SUPREME COURT OF QUEENSLAND

CITATION:	*Black Diamond Group Pty Ltd v Manor of Maluka Pty Ltd & Anor* [2014] QSC 219
PARTIES:	**BLACK DIAMOND GROUP PTY LTD** **ACN 161 737 300** (plaintiff) and **MANOR OF MALUKA PTY LTD (in liquidation)** **ACN 153 962 906** (first defendant) and **GO COUNTRY GROUP PTY LTD** **ACN 147 698 342** (second defendant)
FILE NO:	BS12206/13
DIVISION:	Trial
PROCEEDING:	Trial
DELIVERED ON:	8 September 2014
DELIVERED AT:	Brisbane
HEARING DATE:	25 and 26 August 2014
JUDGE:	Jackson J
ORDERS:	**The order of the Court is that:** **1 The plaintiff's claim for damages against the second defendant is dismissed.** **2 The second defendant pay the plaintiff's costs of the proceeding up to and including 25 August 2014.**
CATCHWORDS:	TORTS – TROVER AND DETINUE – POSSESSION OR RIGHT TO POSSESSION – ACTUAL POSSESSION – where the plaintiff sought damages for detinue against the second defendant – where the first defendant had hired demountable buildings from the plaintiff – where the second defendant was the owner of the land – where the first defendant occupied the land under an agreement with the second defendant – where the plaintiff made a demand for return of the chattels from the second defendant – whether the second defendant had possession of the demountable buildings during the term of the agreement with the first defendant TORTS – TROVER AND DETINUE – REMEDIES –

ACTION OF DETINUE – where the plaintiff sought damages for detinue against the second defendant pursuant to the principles in *Strand Electric* – where the plaintiff's demountable buildings had remained on the second defendant's land but had not been used since the termination of the second defendant's lease with the first defendant – whether the second defendant had "used" the buildings

Bunnings Group Ltd v Chep Australia Ltd (2011) 82 NSWLR 420, applied
Butler v Egg & Egg Pulp Marketing Board (1966) 114 CLR 185, considered
Farah Constructions Pty Ltd & ors v Say-Dee Pty Ltd (2007) 230 CLR 89, applied
Gaba Formwork Contractors Pty Ltd v Turner (1991) 32 NSWLR 175, referred to
Radaich v Smith (1959) 101 CLR 209, cited
Rapid Metal Developments (Australia) Pty Ltd v Rildean Pty Ltd [2010] NSWSC 7, referred to
Reynolds v Aluma-Lite Products Pty Ltd [2009] QSC 379, referred to
Sadcas Pty Ltd v Business Professional Finance Pty Ltd [2011] NSWCA 267, referred to
Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd (1952) 2 QB 246, considered
Thomas v APL Co Pte [2013] FCA 911, referred to
Western Australia v Ward (2002) 213 CLR 1, cited

COUNSEL: C Johnstone for the plaintiff
A Ivantsoff (solicitor) for the first defendant
NM Cooke for the second defendant

SOLICITORS: Hazan Hollander for the plaintiff
Shine Lawyers for the first defendant
Cranston McEachern for the second defendant

[1] **Jackson J:** On 25 August 2014, a consent judgment was entered as between the plaintiff and the first defendant on the plaintiff's claim. On the same day, a consent order was entered as between the plaintiff and the second defendant on part of the plaintiff's claim, leaving a claim for damages for detention for the tort of detinue to be determined. These reasons deal with that claim. It was pleaded in the alternative as a claim for damages for conversion but the plaintiff pressed only the claim for damages for detinue in its closing address.

The parties

[2] Black Diamond Group Pty Ltd, the plaintiff, carries on business hiring demountable accommodation buildings. A typical application is for a camp to accommodate workers employed in mining operations. Until some time this year, Manor of Maluka Pty Ltd (in liquidation), the first defendant, carried on business providing accommodation services at a site which is described as the Banana Accommodation Village or "the Banana Camp", near Banana, in Central Queensland. For that

purpose, it hired 21 buildings from a company. That company later assigned its property in the buildings and the benefit of the contract to the plaintiff.

[3] An associate company of the first defendant, Go Country Catering Pty Ltd, provided catering services at the Banana Camp. The first defendant's major customer was known as BAJV. The sole director and shareholder of the first defendant and Go Country Catering Pty Ltd was Robert Johnston.

