the investor for all the rails, that is, 3,850 M/T @ US $120.00 per tonne, for a total of US $ 462,000.00. Simultaneously, the parties shall sign a repurchase agreement which shall provide for a maximum time limit of 180 days counted from the date of the invoice, with a 20% interest rate for said period.
>
> The minimum net yield for the investor will be no less than US $ 60,000.

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[220] Mr. Solar agreed on cross-examination that the reference to the minimum net yield of not less than $60,000 was a reference to the minimum net return to Imbamar in the event of a pre-payment. The deal ultimately negotiated with Tracomex Chile did not include a pre-payment penalty. Instead, Tracomex Chile was obligated to pay the repurchase price without any discount for early payment.

[221] Pre-payment penalties are common in secured transactions to ensure that the secured party is ensured a certain return on amounts it has advanced. Though no such penalty was included in the Imbamar Contract, I consider that the discussions have some probative value. The fact that the parties were negotiating a pre-payment penalty further serves to illustrate that the parties' intention, viewed objectively, was to enter into a financing arrangement. Furthermore, the reference to a pre-payment penalty, well into the negotiations, helps test Mr. Solar's evidence that he told Mr. Ocampo, from the outset, that Imbamar was not interested in providing financing to the Tracomex companies.

[222] Both Mr. Solar and Mr. Bezmalinovic accepted that they were prepared to extend the option or right of repurchase to Trac Chile because they were hoping to do further business with Mr. Mitarakis, and to benefit from his relationship with Canadian Pacific and his access to further rails in the future.

[223] Mr. Solar testified that he made it clear to Mr. Ocampo from the very outset that Imbamar was not a financier, and that whenever Mr. Ocampo referred to the transaction in financing terms "we each and every time told him that we are not interesting [sic] in financing."

[224] I do not accept this evidence. The written communications between Mr. Ocampo and Mr. Solar spanned more than six weeks. All of Mr. Ocampo's

written communications over the period November 28, 2009, to January 4, 2010, presented a “financing” transaction. That never changed. I do not accept that Mr. Ocampo would have continued to express himself in such explicit terms had Mr. Solar repeatedly corrected him or told him he was not interested in any such transaction. I consider that this objective record, in combination with other factors, is more persuasive than the evidence of Messrs. Solar, Araya and Bezmalinovic.

[225] One further communication is relevant. On June 6, 2010, a date which post-dates the closing of the Imbamar Contract, but which precedes the end of the Repurchase Period, Mr. Pitters, the comptroller for Trac Chile, wrote an email to Mr. Solar which stated in part, “[p]lease find enclosed a table that summarizes the real dates of the disbursement of the loan with repurchase agreement, granted to [Trac Chile] on January 15, 2010”. Mr. Pitters said, however, that his use of the word “loan” was an error.

[226] The simple reality is that the objective record, from the start of negotiations through to their conclusion, which addresses both the genesis and object of the Imbamar Contract, overwhelmingly does so in the context of a financing or loan transaction.

iv) Value of the Steel Rail Relative to the Price in the Imbamar Contract

[227] 029 argues, and I accept, that the market value of the Steel Rail relative to what Imbamar paid is compelling evidence of the parties’ intention to set up a financing arrangement. I have said that the true market for those rails was the North American market and, in fact, likely the Pacific Northwest market. The written exchanges between Mr. Ocampo and Mr. Solar speak to the Steel Rail being “sold” for perhaps one-half of what they were worth. I have said that this generally accords with most of the relevant evidence that addresses the issue.

v) The Repurchase Option

[228] A right of repurchase or redemption, at the vendor’s option, has been described as a “strong factor” evidencing the parties’ intention, viewed objectively,

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that the true nature of such a transaction is a financing arrangement; *Metropolitan Toronto Police Widows and Orphans Fund v. Telus Communication*, [2003] O.J. No. 128, at para. 67 (S.C.J.), rev'd on other grounds 75 O.R. (3d) 784 (C.A.). Indeed, in *Metropolitan Toronto Police,* the court described this consideration as "the ultimate test to be applied to determine whether a particular transaction should be interpreted as a secured loan or as a true sale"; at para. 67.

[229] Two decisions, *Metropolitan Toronto Police* and *Kaak* address the significance of a right or option to repurchase when considering the substance of a transaction and, in particular, whether such agreements are in the nature of a security interest. Both are also useful because they identify additional factors which can assist with this assessment or determination.

