PARTIES:	PHILLIP CHARLES POAT
	v
	AUSTRALIAN GUARANTEE CORPORATION LIMITED
TITLE OF COURT:	SUPREME COURT (NT)
JURISDICTION:	SUPREME COURT
FILE NO:	81 of 1995
DELIVERED:	Darwin 10 January 1996
HEARING DATES:	30 August 1995
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

Contract - General Principles - Agreement as to terms - Allegation of misrepresentation and mistake - Whether Magistrate made an error in law

Tort - General principles - Conversion - Whether Magistrate erred - Construction of contract - Question of value of items at time they were seized - No evidence adduced by either party - Burden of proof

Jones v Dunkel and Another (1959) 101 CLR 298, applied.

Damages - General Principles - Conversion - Question of value of seized items - Burden of proof - Defendant's actions made accurate determination problematic - Presumption in favour of plaintiff

Armory v Delamirie [1722] 1 Strange 505, applied
Egan v State Transport Authority (1982) 31 SASR 481, considered
Cook v Saroukos and Another (1989) 97 FLR 33, considered
Whitehead v District Council of Murat Bay and Another (1982) 52 LGRA 231, considered
LJP Investments Pty Ltd and Another v Howard Chia Investments Pty Ltd (1989) 24 NSWLR 499, considered

REPRESENTATION:

Counsel:

Appellant: Mr J Withnall
Respondent: Mr M Spargo

Solicitors:

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Respondent: Mildrens

Judgment category classification: N/D
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 81 of 1995

BETWEEN:

PHILLIP CHARLES POAT
Appellant

AND:

AUSTRALIAN GUARANTEE CORPORATION LIMITED
Respondent

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 10 January 1996)

This appeal and cross appeal arise from decisions made in the Local Court sitting at Darwin in proceedings in which the respondent ("AGC") sought to recover from the appellant ("Poat") a debt, and Poat sought to deny liability for it, and to claim against AGC damages for its alleged conversion of certain property of his.

AGC's claim against Poat was based upon a document ("the Agreement") purporting to be a chattel mortgage pursuant to which Poat undertook to repay a sum of $32,386.17 advanced by AGC, plus interest at the rate of 25.36% per annum. The repayment of the

debt and interest was to be made by way of specified instalments. The chattels purportedly the subject of the mortgage were ten jet skis, each identified by serial or engine numbers, and a Toyota Utility. It was common ground between the parties that the monies said to have been advanced by AGC, referred to in the Agreement, represented monies payable to AGC by Darwin Jet Ski Hire Pty Ltd under four other agreements. It was agreed between AGC and Poat that Poat would assume responsibility for the debts of Darwin Jet Ski Hire Pty Ltd and that that debt would be "consolidated" into a new account. For reasons given by his Worship, and which are not contested in this Court, his Worship found that Poat was not the owner of the chattels when the chattel mortgage was executed, and thus it did not operate as a chattel mortgage. However, his Worship held in effect that the Agreement was evidence of a debt owing by Poat to AGC and of the terms and conditions relating to interest and payment as set out in it. That finding is not in dispute.

Poat claimed, however, that the sum of $32,386.17 referred to in the Agreement, was not the amount which he had agreed to pay to AGC. Although Poat was prepared to acknowledge that he owed AGC money arising from the "consolidation" of the accounts in relation to the other four contracts, the sum specified in the Agreement was greater than the amount which he had agreed to pay because AGC had failed to calculate the sum in accordance with certain conditions which Poat asserted were agreed to for that purpose. His Worship held that the consolidation was not intended

to, and did not include, monies owing by Poat personally on two accounts with an AGC affiliate in Queensland. There is no appeal from that.

Next, Poat claimed that it was a condition of the consolidation that interest on the debt so established should be at 14% "flat". In that Poat was successful.

The third area in respect of which Poat sought to have the amount of his acknowledged indebtedness reduced arose from his claim that there should have been no penalties imposed by AGC arising from the discharge of the four contracts prior to the date on which they were to be discharged in the ordinary course. His Worship accepted that Poat informed a representative of AGC that that was what he required some time prior to the Agreement being prepared and signed. But his Worship also held that he was unable to decide just what words were used by Poat in that regard and whether the representative of AGC understood them, and, further that Poat had never enquired whether this desire of his had been accommodated by AGC. In particular, he was not satisfied that Poat made any enquiry of the representative at the time the Agreement was signed. On the evidence, his Worship was not satisfied that AGC was "ever actively aware that Poat's desire was, in Poat's view, a condition of the consolidation (if it was)". It was held that there had been no misrepresentation by AGC by maintaining silence knowing that Poat was making a mistake as to how the sum referred to in the Agreement was calculated, he was