[4] Go Country Group Pty Ltd, the second defendant, was and is the proprietor of the land comprising the Banana Camp. Nicole Newman was and is the sole director and shareholder of the second defendant. She was and is the de facto partner of Robert Johnston. The second defendant purchased the land with the purpose of the first defendant developing and operating the Banana Camp on it.

[5] Ms Newman said an agreement was made between her, for the second defendant, and Mr Johnston, for the first defendant that the first defendant would occupy or lease the land from the second defendant for $1,000 per month rent, and that at the end of the agreement the improvements were to remain with the second defendant as proprietor of the land.

[6] As it turned out, the business venture of the Banana Camp was not successful. Shortly before Christmas 2013, BAJV terminated its contracts with the first defendant and Go Country Catering Pty Ltd. Thereafter, the camp was not used to provide accommodation, with two minor exceptions. The plaintiff's accommodation units remained unused in those instances. For a time, the first defendant sought to interest other customers for the services, including accommodation services, that could be supplied by it and Go Country Catering Pty Ltd. The attempts were not successful. Mr Johnston had carriage of any negotiations.

[7] Ms Newman worked for the first defendant in providing office administrative services throughout these events. She was aware of how matters were developing or progressing from time to time.

[8] From a time in 2012 which it is now unnecessary to identify, the first defendant fell into arrears in the payment of its suppliers' debts. That included the monthly instalments of hire payable for the plaintiff's buildings.

Detention of the plaintiff's buildings

[9] On 9 December 2013, by letter from the plaintiff's solicitors to the second defendant by Ms Newman and its solicitors, the plaintiff intimated that it intended to recover possession the buildings. The letter sought confirmation from the second defendant that it would not take any steps to impede the plaintiff's exercise of the asserted right to recover the buildings from the land.

[10] On 12 December 2013, the second defendant's solicitors responded that they held instructions to accept service of any proceedings and that the second defendant would strenuously defend any proceedings. The implied statement was that the second defendant denied the plaintiff's right to recover the buildings from the land.

[11] On 19 December 2013, the plaintiff started this proceeding by originating application claiming an order against the second defendant that it deliver up the

buildings. This was later amended to include an order requiring the second defendant to compensate the plaintiff by way of damages in the amount of $525,987 (later abandoned) or $58,443 per month. The application was served on the second defendant's solicitors on that day.

[12] On 17 January 2014, the second defendant's solicitors wrote to the plaintiff's solicitors. The letter alleged that the buildings were fixtures attached to the second defendant's land but, somewhat inconsistently, also stated that the second defendant objected to the plaintiff coming onto the second defendant's land without appropriate insurance cover and a relevant net worth of at least $200,000, against the risk of damage to the second defendant's land caused by any removal or recovery.

[13] On 7 February 2014, the plaintiff's solicitors again wrote to the second defendant by Ms Newman and the second defendant's solicitors, making formal demand for the second defendant to give up possession of the plaintiff's buildings and to take all necessary steps to make the buildings available for collection.

[14] On 7 February 2014, the second defendant's solicitors responded to the plaintiff's solicitors saying that: "To remove any doubt our client objects to the removal of the buildings and will deem any access to our client's land by your client or any agent representative or otherwise on its behalf to be a trespass and will vigorously defend its rights in this regard." That was a clear denial of the plaintiff's claim to return of the buildings.

[15] On 13 June 2014, the second defendant terminated the agreement to occupy or lease between the second defendant and the first defendant.

[16] On or about 26 June 2014, the first defendant went into liquidation.

[17] By the consent order made on 25 August 2014, it was ordered that the second defendant return the buildings to the plaintiff. That order was made upon an exchange of undertakings given to the Court by the parties. The plaintiff undertook to hold appropriate insurance. The second defendant undertook to grant access to the land to enable the buildings to be removed and neither to occupy nor otherwise deal with the buildings except for the purpose of disconnecting attachments.

[18] By that order, the second defendant accepts that from 25 August 2014 it detained the plaintiff's buildings. But it contends that at no time prior to that date did the plaintiff have a cause of action against it in detinue which supports an order for damages for detention.

Claim for damages for detention

[19] The remaining claim of the plaintiff against the second defendant for damages for detention is calculated from either 12 December 2013 or from 7 February 2014. The damages are claimed at the rate of $58,443 per month representing the hire rate for the buildings agreed between the plaintiff's assignor and the first defendant under the contract made between them. An alternative rate is claimed, of $35,700 per month, being the monthly hire rate for the same number of similar buildings as agreed between the plaintiff and a number of other customers who hired similar buildings from the plaintiff in November and December 2013.