[230] In *Metropolitan Toronto Police*, the court considered whether a securitization transaction should be characterized as a sale or as a secured loan. The court considered not only the wording of the subject agreement, but it also considered "how the relationship transpired and the conduct of the parties"; at para. 40.

[231] After looking at the factual matrix and context of the agreement, the court concluded that the transaction was a true sale. Indeed, the court concluded that "both parties could only get the full benefit of the transaction if it was a true sale"; at para. 40.

[232] The court was also satisfied that the agreement in question did not, in fact, provide the defendant with any right to redeem or repurchase; at para. 69. In this case, the right of Trac Chile to repurchase the Steel Rail, within six months, is clear and express.

[233] In *Metropolitan Toronto Police*, the court also considered the issue of ownership risk saying that in any true sale there must be a transfer of ownership risk to the purchaser; at para. 41. In this case, ownership of the Steel Rail did pass to Imbamar when the Imbamar contract was executed. The force of this consideration, however, is somewhat attenuated because Trac Chile was required to pay general

liability insurance for the Steel Rail. It was also required, if it repurchased the Steel Rail, to reimburse Imbamar for the storage costs it had incurred.

[234] In *Kaak,* the court was concerned with a transaction that involved the sale of cattle with an option to repurchase them. The bank argued that the transactions were, in essence, security transactions under the Ontario *Personal Property Security Act*, R.S.O. 1990, c. P. 10. That legislation contains similar language to the *PPSA* with respect to the application of the Act and the definition of "security interest".

[235] The court, in *Kaak*, in deciding the option or repurchase agreement did not give rise to a security interest, placed significant weight on the fact that the option price appeared "to be close to or perhaps greater than market"; at para. 36. The court considered that with this option price there was uncertainty about whether the option would be exercised; at paras. 38-39. In this case, based on my earlier finding that the "sale price" of the Steel Rail was considerably lower than the market value of that rail, this consideration has limited significance.

[236] The court concluded that, "on a practical and common-sense objective view of all the evidence the parties were not negotiating financial arrangements to assist [the vendor] in financial difficulty"; *Kaak,* at para. 42.

[237] *Kaak* was upheld on appeal. In a brief endorsement, found at *Kaak v. Bank of Montréal*, [2003] O.J. No. 3662 (C.A.), the Ontario Court of Appeal said:

> 2 … An option does not create a security interest. A security interest [is] defined in the relevant portion of s. 1(1) of the *Personal Property and Security Act* as "… an interest in the personal property that secured payment or performance of an obligation…" An option is a right; it is not a payment or an obligation.

[238] 029 argues, and I accept, that the foregoing statement was not intended to advance a proposition of general application and does not reflect the state of the law. Thus, there are numerous instances where options can properly be considered a payment or obligation for the purposes of determining a security interest under *PPSA* legislation. A common example of this is found in options to purchase in lease agreements; see e.g. *Re. 488723 Ontario Inc. (R.P.M. Motors)* (1985), 55 C.B.R

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(N.S.) 311 at 313 (Ont. S.C.), *Crop & Soil Service Inc. v. Oxford Leaseway Ltd.* (2000), 48 O.R. (3d) 291, at para. 6 (C.A.).

[239] Furthermore, respectfully, the statement is inconsistent with the principle that it is the substance, and not the form, of a transaction that is important when determining whether a security interest is created, regardless of how the parties refer to the transaction. The fact the parties refer to a term in an agreement as an “option”, is not in and of itself determinative of the true nature of that agreement.

[240] Finally, it is frequently recognized that endorsements are generally directed to the immediate parties and they are not intended to have broad precedential value. They are not generally interpreted to create broad overarching principles which are not specifically addressed in the endorsement; *R. v. Timminco Ltd.* (2001), 54 O.R. (3d) 21 at paras. 35-36 (C.A.); *R. v. Singh*, 2014 ONCA 293 at para. 12.

vi) Obligations of Ownership

[241] A final set of relevant factors is identified in Ronald C.C. Cuming & Roderick J. Wood, *British Columbia Personal Property Security Act Handbook*, 4th ed. (Scarborough: Carswell, 1998) at p. 36, where the authors state that the fact the “lessee [vendor] bears some of the obligations of ownership, such as the requirement to repair and insure the goods, provides some persuasive but not conclusive evidence of the security agreement”; see also *488723 Ontario* at 313.