not satisfied that AGC had in any way caused Poat's mistake or contributed to it, nor that AGC was aware of the mistake or should have been aware of the mistake at the time that Poat signed the Agreement. From those findings there is an appeal by Poat based upon alleged error in law on the part of his Worship in making contradictory findings in relation to that matter. Whether his Worship in fact made contradictory findings is to be determined by looking at his reasons, and having done so, I am not satisfied that this ground of appeal has been made out. His Worship said that he accepted evidence from Poat that he informed the representative of AGC "of this precondition" some time prior to the signing of the Agreement. However, it is tolerably clear, on reading the whole of his Worship's reasons, that it was not possible to determine just how Poat expressed himself on the point and whether the representative of AGC understood him. Thus, leaving aside the question of mistake, there was no foundation for a finding on the part of his Worship that there was agreement between the parties in relation to pay out penalties which had not been carried forward into the Agreement. Poat may well have had in mind what he wanted as part of the consolidation arrangements in this regard, and tried to explain it to the representative of AGC; he desired to make the relief from pay out penalties a precondition of the consolidation arrangements, but that was not adequately explained to nor accepted by AGC. That ground of appeal is dismissed.

The remaining ground of appeal arises from his Worship's

determination in respect of the claim by Poat for damages for conversion. In his Statement of Claim he asserted that he was at all material times the owner of and entitled to possession of four jet skis (of which particulars were given), which were not referred to in the Agreement. He asserted that AGC converted them in purported exercise of rights under the Agreement, and he claimed damages for each of the jet skis in the sum of $3,000 and consequential loss as a result of his inability to use the same in the conduct of his business. In its defence to this claim AGC asserted that the jet skis were the subject of the Agreement (which they maintained was a chattel mortgage) and that they were of scrap value only when it took possession of them consequent upon Poat's default in making instalments under the Agreement. His Worship found that AGC "swept up four jet skis which were not among those listed as security in the Agreement" and that their seizure amounted to a conversion by it of them. Poat's claim against AGC was for the conversion of four jet skis, and his Worship so held. The ground of appeal put forward by Poat alleges that his Worship erred in not making any finding in relation to, nor in any way dealing in his judgment, with two additional jet skis which had been the subject of the purported chattel mortgage, as distinct from the other four. But there was never any claim by Poat against AGC in respect of the additional two. There are some indications, particularly from some photographs, that there were a group of six jet skis at some stage rather than four, but looking through the whole of the Local Court file, I cannot find any document that would indicate that the issue joined between the parties involved

six jet skis rather than the four as referred to in the pleadings. Written submissions to the Local Court from counsel for Poat largely concentrated on the question of the value of the four jet skis which were not amongst those described in the Agreement. However, submissions were also made in relation to two, which are described in the Agreement, and the argument was that since the Agreement was not in fact a chattel mortgage, then AGC had no right to repossess them even though Poat was in default in repayment under the terms of the Agreement. It is true that his Worship did not specifically advert to the claim made by Poat on the pleadings as opposed to the matters put forward in final submissions, but it is clear enough from his Worship's earlier findings that, in any event, there was no evidence to show that Poat was the owner of the chattels described in the Agreement. In the course of discussion about the Agreement and its effect, his Worship said: "The Agreement, a chattel mortgage in form, has Poat as owner of the chattels (which he was not), assigning them to AGC". This ground of appeal must be dismissed.

In respect of the finding of conversion by AGC of the four jet skis, his Worship assessed value and awarded damages in the sum of $10,500. AGC appeals in respect of that decision (his Worship found against Poat in respect of the claim for consequential loss and there is no appeal concerning that).

In assessing the damages his Worship proceeded as follows:

1. Poat left Darwin in 1991 and did not see the jet skis until long after they had been seized by AGC "and left to rot".

2. Poat's evidence as to the state of the machines when he left them was extensive and detailed. He was plainly an expert mechanic, with particular expertise for jet skis.

3. Poat had made adaptations to the jet skis which would not have improved the appearance of them to the untrained eye, but would have improved their reliability.

4. Before leaving Darwin Poat had laid up the machines and taken appropriate steps to protect them.

5. Although Poat left instructions with someone to turn over the motors every couple of months, there was no evidence as to whether those instructions were followed.

6. There was no evidence called from those who seized the machines on behalf of AGC. Although Mr Jagger saw some of them some days after they were placed in the open and exposed to the elements (presumably by AGC), it was not clear how closely Mr Jagger examined them, nor how many he looked at, and although Mr Jagger was not impressed with the condition of them, he did not inspect

them closely enough to provide a basis for any opinion. In any event, Mr Jagger's evidence did not provide his Worship with sufficient basis to disbelieve Poat's account of the condition of the machines as he left them.

