Roder Zelt-Und Hallenkonstruktionen Gmbh v Rosedown Park Pty Ltd (In Liquidation) and Reginald R Eustace [1995] FCA 1707 (30 November 1995)

FEDERAL COURT OF AUSTRALIA

RODER ZELT-UND HALLENKONSTRUKTIONEN GMBH v. ROSEDOWN PARK PTY LTD (in

liquidation) AND REGINALD R EUSTACE

No. SG 3076 of 1993

FED No. 1049/95

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Damages

COURT

IN THE FEDERAL COURT OF AUSTRALIA

SOUTH AUSTRALIAN DISTRICT REGISTRY

GENERAL DIVISION

VON DOUSSA J

CATCHWORDS

Damages - assessment - wrongful retention of goods - applicant not in business of hiring goods - whether damages should be based on rental value of goods - whether rental value should be adjusted for direct overheads incurred in renting goods - whether damages should be based on value of the goods at the date of conversion

Strand Electric and Engineering Co. Ltd v Brisford Entertainments Ltd (1952) 1 All ER 794 distinguished

British Wagon Company Ltd v Shortt (1961) IR 164 followed

HEARING

ADELAIDE, 28-30 November 1995

30:11:1995

Counsel for the applicant : Mr S H Milazzo

Solicitors for the applicant : Piper Alderman

Counsel for the respondents : Mr M Bevan-Johns

Solicitors for the respondents : Dunemann Sutherland Pty

ORDER

THE COURT ORDERS THAT:

1. Judgment for the applicant against both respondents for

the wrongful detention of the goods for A$142,342 together

with the costs of both trials.

Note: Settlement and entry of orders is dealt with in Order 36

DECISION

VON DOUSSA J On 28 April 1995 judgment was delivered in these proceedings which were then stood over for further consideration to enable the question of damages and other remedies to be considered. It was held that, subject to rectifying a procedural irregularity arising from the absence of leave under s.444E of the Corporations Law, the applicant was entitled to damages from both respondents, that is from the company Rosedown Park Pty Limited ("Rosedown") and from the administrator under a deed of company arrangement of that company, Mr Eustace, for the wrongful withholding of certain large tents. I shall not repeat the history of the issues between the parties. These reasons are to be read with the earlier reasons of judgment.

2. Damages were to run from 30 November 1993, being the date when the administration of Rosedown came to an end by virtue of the company entering into the deed of company arrangement: see s.435C of the Corporations Law. It was not known by the Court when judgment was delivered that Rosedown had gone into liquidation on 30 March 1995. On 18 May 1995 the matter was brought on and applications were made to deal with the irregularity to which I have referred and the fact of the liquidation. Leave was given to the applicant to amend the description of the first respondent to reflect the liquidation and, under s.471B of the Corporations Law, to proceed against Rosedown to the point of entry of judgment. A declaratory order was also made under s.1322(4) of the Corporations Law intended to cure the irregularity arising from the non-compliance with s.444E. Directions were given about the further conduct of the proceedings.

3. The matter now comes back before the Court to assess damages and to enter a final judgment. In opening the case on damages, counsel for the applicant sought to have the Court assess the applicant's loss and damage against Rosedown under the United Nations Convention on Contracts for the International Sale of Goods, and to adjust the rights of the applicant and Rosedown to reflect the probable liability of the applicant to refund certain payments made on account of the purchase price of the tents before the contract under which the tents were supplied to Rosedown was avoided by the applicant. However, discussion with counsel clarified that the appropriate course in

respect of those rights would be for the applicant to file a proof of debt in the liquidation of Rosedown, and for the liquidator to form a view about the extent of the applicant's loss and damage under the contract, and also to form a view about the entitlement of the applicant to set off against that loss and damage the moneys that might otherwise be repayable by it to Rosedown. In my view the Court should not be entering upon those matters in these proceedings. It is now agreed by the parties that the Court should deal only with the question of damages in tort arising from the wrongful detention of the tents, for which Rosedown and Mr Eustace have a joint and several liability. When the damages are assessed I propose to enter judgment against Rosedown pursuant to the leave given under s.471B, but on the express understanding agreed with counsel that the judgment relates only to that question of damages in tort. The entry of the judgment might be of some assistance later in the liquidation, because it is not improbable that Mr Eustace has rights of indemnity or contribution against Rosedown in respect of the damages awarded; the judgment will fix the liability of both tortfeasors.