[242] In this case, as I have said, Trac Chile was required to pay the general liability insurance for the Steel Rail, and was expected to reimburse Imbamar for storage costs if it repurchased the rails.

[243] It is apparent that numerous considerations inform the true nature of the Imbamar Contract. The root, or genesis of the transaction, is found in the illiquidity of the Tracomex companies and in the efforts of Mr. Ocampo to obtain financing for those companies. The structure and central components of the deal first proposed by Mr. Ocampo, which Mr. Solar accepted was a financing transaction, mirror the ultimate structure of the Imbamar Contract. The “aim” of the Imbamar Contract, as

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expressed in the objective record of communications between Mr. Ocampo/Trac Chile and Imbamar leading up to the Imbamar Contract, was throughout in aid of obtaining financing for Trac Chile. The "purchase" price for the Steel Rail was never intended to be and was not a market price. The "repurchase price" was based on an interest calculation. Mr. Mitarakis throughout intended to repurchase the Steel Rail and, indeed, gave formal notice of his intention to do so, though he did not follow through on this. Based on these considerations, I conclude that the Imbamar Contract created a security interest that was subject to the *PPSA*.

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12) Did Imbamar Abandon Possession of the Steel Rail so that 029's Registration of its Interest in the Steel Rail took Priority over Imbamar's Interests?

i) Attachment, Perfection and Priorities under the PPSA

[244] As set out in the context of my discussion of the *Convention* above, priorities as between security interests in British Columbia are governed by the *PPSA*. Stated broadly, security interests become enforceable as against third parties once they have attached, and then take on priority as against other security interests if they are perfected. The final issue before me is one of priority between 029 and Imbamar's competing security interests.

[245] Attachment occurs when value is given, the interest is enforceable under a written security agreement that fulfills the requirements of s. 10 and the debtor has rights in the collateral; *PPSA*, s. 12. Both Imbamar and 029 advanced funds to Trac Canada and/or Trac Chile as value for written security interests, the Imbamar Contract, and the two 029 GSAs respectively.

[246] As with the issue of whether the Imbamar Contract created a security interest, the issue of priority as between 029 and Imbamar is academic as a result of my conclusion that C & F is entitled to retain title to the Steel Rail. This is largely because creditors of the Tracomex companies do not have an attached interest against collateral in which the Tracomex companies do not have a right. 029 has asked me to set aside this issue, which limits both claims, and address the core of

the priority dispute as between Imbamar and 029 – perfection and resulting priority – independent of my holdings on the rescission issue.

[247] The *PPSA* provides:

> 19 A security interest is perfected when
>
> (a) it has attached, and
>
> (b) all steps required for perfection under this Act have been completed,
>
> regardless of the order of occurrence.
>
> …
>
> 24(1) Subject to section 19, possession of the collateral by the secured party, or on the secured party's behalf by another person, perfects a security interest in
>
> …
>
> (b) goods,
>
> …
>
> unless possession is a result of seizure or repossession.
>
> …
>
> 25 Subject to section 19, registration of a financing statement perfects a security interest in collateral.

[248] *PPSA*, s. 35 then sets out the residual priority rules applicable to this case. First, perfected interests have priority over unperfected interests. Second, where multiple parties have a perfected interest, the earliest party to register a financing statement, take possession or perfect its interest in another enumerated manner, has priority regardless of the date of attachment.

[249] On July 29, 2010, 029 registered a financing statement in connection with the GSA provided by Trac Chile. At that time, 029 held a validly perfected security interest in the Steel Rail pursuant to the *PPSA*, s. 25. I note that 029 had also had a validly perfected security interest over Trac Canada's assets since June 15, 2010, when it perfected a financing statement in connection with the March 5, 2009, GSA provided by Trac Canada. However, Trac Canada had not had an interest in the Steel Rail at issue in this dispute since it transferred title to C & F in July 2009. According I have not addressed this further.

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[250] Imbamar did not register a financing statement and, thus, it could only establish perfection by way of possession. On January 18, 2010, Imbamar entered into a written storage agreement for the Steel Rail with Super H and Trac Chile. The storage agreement was ultimately extended to December 19, 2010, though no further written extensions were provided. The parties agree that this amounts to perfection by way of possession by Super H on Imbamar's behalf; *PPSA*, s. 24(1).