7. As to the condition of the four jet skis at the time AGC converted them, the evidence was entirely unsatisfactory. Poat could not say anything of what had happened since he had left them in Darwin, but that was not altogether his fault. AGC provided no evidence of their state at the time of their conversion and that was the company's fault. The scraps of evidence available from subsequent inspection, such as that given by Mr Jagger, left open the possibility that all of the differences between Poat's description and the later description could be accounted for by AGC's mishandling of the machines.

8. As to the valuation of the machines, the evidence was unsatisfactory, firstly because of the scanty evidence as to the condition of the machines, and, secondly, because each party chose to invoke the rules against undisclosed expert evidence.

In those circumstances his Worship applied *Armory v Delamirie* [1722] 1 Strange 505 and assumed that the jet skis were of the highest possible value consistent with such

evidence as there was, most of which came from Poat.

9. Poat's evidence had related to the prices for jet skis in going order, which the machines were not at the time Poat left them.

10. Three of the jet skis which were converted could have been restored to good saleable condition with minor expenditure by Poat, and the value of each of them and the market value of those machines when converted was $3,000 (after taking into account that minor expenditure).

11. The fourth machine could not have been so readily restored to good condition, but it must have had a value of at least one half of the better jet skis, and in doing the best he could in the circumstances, bearing in mind that the burden of proof lay on Poat, the value of it when converted was $1,500.

The appellant's submissions on the question of damage for the conversion rested primarily upon the failure of Poat to prove the loss. The evidence establishes that Poat left Darwin about seven months prior to AGC seizing the goods, and he did not see the goods during that period of time. They were left at the private residence of his brother-in-law, Mr Fitzjohn, who was not called to give evidence. Mr Jagger's evidence, which was not

reliable as to the condition of the jet skis in any event, did not see them until two weeks after they had been seized.

His Worship's finding that Poat was an expert mechanic with particular expertise for jet skis was well open to him on the evidence. But he was also accustomed to dealing in jet skis, having been involved in purchase or sale transactions involving those machines on probably twenty or thirty occasions. Poat gave evidence of having sold three jet skis for between $3,700 and $3,000 in or around October 1991. He told his Worship that they were very similar in condition to three of the machines seized by AGC that had engines in them. He acknowledged, as his Worship found, that money would have had to be spent on the machines to ready them for further use after they had been laid up during his absence from Darwin, and to bring them up to the condition of the three sold in late 1991. His evidence was to the effect that if he had spent $2,000 in respect of all six jet skis seized by AGC that would bring them up to the condition to those which were sold at the end of 1991. There was evidence upon which his Worship could base a finding that a sale price, after repair and maintenance and reconditioning, would amount to $3,000 for each of three of the machines and $1,500 for the other. That assumed that the machines when seized by AGC were in the same condition as they were when left by Poat with his brother-in-law when he departed Darwin.

There was no evidence called by Poat or AGC as to the

condition of the machines at the time they were seized, his Worship finding that Mr Jagger's evidence was of no assistance in that regard. It was in that regard that his Worship regarded the evidence as unsatisfactory, since Poat could say nothing of what had happened to the machines since he left them in Darwin, and AGC provided no evidence of their condition at the time of their conversion. His Worship categorised the evidence as to valuation of the machines as unsatisfactory, but upon the basis that there was little evidence as to their condition (at the time of their conversion) and because there was no expert evidence in the sense of independent expert evidence. However, his Worship found that Poat's evidence as to the value of the machines was "entirely creditable". He noted that prices obtained by Poat were for jet skis in going order, that those in question were not so at the time that they were left by Poat, and in that respect he made an allowance in favour of AGC for the cost of repair and reconditioning them. Poat had had experience in dealings with jet skis and he gave evidence of prices for comparable machines of which he was aware and applicable at about the relevant time. Obviously it would have been more satisfactory to his Worship if he had evidence other than from Poat as to the condition of the machines at the time he left them in Darwin and as to values, as well as some evidence as to the condition of the machines when they were seized by AGC.