4. At the conclusion of the reasons for judgment delivered on 28 April 1995 I referred to the principles which govern the assessment of damages in tort for conversion, observing that the conventional measure of damages for conversion is the value of the goods at the date of the wrong, in this case the value of the goods at the date when the deed was executed. In addition the applicant would be entitled to interest under the Federal Court of Australia Act 1977, s.51A, from that date. I commented that if the value of the goods at that date and interest thereon were allowed, it is difficult to follow how the applicant would have any additional right to compensation for "rental value" from that date. I then referred to the varying situations that could arise according to whether the goods were returned or not. It now transpires that the goods, or most of them, were returned by the respondents to the applicant at the end of May 1995, and for convenience I propose to use the date of 30 May 1995 as the day when the goods came usefully back into the possession of the applicant through its Australian agent.

5. Notwithstanding those observations in the reasons for judgment, the applicant has returned to Court still expressing a preference for damages in detinue rather than conversion. It does so in order to support an argument that it should be awarded rental value for the tents, said to be an industry standard of $5 per square metre per month, for the whole of the period from 30 November 1993 to 30 May 1995. The applicant also seeks an additional allowance for depreciation and damage caused to the tents during that time, over and above ordinary wear and tear, together with a further sum for the costs of repairs and replacements necessary to the goods when returned. Interest is claimed on the resulting loss from 30 May 1995 after allowing for the value of the goods returned that day.

6. In detinue, the normal measure of damages is the value of the goods at the date of judgment or their earlier return, together with compensation for the use of the goods up until that day. There may well be a question whether the claim for depreciation sought to be advanced by the applicant over and above normal wear and tear would be allowable in detinue, and, if so, on what basis and to what extent. Fortunately those difficult questions are unnecessary to decide. The valuation evidence given by Mr Matthews, a licensed valuer whose evidence has been received by the Court and which I accept, does not bear out the suggestion that the value of the goods at the date of return was less than would be expected having regard to ordinary wear and tear.

7. I prefer the evidence of Mr Matthews to the alternative modes of calculation of value suggested by the applicant's case for a number of reasons. Mr Matthews is a licensed valuer, he is a person of experience in that area of commerce, and he is a person who understands valuation principles and has approached the matter of value in a traditional way. On the other hand, Mr Curkpatrick is not a licensed valuer. Whilst the observations he made about the conditions of the tentage and equipment, and the likely life of it, were interesting and entitled to some weight, that evidence, coupled with the arbitrary application of the formula suggested by him to current list prices for new items is not an accepted valuation method. It is not necessarily one that is likely to produce an accurate market value for the goods. I accept the evidence of Mr Matthews where it is relevant to have regard to matters of valuation, in particular at the date of the execution of the deed of company arrangement and at 30 May 1995.

8. There has been a dispute between the parties as to the relevant area of tentage that should be the subject of the claim for damages. The square metreage initially supplied was as follows:

Unit Total Area

25m x 80m 2000 sq m

15m x 80m 1200 sq m

6m x 201m 1206 sq m

10m x 40m 400 sq m

9. It is now common ground that before Rosedown went into administration, 25 metres in length of the 15 metre structure had been sold to a company in Queensland. That sale was not known to the applicant at the time of trial, and the proceeds of sale were not accounted for to the applicant prior to the administration. There was no question raised at trial as to possible third party interests in the tentage. There is no evidence that when judgment was delivered Mr Eustace had any reason to suspect that the 10m x 40m tentage may have been the subject of a transaction with a third party. The applicant had heard a rumour to that effect, but had assumed, in the absence of any advice from the administrator to the contrary, that the ownership of the property continued to be subject to the retention of title clause.

10. As I have said, judgment was delivered on 28 April 1995. On 1 May 1995 solicitors for Mr Eustace informed the applicant's solicitors that a claim had been made by Beneficial Finance Corporation ("BFC") in respect of the 10m x 40m structure. The administrator requested the applicant to deal direct with BFC on that problem. On 2 May 1995 Mr Eustace's solicitors informed the applicant's solicitors that they had now learned that a repossession agent acting for BFC had purported to take formal possession of the goods on Friday, 28 April 1995, but that the goods would remain in the physical possession of the administrator until the completion of the Agfest event in Tasmania where the tentage was then in use. The date of the conclusion of that event was not mentioned.