[20] The plaintiff does not claim the amount represented by those periods or amounts as compensatory damages in accordance with the general principles governing the assessment of damages in tort. Instead, the plaintiff relies upon a particular rule of law for the assessment of damages for the tort of detinue, where the plaintiff carries on business of hiring the chattels in question for reward and the defendant makes use of them, that results in the plaintiff being entitled to its usual rate of hire for the chattels in question.

[21] In accordance with the manner in which the plaintiff pleaded and argued its case, there are three relevant issues to determine. First, from what date did the second defendant wrongfully detain the plaintiff's buildings as the starting point for the assessment of damages for detention? Secondly, has the second defendant made use of the plaintiff's buildings within the meaning of the principles which govern the availability of such a claim for damages? Thirdly, what is the relevant rate to apply?

Bunnings v CHEP – a concession

[22] Before proceeding to the issues it is appropriate to record the concession by the second defendant that the plaintiff may be entitled to damages representing its usual rate of hire without regard to whether that would be its loss applying the compensatory measure of damages.

[23] Specifically, the second defendant does not submit that the plaintiff's damages, if any, fall to be discounted if the plaintiff would not have been able to re-hire the buildings had they been returned to the plaintiff at the time when any detention by the second defendant commenced.

[24] In principle, this approach treats the second defendant as a quasi-hirer for the period of the detention, whether or not the plaintiff's loss would have been as much as that, if the chattels had been returned. This measure of damages for conversion or detinue, where the plaintiff is in the business of hiring the chattels in question, and the defendant makes use of them, is associated with the decision of the Court of Appeal of England and Wales in *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd*.[1] In that case, the primary Judge discounted the plaintiff's claim for damages for detinue by making an allowance for the prospect that the plaintiff may not have been able to re-hire the detained chattels for the period of the detention or for the amount of its usual hire rate. The Court of Appeal set aside the judgment and increased the damages to the amount of the plaintiff's usual hire rate for the chattels for the period of the detention.

[25] Such an approach is arguably inconsistent with the decision of the High Court of Australia in *Butler v Egg and Egg Pulp Marketing Board*[2] that damages in tort, including the tort of conversion, are compensatory, so that a plaintiff may not recover more than the "sum of money [that] would be required to place it in the same position as it would have been in if the appellants had [not converted the chattels]."[3]

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1 (1952) 2 QB 246.
2 (1966) 114 CLR 185.
3 (1966) 114 CLR 185, 191.

[26] However, in *Bunnings Group Ltd v Chep Australia Ltd*,[4] the Court of Appeal of New South Wales followed and applied *Strand Electric* as part of the common law of Australia. The reasons for judgment in *Bunnings* refer to *Butler*. I am bound to follow *Bunnings* unless it is "plainly wrong", in accordance with the principle of precedent stated by the High Court in *Farah Constructions Pty Ltd & ors v Say-Dee Pty Ltd*.[5]

[27] Accordingly, the second defendant conceded that I should apply *Strand Electric*, as explained in *Bunnings*, to which I will return.

Date of detention

[28] The cause of action in detinue is complete when a person entitled to possession of chattels makes a demand on a possessor and the possessor refuses to return them.

[29] The second defendant submits that it did not refuse to return the plaintiff's buildings at any time before the order made for their return on 25 August 2014. It is necessary to consider the relevant dates contended for by the plaintiff successively.

[30] If the second defendant had a sufficient possession of the buildings from 9 December 2013 onwards, the question becomes whether the plaintiff's demand was adequate and the second defendant's response sufficient to constitute a refusal for the purposes of the tort of detinue.

[31] In my view, there might have been a question whether the plaintiff's solicitor's letter dated 9 December 2013 was unequivocal enough to constitute a demand. There are cases where a defendant has been found not to have refused, because the demand was found to be excessive[6] or too vague. However, it would be unrealistic to find that the demand, on the facts of this case, was inadequate when the response it provoked from the second defendant's solicitors was to inform the plaintiff's solicitors that they had instructions to accept service of any proceeding to recover possession. The plaintiff's solicitor's letter which provoked that response had stated that the plaintiff was planning to recover the buildings. In my view, the demand was enough to engage the second defendant's response as a refusal to return the chattels, on any basis.[7]

[32] Further, the cases recognise that in some circumstances a defendant's failure to respond to a demand may not constitute a sufficient refusal and that a defendant may not have refused sufficiently where the purpose of refusal is to reasonably investigate the plaintiff's right to possession before responding further. But this case does not fit either of those characterisations. The second defendant's response was an unequivocal statement that it would accept service by its solicitors of any proceeding for an order for return of the buildings.