[251] In March 2011, however, Imbamar instructed Super H to begin invoicing Imbamar Canada Inc. ("Imbamar Canada"). Imbamar Canada is a separate legal entity registered in British Columbia. Mr. Solar testified that the invoicing change was motivated by a desire to obtain an HST "discount". This is consistent with a March 21, 2011, email from Mr. Solar to a number of recipients including Mr. Singer, Imbamar's Canadian counsel, in which Mr. Solar writes, "Aaron [Singer] be so kind to pay to Super H 3 months of rent in advance but ask them if they can issue the Invoice to Imbamar Canada Inc. in order that we can discount HST." Imbamar Canada has been invoiced for the storage costs of the Steel Rail since that time.

[252] 029 acknowledges that Imbamar's interest was perfected by way of possession prior to 029's perfection by way of registration and that that interest would normally take priority. However, 029 argues that Imbamar's request that Super H invoice Imbamar Canada amounted to a break in the continuity of Imbamar's possession, rendered Imbamar's interest "un-perfected", and granted priority to 029's perfected interest.

[253] Imbamar took the position that, if the Imbamar Contract was in the nature of a security interest, it retained continuous possession either in its own right or through Imbamar Canada, as its agent, on the basis of a cooperation agreement that existed between the two companies.

ii) Break in the Continuity of Imbamar's Possession

[254] 029 advances two alternative arguments in support of its submission that there was a break in the continuity of Imbamar's possession. The first is that a strict interpretation of s. 24(1) does not permit perfection by possession through a party,

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Imbamar Canada, on the secured party's, Imbamar's, behalf unless that party, Imbamar Canada, physically possesses the collateral. In other words, s. 24(1) only permits perfection through another person's possession where that other person is both in possession and acting on the behalf of the secured party. Thus, Imbamar can only gain perfection through possession where the possessing party, Super H, is acting directly on Imbamar's behalf. Imbamar cannot gain perfection through possession where Super H is acting on behalf of Imbamar Canada which, in turn, is purportedly acting on Imbamar's behalf but does not possess the property. 029's second argument is that, regardless of the interpretative approach taken to s. 24(1), Imbamar cannot establish that Imbamar Canada was acting on Imbamar's behalf when paying for storage of the rails.

[255] The issue underlying the second argument, whether Imbamar Canada was acting on Imbamar's behalf when it paid the storage invoices, is foundational to both issues.

[256] Mr. Solar gave evidence about a cooperation agreement between Imbamar and Imbamar Canada; however, that agreement was not produced.

[257] More important is Mr. Solar's testimony, supported by contemporaneous emails, that Imbamar's intent was to shift the burden of the storage costs to Imbamar Canada for tax purposes. The *Excise Tax Act*, R.S.C. 1985, c. E-15, ss. 169(1) and 225(1), provides registrants with tax credits in proportion to the extent to which taxable goods were acquired for consumption, use or supply in the course of the registrant's commercial activities. Importantly, these tax credits can only be claimed by the entity engaged in those commercial activities, not by that entity's agent; *Y.S.I.'s Yacht Sales International Ltd. v. R.*, 2007 TCC 306, at paras. 33-49.

[258] In order for Imbamar Canada to obtain this tax benefit, it was necessary that Imbamar Canada pay for the storage itself, in the course of its own commercial activities, so that it could later obtain the benefit when it sold merchandise in Canada. Imbamar Canada could not have been working as Imbamar's agent if it hoped to obtain the tax benefit it sought.

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[259] This conclusion is bolstered by Mr. Solar's testimony that, but for the commencement of these proceedings, Imbamar intended to transfer the Steel Rail to Imbamar Canada. He further testified that Imbamar Canada was created to conduct operations in North America and that he expected that it will do so in the future. Furthermore, both he and Mr. Bezmalinovic testified that they did not intend for Imbamar to conduct operations in Canada.

[260] In *KBA Canada Inc. v. Supreme Graphics Limited*, 2014 BCCA 117, at para. 20, the court endorsed a strict application of the provisions of the *PPSA*. It noted that "the overriding goal of the *PPSA* is to provide commercial certainty and predictability to personal property financing" and that "[c]ourts have been very reluctant to circumvent or modify the explicit statutory provisions through the use of extra-statutory principles of common law or equity."