11. On 19 May 1995 the applicant's solicitors advised Mr Eustace's solicitors that they considered an undertaking given to this Court at the commencement of these proceedings, to the effect that Mr

Eustace would secure and maintain the structures, continued to bind him. However, unbeknown to the applicant's solicitors at that stage and, indeed, unbeknown to Mr Eustace, BFC agents had actually taken the 10m x 40m structure on 7 May 1995. It now appears that on 4 November 1992, that is shortly after the 10m x 40m structure arrived in Australia, Rosedown purported to sell it to BFC and lease it back under a lease agreement bearing date 4 November 1992.

12. The applicant, on learning that BFC had taken possession of the structure, was over a commercial barrel as it needed to recover the structure to enable it to be hired to a contractor who intended to erect that structure, and indeed all the tentage the subject of these proceedings, at the Grand Prix in Adelaide in November 1995. To recover the tentage the applicant paid $17,000 to BFC.

13. Questions now arise in respect of the 10m x 40m structure. First, it is necessary to determine whether the property in it remained with the applicant, notwithstanding the transaction on 4 November 1992. If it did not, the applicant had no entitlement to possession when demand was made for it after the commencement of the administration and no claim for damages against Mr Eustace would now exist in respect of it. Ownership of the 10m x 40m structure was not an issue considered at all in the judgment delivered on 28 April 1995, and there is certainly no order of the Court which determines the issue of ownership as between the parties.

14. I will deal with that issue first. The claim of ownership by the applicant rested upon the terms of the retention of title clause. Whatever might have been the terms initially agreed about retention of title, the agreement was reduced to writing in a document signed by Mr Tucker on 2 September 1992. I read the relevant passage:

"Until such time as property in the contract goods passes to the Buyer, the Buyer shall hold the goods as the Seller's fiduciary agent and bailee, and shall keep the goods separate from those of the Buyer and third parties and shall properly store, protect, insure and identify the same as the Seller's property and as against the Seller's invoices. Until that time the Buyer shall be entitled to resell or use the contract goods in the ordinary course of its business but shall account to the Seller for the proceeds of sale or otherwise thereof and shall keep such proceeds separate from any monies or property of the Buyer and third parties."

15. It is contended by counsel for the applicant that the "sale", that has now come to light, of the 10m x 40m structure shortly after it arrived in Australia to BFC was not a resale in the ordinary course of the business of Rosedown. For that reason, the sale was without authority and the legal ownership of the goods remains with the applicant. I should add that this point was not one that was agitated during the course of the evidence. It was a matter that came to light as a real issue only in the addresses. Nevertheless, there is some evidence on the topic and it is not suggested by either side that I should not proceed to deal with it.

16. In my view, the relevant sentence in the above clause should be construed so that the requirement "in the ordinary course of its business" qualifies both "resell" and "use". The sale on 4 November 1992 or thereabouts cannot be classified as a sale in the ordinary course of Rosedown's business. It was clearly contemplated between the applicant and Rosedown that the goods would be supplied, as it were, as a package deal by the applicant, and the applicant would retain property in all the goods as security for the unpaid purchase price, and would continue to have that security until such time as the purchase price was paid in full.

17. I agree with counsel for the applicant that it was not within the contemplation of the parties that the goods or any part of them would be sold in the manner that occurred. Indeed, the evidence strongly suggests that the sale occurred to enable Rosedown to make one of the instalments that was due to Roder for the very goods in question. In my view, it was not part of the business of Rosedown to be selling tentage in those circumstances. The fact that it was not in the ordinary course of business gains some weight from the inference that arises on the evidence that the transaction was not recorded as a sale in the books of Rosedown when it happened. For that reason, it did not become known to the administrator in the course of his investigation of the books after he was appointed under s.436A of the Corporations Law. For those reasons I consider that the 10m x 40m structure remained the property of the applicant, and is to be included in the assessment.

18. The next question that arises in respect of the 10m x 40m structure is whether it is appropriate to include in the assessment of damages the sum of $17,000 that was paid by the applicant to recover it from BFC. In my view, it is not. When the claim of BFC came to light, Mr Eustace said that unless BFC and the applicant could sort out ownership to the property, he would interplead. There was plainly a dispute between the applicant and BFC. He put that dispute in the hands of the applicant to sort out. The applicant now asserts that BFC had no title and the applicant was not in law required to pay anything, but had to act as it did to get the goods back in the urgent situation that arose. It is contended that the applicant acted reasonably in making the payment. In my opinion, the decision to pay or not pay, rather than determine the legal position by resort to the Court, was entirely a matter for the applicant. It was a commercial decision, and the applicant having made the decision which it did, cannot now turn around and seek to create some legal right against Mr Eustace that did not previously exist. I reject the argument that Mr Eustace, by reason of the events that happened, was in breach of his undertaking to secure the goods.