[33] Second, the plaintiff's solicitor's letter to the second defendant's solicitors dated 7 February 2014 made a further demand for the return of the buildings. This demand provoked a response where the second defendant refused to return the buildings and

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4 (2011) 82 NSWLR 420.

5 (2007) 230 CLR 89, 151 [135].

6 For example, *Capital Finance Co Ltd v Bray* [1964] 1 All ER 603, 606-607.

7 Compare, as to conversion by detention, *Flowfill Packaging Machines Pty Ltd v Fytore Pty Ltd* (unreported, New South Wales Supreme Court, Young J, 1901/93), 11.

warned the plaintiff that any access to the land would be deemed a trespass for which the second defendant would vigorously defend its rights. Except that it was made after the proceeding was started, this was plainly a sufficient demand and refusal as a matter of fact.

[34] It is said in some cases that a demand in detinue must be made before the proceeding is started. At common law so it had to be. However, in this Court, *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") r 375(2) permits the joinder of a cause of action by amendment that accrues after the date when a proceeding is started. The proceeding in the present case started on 19 December 2013. It was started by originating application. The statement of claim was filed and served on 14 February 2014. The statement of claim alleges the facts of the 7 February 2014 demand and following refusal. If the 9 December 2013 demand and refusal were not enough to constitute a wrongful detention, in my view, the 7 February 2014 demand and following refusal were enough to do so.

[35] However, another consideration is that the second defendant alleges that there was an agreement to occupy or lease the land on which the buildings were located by the second defendant to the first defendant from before the time of the plaintiff's first alleged demand on 9 December 2013 until 13 June 2014. The question that fact might raise is whether, because the second defendant was not in possession of the land or the buildings, any relevant refusal by it is sufficient for the tort of detinue.

[36] The alleged agreement to occupy or lease is an oral agreement made in July 2012 between the second defendant by Ms Newman and the first defendant by Mr Johnston. The subject was the whole of the land (including the Banana camp) for a term of five years for a rent of $12,000 per annum payable by the amount of $1,000 per month. The second defendant alleges that a term was that on termination of the agreement to occupy or lease the second defendant would be the owner of the improvements to be made by the first defendant during the term of the lease.

[37] The first defendant went into occupation or possession following the alleged agreement to occupy or lease. It effected improvements including the installation of the plaintiff's buildings. Ms Newman said that about $37,000 was paid by the first defendant to the second defendant by way of rent.

[38] At law, in this State, a lease of land for a term in excess of three years must be made in writing.[8] However, in equity, an agreement for lease followed by entry into possession and the payment of rent constitutes an equitable lease. And at common law, as altered by s 129(1) of the *Property Law Act* 1974 (Qld), those facts create a tenancy terminable by a month's notice.[9] The lack of a legal lease does not defeat the conclusion that there was a tenancy or that the first defendant may have been in possession of the land between 9 December 2013 and 13 June 2014. In that case, the second defendant will have been the landlord and held the reversion upon the tenancy, but will not have been in possession of the land at law. Possession of the tenant is a necessary incident of a tenancy.

[39] The parties did not focus upon or make specific submissions directed to whether the agreement was an agreement for lease as opposed to an agreement for occupation

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8 *Property Law Act* 1974 (Qld), s 12.

9 *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242, 248-258.

not constituting possession but amounting only to a licence. The language of the evidence given by Ms Newman about the agreement suggested lease not licence. However, the difference between lease and licence is not always easy to tell. Notwithstanding that his Honour was in dissent, the penetrating analysis of McHugh J in *Western Australia v Ward*[10] shows why, as does the recognition by the High Court in *Radaich v Smith*[11] that the label chosen by the parties does not foreclose the answer to the question in law. In particular, part of the discussion in McHugh J's reasons in *Ward*[12] shows the difficulties that can attend distinguishing between possession (lease or tenancy) and occupation (licence).

[40] If the true character of the relationship between the first defendant and the second defendant is that the first defendant had possession of the land under a tenancy, does that affect the plaintiff's claim against the second defendant in detinue?