[261] The case law has extended this strict construction or strict application to the s. 24 context: where there is a break in possession, perfection ceases, regardless of the reason for that break; *Minister of National Revenue v. Pollock* (2000), 182 F.T.R. 92, at para. 23; *Canadian Imperial Bank of Commerce v. Melnitzer (Trustee of)* (1993), 23 C.B.R. (3d) 161, at para. 142 (Ont. Ct. J. (Gen. Div. Bank.)), aff'd 50 C.B.R. (3d) 79 (Ont. C.A.).

[262] A strict construction of s. 24 requires that possession amounting to perfection must be "on the secured party's behalf". As of March 2011, Super H was instructed or told that future payments to it would be made by Imbamar Canada. Imbamar Canada did make those payments, but it made such payments on its own behalf. Here, Imbamar's primary position, that Imbamar Canada was paying for storage on Imbamar's behalf, cannot succeed on the evidence before me.

[263] Accordingly, I conclude that there was a break in the continuity of Imbamar's possession in March 2011, which rendered its security interest unperfected. As the holder of a continually perfected security interest over the collateral, in the form of the July 28 Trac Chile GSA that was registered on July 29, 2010, 029 would take priority over Imbamar's interests pursuant to s. 35(1)(b) of the *PPSA*.

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13) Summary of Conclusions

[264] In relation to actions S116044 and S120939, I have concluded that C & F was induced to enter the Trac Chile Contract based on the fraudulent representations made to it by or on behalf of Trac Chile. I have concluded that valid title in the Steel Rail did not pass from Trac Chile to Imbamar as either a good-faith purchaser or in the ordinary course of Trac Chile's business. I have also determined that Mr. Krause was not C & F's agent in relation to his dealings with Imbamar or the formation of the Imbamar Contract. Accordingly, I am satisfied that the formation of the Imbamar Contract is not a bar to rescission of the Trac Chile Contract, and that C & F holds title in the Steel Rail.

[265] Imbamar's claims against C & F are dismissed.

[266] I have said that Trac Chile paid C & F $100,000 US under the Trac Chile Contract. With the rescission of the Trac Chile Contract, this amount would normally be repaid to Trac Chile. C & F plans, however, to sell the Steel Rail and submits that the law permits a defrauded party to obtain both rescissionary relief and damages from the fraudulent party in order to achieve restitution. Thus in Fridman, *Contract*, at 292, the learned author states:

> Damages may be awarded as well as rescission. Such damages will be calculated on the basis of the loss suffered through the deceit, so as to put the injured party into the position he would have been had the fraud not occurred. This includes all losses flowing from the avoided transaction.
>
> [Footnotes omitted.]

[267] Still further, C & F has claimed both interest and costs against the various defendants in action No. S116044.

[268] C & F's interest claim against Trac Chile is advanced under clause 3 of the General Conditions to the Trac Chile Contract which states: "If the Buyer fails to pay by the stipulated date, the Seller shall be entitled to interest at a rate equal to Euribor plus 4% p.a. from the date on which payment was due." I am satisfied that C & F is entitled to interest at this contractually-stipulated rate.

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[269] Accordingly, I consider it appropriate for C & F to continue to hold the $100,000 US it was provided by Trac Chile. It will remain necessary, however, for C & F to ultimately provide some accounting in relation to those funds, and to obtain some further order relating to their retention or return.

[270] The parties will also need to address the fact that it has been Imbamar or Imbamar Canada that has continued to pay for the storage of the Steel Rail pending the hearing of these various actions. I expect that the parties can resolve this issue as between themselves.

[271] The parties asked that I not make any cost orders until after the parties had received these Reasons and are in a position to make further submissions in relation to costs.

[272] In action No. S122034, I have determined that the Imbamar Contract is, in substance, an unperfected security interest governed by the *PPSA,* and that 029's perfected security interest charging the collateral set out in the Trac Chile GSA takes priority over Imbamar's interests. The rescission of the Trac Chile contract, however, renders these conclusions immaterial in so far as Imbamar and 029's security interests in the Steel Rail are concerned. I have said that 029 obtained judgment against each of Trac Canada and Trac Chile during the course of the trial.

"Voith, J."