19. The total area of the tentage the subject of the claim for damages is therefore 4356 square metres. The applicant's claim, as I have said, is for $5 per square metre per month. Over the 18 month period in question the claim amounts to rental of approximately $392,000. The value of the tentage as assessed by Mr Matthews was $417,000. Although his valuation was at 15 October 1993,

I propose to apply it as the value at 30 November 1993. It will be observed, therefore, that the rental that is claimed amounts to a return of approximately 62 per cent per annum.

20. The claim for rental is primarily based on the decision of the Court of Appeal in Strand Electric and Engineering Co., Limited v Brisford Entertainments Limited (1952) 1 All ER 796. A high water mark of that case for the applicant is in the following passage from the judgment of Denning LJ at p.800:

"If a wrongdoer has made use of goods for his own purposes, then he must pay a reasonable hire for them even if though the owner has, in fact, suffered no loss. It may be that the owner would not have used the goods himself, or that he had a substitute readily available which he used without extra cost to himself. Nevertheless, the owner is entitled to a reasonable hire. If the wrongdoer had asked the owner for permission to use the goods the owner would be entitled to ask for a reasonable remuneration as a price for his permission. The wrongdoer cannot be better off because he did not ask permission. He cannot be better off by doing wrong than he would be by doing right. He must, therefore, pay a reasonable hire. This will cover, of course, the wear and tear which is ordinarily incurred in a hiring charge, but for any further damage the wrongdoer must pay extra."

21. A number of other cases which have applied that principle, or an analogous one, have been referred to, the most recent being the decision of the Privy Council, Inverugie Investments Ltd v Hackett (1995) 3 All ER 841. That case was not one dealing directly with the wrongful retention of goods but with trespass to land. Nevertheless, the applicant's counsel contends that it confirms a general principle that for the wrongful use of property a reasonable rent should be paid. It was not common ground, but it is established by the evidence, that there is in the industry a $5 per square metre per month standard for long term rental of the kind of tentage under consideration. On what is referred to as casual hire, that is short term rentals, the rate would be higher. It is, in my view, clear on the evidence that the $5 rate is one that is intended to cover both direct and indirect overheads. It was referred to by one of the witnesses as a "budget figure". There are, of course, significant indirect overheads in running a hire business of the kind which was being run by Rosedown. Indeed one could infer from the fate of Rosedown and from that of other companies who carried on similar businesses which have been referred to in the evidence, all of which have in

one way or another collapsed, that the indirect overheads are substantial. Direct overheads, greater in the case of casual hire than long term hire, cover such matters as transportation of the tentage, erection, demounting at the end of the hire, periodic inspections and, on Ms Galloway's evidence, replacemnt of consumables, that is parts which are susceptible to being lost or damaged on a regular basis. All those matters are included within the $5. When their Lordships in Strand Electric v Brisford refer to a fair rental value or a reasonable remuneration they are not suggesting one seizes upon a figure which appears in some rental agreement as, "rental" and applies that without further adjustment. Adjustment must be made for direct overheads and outgoings of the kind that I have mentioned. This is borne out by the concluding passages in the judgment in Inverugie Investments Limited v Hackett where the Privy Council approved the deduction of a variety of direct outgoings from the potential rent capable of being charged for the apartments in question.

22. In my view the first difficulty which the applicant encounters in its approach to this case in seeking to apply a "budget figure", or the standard figure of $5, is that the outgoings appropriate to either a short-term rental or a long-term rental are not adequately established. In effect the Court is being asked to engage upon an exercise of speculation.

23. I mentioned the rate of return of 62 per cent at the outset to indicate that an unadjusted figure of $5 appears to give an unreasonably high rate of return even allowing that the rental does include an allowance for the wear and tear and depreciation of the goods. It must be some lesser figure, and it seems to me that it must be less by quite some margin for direct expenses, but by what margin I am unable to determine. I agree with the submissions of the respondents that the development of the law of torts in Australia over recent years gives greater emphasis than is apparent in the reasoning in Strand Electric v Brisford to the principle that remedies in the law of torts are to compensate the plaintiff for the loss actually suffered, and not beyond that; in other words to put the plaintiff in the position the plaintiff would have been in but for the wrong. In light of that it seems to me that a wrong result would be achieved by simply applying the $5 per square metre approach without deduction for direct expenses. And, short of speculation, the appropriate deductions cannot be assessed.