The point on appeal is directed to there having been no evidence as to the state of the machines at the time they were seized by AGC. In that regard counsel for AGC seeks to invoke

Jones v Dunkel and Another (1959) 101 CLR 298. But the principle applies as well to AGC as it does to Poat. Both were in a position to call evidence going to the issue of the condition of the machines at the time they were seized, and there was no explanation for the absence of any witness from either side on that point. I bear in mind that the failure on the part of AGC to call evidence can not be used to fill in gaps in the plaintiff's case where the plaintiff bears the legal burden of proof. It was in those circumstances that his Worship applied *Armory v Delamirie* to lead to an assumption that the jet skis were of the highest possible value consistent with such evidence as there was. A plaintiff who has been deprived of his chattels is ordinarily entitled to its full value as a result of the unlawful detention or conversion, and it is thus necessary to determine the value prior to that unlawful act. On its facts *Armory v Delamirie* does not aid Poat. The finder of the jewel did not know what it was. He delivered it to the defendant, a goldsmith, who offered to buy it. The plaintiff refused to take the sum offered, and unsuccessfully sought to have the jewel returned. It was held that unless the defendant produced the jewel and showed it not to be of the finest water, then there being evidence to prove what a jewel of the finest water would be worth that should be the measure of the damages. The onus of proof is thus satisfied. The authority has been applied in a number of other circumstances. In *Egan v State Transport Authority* (1982) 31 SASR 481, the defendant unlawfully took possession of the plaintiff's plant and material. The question of assessment of damage was referred to the Master, and

in so doing his Honour Justice White provided some guidance. He said at p530 that:

> "The basic/static loss in relation to the plant is the 1982 cost of replacement of each vehicle, piece of equipment, tool etc., not as new but in the condition in which each item was in May 1966. In the absence of proof to the contrary, each item of plant is to be presumed to be in the best condition which could be reasonably expected of an item of plant of that type and age"

and referred to *Armory v Delamirie*. There was no issue in that case as to the identity of the plant and equipment unlawfully seized by the defendant nor as to its condition at the date it was seized. Both cases were followed by Angel J. in this Court in *Cook v Saroukos and Another* (1989) 97 FLR 33. In that case the plaintiff left Darwin in about July 1982 to go overseas, leaving behind plant which his Honour found was in good order and condition and properly maintained (see p37). The plaintiff returned to Darwin in 1983 (precisely when is not disclosed), but in the meantime the defendants had used the plant in business operations. At p39 his Honour observed that "some of the property was used to exhaustion". There was evidence of value of the goods at the time of the conversion. His Honour said:

> "His [the valuer's] task was a difficult one, having only this year been first called to bring his expertise to bear upon the issue. I accept his evidence that some of the items of plant would have depreciated with time, others would have maintained their value, whilst other equipment would have increased in value. The age of some of the items is uncertain. However, I accept his range of values for the equipment and in particular that his upper limit of values represents the value of equipment in good working order and well maintained. Some of the items claimed by the plaintiff can not be

> located and could be presumed, against the defendant, to be "of the first water"." (p41).

It does not seem to have been an issue in that case that there had been any circumstance intervening, affecting the value of the goods, between the time when the goods were last seen by the plaintiff until the time at which they were converted unlawfully by the defendants. Indeed, at p39 his Honour said that he was unable to find the periods of use in respect of some items of plant. His Honour concluded his assessment of the damages at p43 by saying that the value of the items was incapable of precise calculation and it was "largely a matter of estimation and essentially a jury question: cf *Brown v Jam Factory Pty Ltd* (1981) 53 FLR 340 at 354", and proceeded to award an amount by way of a "reasonable compensatory sum for the value of the items". In another South Australian case, *Whitehead v District Council of Murat Bay and Another* (1982) 52 LGRA 231, Mitchell J. at p242 was considering the value of goods which had been unlawfully removed from the property of the plaintiff by the defendant Council and dumped. There were difficulties in the valuation, but her Honour formed the opinion that it was "honest and as accurate as it was possible for" the valuer to make it. She went on: "The defendant Council, by its destruction of the chattels, deprived the plaintiff of the opportunity of having them valued while they were in existence" and applied *Armory v Delamirie* presuming the strongest against the Council. But, again, it was not a case where there was no evidence as to the nature and condition of the goods converted at the time of the conversion. In a case involving the

assessment of restitutionary damages for trespass to land, Hodgson J. in *LJP Investments Pty Ltd and Another v Howard Chia Investments Pty Ltd* (1989) 24 NSWLR 499 at 508, finding it impossible to be certain which course the defendant would have taken if it had refrained from trespassing, thought that the Court was justified in taking the course adopted in *Armory v Delamirie* "and resolving the question of value against the party whose actions have made an accurate determination so problematic".

These cases indicate that where there is action on the part of the defendant, which has caused the assessment of damages to be difficult, then that should weigh against the defendant. The difficulty can arise in two ways, by the defendant having done something in respect of the subject of the damages claim after converting it, or by failing to adduce available evidence which would assist the Court. It is a nice point and not free from doubt, but in my view, the principle based on *Armory v Delamirie* overcomes any adverse inference which a plaintiff may suffer as a result of the application of the principle in *Jones v Dunkel*, in a case such as this where that latter principle is applicable to both parties, and that in *Armory v Delamirie* only against the defendant.

The cross appeal is dismissed.