24. There is, however, another compelling reason for not applying the method of assessing damages adopted in Strand Electric v Brisford. In my view, that decision is plainly and firmly based upon the premise that the owner of the goods who was seeking a remedy was in the business of hiring the goods, and moreover that the goods had initially gone out of the possession of the owner as goods for hire. Admittedly in that case there was no charge levied in the first period of the enjoyment of the goods by another party, but nevertheless possession was given over in circumstances akin to rental and as part of the plaintiff's rental business. The goods were not given over as part of a sale transaction, nor was the transaction between the parties one where the plaintiff's continuing claim to possession arose out of a transaction intended to secure the payment of an unpaid purchase price. In a case such as the present I consider different considerations apply.

25. It was strenuously urged on the applicant's behalf that the applicant was in the business of hiring tentage in Australia and that it should be treated as a hirer in any event. I am unable to accept that submission. The evidence does not establish, to any degree of confidence, that the applicant carried on the business of hiring tents in Australia at the time relevant to the assessment of damages. The

evidence at the main trial indicated that Roder was a major international manufacturer of tentage which it sold to many parts of the world, and indeed a number of sales had occurred to Australia including that of the subject tentage. There is no evidence, though, that at the time that the transaction with Rosedown occurred the applicant was in the business of letting tents in Australia.

26. The impression that I am left with is that after the failure of Rosedown, not the first company failure that the applicant had experienced among its customers in Australia, the applicant decided that it would become a renter of tents in Australia, through an Australian agent. After it regained possession of the subject tents, it embarked on this business by hiring them out. The first hire appears to have been in 1995 when the subject tents were recovered and rented to Burwood Hire for the purposes of the 1995 Grand Prix.

27. Damages should be assessed on the footing that the applicant was not in the business of hiring tents; rather, at the relevant times, it was in the business of selling tents. It sold tents to Rosedown. It imposed a retention of title clause as a means of security for the unpaid purchase price. It was in that capacity that it sought to exercise its rights as owner in about October 1993. I consider the case is not one governed by the principles that were applied in Strand Electric v Brisford, but rather by the principles usually adopted where goods have been converted, namely that the loss equals the value of the goods at the time of conversion, plus compensation or interest for being kept out of the monetary equivalent of that value until judgment. I refer by way of example to British Wagon Company Limited v Shortt (1961) IR 164 at 168 where Strand Electric v Brisford was not applied because the plaintiff was not in the business of hiring out equipment; rather it was a hire purchase company in the business of financing transactions of that kind. I consider the proper approach to damages in this case is to assess them as if this were a claim in conversion, that is to take the value of the tents at 30 November 1993, then allow compensation by way of interest, or damages akin to interest, from that date forward but giving credit to the respondents for the value of the tentage when it was returned on 30 May 1995.

28. I have already indicated my view that $17,000 paid to BFC should not be included in the damages. Mr Matthews assessed the value of the tentage at about 30 November 1993 at $417,000. At 30 May 1995 he valued the same tents at $367,000. The difference between those two figures will be accounted for in the mode of assessment that I propose because credit will only be given for the latter figure. It is suggested however that there should be additional sums allowed. It is alleged that the tents were partly damaged and various components were missing when they were returned, and that compensation for these matters should be added.

29. The respondents answer this by saying that the tentage, or the best part of it, was examined by Mr Matthews, erected at Agfest. Whatever damage existed of the kind now complained of was there to be seen and that damaged condition would be reflected in the value at 30 May 1995. It would therefore be inappropriate to add anything more.

30. In my view it is appropriate to add something more, but not as much as the applicant seeks. Mr Matthews reached his original valuation by considering several factors. He looked at the tents and he had regard to the likely resale price of what he saw. However, he also had regard to the invoices to Rosedown for the purchases from the applicant which listed all the components that were delivered; then he applied a discount for wear and tear to the current list prices of all the equipment. That calculation assumed that the items in the original invoices were still available and were to be included, and that those items include some that would be additional to those incorporated in the erected tents that he inspected. Additional pieces had been supplied that for one reason or another may not have been incorporated in the erected tents, and it may be that not all the tents were erected. It was certainly the case that not all the tents were erected at Agfest. It may be that less than the total area initially sold by the applicant was erected for the very reason that there were pieces missing and pieces damaged that would prevent erection of the total area. Even if that is not the explanation, I accept the evidence adduced on the applicant's behalf that amongst the returned material there were damaged pieces. If less than the full amount were to be erected, obviously it would be the damaged bits that were not used.

31. I accept the applicant's evidence that it was necessary to replace certain parts. I think also it was probably necessary to repair some parts. The types of damage described by Mr Curkpatrick would not have been, or at least parts of it would not have been, apparent with the tent erected, e.g. lugs would not be apparent. On the other hand, some of the damage complained about by Mr Watts seems to me to be damage of a kind that would normally be accepted as wear and tear, and some of it was damage of a kind that could be made cosmetically satisfactory, and presumably mechanically satisfactory, more cheaply than by bringing new parts from Germany.

32. I propose to allow something for the parts that were imported from Germany, including an allowance for freight and the customs agents. The invoice price for all the imports was approximately DM24,000, but some deduction must first be made from that for parts that were bought for other purposes and not merely to make good damage and loss. Taking off the components purchased to make the remainder of the 15 metre structure fully functional, the invoice price is reduced to something like DM21,300. That has to be converted to Australian dollars, and 8 per cent duty and freight added. The total cost of the components imported to rectify damaged and missing components was about A$24,500. The question is, how much of that should be allowed? The applicant has not, and presumably cannot, establish that some of the pieces missing on 30 May 1995 were not missing on 30 November 1993. As well, as I have indicated, I am not satisfied that all the other parts were necessarily needed to make good loss and damage which exceeded ordinary wear and tear taken into account in Mr Matthews' valuation.

33. All the Court can do is to approach the matter in a broad way. Mr Matthews thought the tents were in an acceptable condition, but the applicant's witnesses thought that the damage was greater than it should have been. I suspect the true position lies somewhere between the two. I propose to allow for repair and replacement over and above wear and tear, the sum of A$8,000.

34. A claim is made for cleaning. This claim is not admitted, but it is plain that a good deal of the material was returned without being cleaned after its journey to the Agfest event in Tasmania. The claim is for $4,790. I think the calculation may be a slight over-estimate. I propose to allow $4,250 for cleaning costs.

35. The next component to be determined in the assessment is the rate of interest to be applied to provide compensation, be it allowed as damages or as interest, for the applicant having been kept out of its money from the time of the conversion.

36. Initially, documents of a contractual nature passing between the parties suggested an interest rate of 9 per cent. However, the documents tendered at trial show that the failure of Rosedown to pay for the goods was causing some financial difficulty or stress to the applicant and the applicant had found it necessary in August 1992 to refinance some aspect of its operation to cover the outstanding purchase price. It was then required to pay an interest rate of 13 per cent in Germany. In the correspondence, quarterly payments of interest were being offered by Rosedown. In those circumstances, it seems to me that it is appropriate to award compensation in the form of damages in lieu of interest under the principle in Hungerfords and Others v Walker and Others [1989] HCA 8; (1989) 171 CLR 125. As to the rate, 13 per cent would seem to be an appropriate starting rate. However, there is no evidence to indicate what happened to the rates in Germany thereafter. It is known that they fell in Australia. In the absence of any evidence as to a different picture in Germany, the Court should assume that they would also have fallen in Germany. In the absence of better evidence I think the Court should be guided by rates in Australia. Again, absent any other evidence of what the rates in Australia were, the Court should be guided by Schedule J to the New South Wales Supreme Court Rules which sets out interest rates to be used in assessing both pre-judgment interest and interest on judgments in that Court. The prescribed rate under Schedule J from 1 September 1993 to 28 February 1995 was 10.5 per cent and after 28 February 1995 it increased to 12 per cent.

37. I think the damages in lieu of interest under the Hungerford principle should be calculated in quarterly rests at 10.5 per cent to 28 February 1995 and thereafter at 12 per cent. The starting figure, therefore, in the calculations will be $417,000 at 30 November 1993 with five quarterly adjustments at an interest rate of 10.5 per cent, and one quarterly adjustment thereafter at the rate of 12 per cent, which takes the calculation to 30 May, 1995, viz $488,921. Then should be deducted the value of the goods upon return, $367,000, which gives an amount due at 30 May 1995 of $121,921. To that must be added the amounts for cleaning and for parts giving a total of $134,171. Two more quarterly rests at 12 per cent produces a total assessment to today's date of $142,342.

38. There will be judgment for the applicant against both respondents for the wrongful detention of the goods for A$142,342, together with the costs of both trials.