[41] From first principles, the tort of detinue is constituted by a defendant's wrongful withholding, that is detention, of chattels to which the plaintiff has an immediate right to possession.[13] It makes little sense that a defendant who does not have possession of the relevant chattels and has never had possession might commit the tort of detinue by denying the plaintiff's right to possession. The case law recognises that a defendant who was in possession but who has lost that possession may still be liable to the plaintiff in detinue in some circumstances. But I am not aware of a case where a defendant who has not had possession at any time before the plaintiff's demand for return has been held to have wrongfully detained a plaintiff's chattels. *The Laws of Australia*[14] states:

> "There are three substantive characteristics of detinue:
> (1) The plaintiff must make a demand for the chattel whose possession the plaintiff is entitled to at the time of making the demand.
> (2) The defendant must have refused that demand.
> (3) Where the chattel is in the defendant's possession, the refusal to return the chattel must be unreasonable; where it is not in the defendant's possession, the defendant must have wrongfully parted with possession." (footnotes omitted)

[42] Pollock and Wright, in *An Essay on Possession in the Common Law*,[15] say that "[p]ossession is presumed from detention",[16] and "[p]ossession is always single and exclusive."[17]

[43] In the present case, if the land was held by the first defendant as the second defendant's tenant, by definition the first defendant had the right to (exclusive)[18] possession of it. The plaintiff's buildings were in the possession of the first defendant from the plaintiff as bailee from a bailor under the hire agreement and

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10 (2002) 213 CLR 1, 215-231 [478]-[530].
11 (1959) 101 CLR 209.
12 Ibid, 228-229 [518]-[521].
13 *Ming Kuei Property Investments Pty Ltd v Hampson* [1995] 2 Qd R 251, 256.
14 *The Laws of Australia*, Ch 33, par [33.8.920].
15 Pollock F and Wright RS, *An Essay on Possession in the Common Law*, Oxford, 1888, 20.
16 In this statement, "detention" is used to mean possession in fact.
17 In this statement, "single and exclusive" connotes that possession in law lies with one person even if two or more persons may claim possession in fact, leaving aside joint ownership.
18 Possession of land, in law, is by definition exclusive, so the addition of "exclusive" to possession is unnecessary.

were located on land of which the first defendant had possession from the second defendant as tenant from a landlord.

[44] If, as between the first defendant and the second defendant, the first defendant was in possession of the land between 9 December 2013 and 13 June 2014, a point of concern is that as between the plaintiff and the second defendant, the second defendant did not take the position that, because it was not in possession of either the land or the buildings (assuming as against the second defendant that there can be a separate possession before they are disconnected from the land), no claim could be made against it in detinue.[19] Instead, apparently as proprietor of the land, the second defendant asserted a right to prevent the plaintiff from coming onto the land for the purpose of obtaining the return of the buildings. Still, it may not be inconsistent with that position to find that the second defendant's refusals to allow the plaintiff to remove the buildings did not constitute detinue because the second defendant was not in possession of the buildings. On the other hand, some cases where the claim was for damages for the tort of conversion point the other way.[20]

[45] Even if the second defendant was not in possession of the buildings before 13 June 2014, there is no reason to doubt that it has been in possession of them since that date. Upon termination of the agreement to occupy or lease, the first defendant's possession of the land and the buildings would or should have been brought to an end. There was no suggestion in the evidence that it had not been brought to an end. However, the plaintiff made no further demand for the return of the buildings after the agreement was terminated. It does not appear when the plaintiff was informed of the termination of the agreement. Nevertheless, if the second defendant did not unlawfully detain the buildings before the agreement was terminated, its possession of the buildings since then may also not have been an unlawful detention because of the absence of a further demand by the plaintiff.

[46] In the result, I do not consider that it is appropriate to resolve these questions. There are two reasons. First, they were not advanced by the second defendant, although they arguably seem to be open on the facts pleaded. Second, in my view, there is another basis on which the second defendant is entitled to succeed in its defence of the plaintiff's claim for damages as made.

[47] For present purposes, I proceed on the finding that the second defendant wrongfully detained the plaintiff's buildings from 12 December 2013, which was the time of communication of its solicitors' letter stating that the second defendant would accept service of any proceeding to recover the buildings.

Strand Electric use

[48] However, assuming that the second defendant's wrongful detention starts on that day, it is not necessarily responsible for the claimed damages in the amount of the plaintiff's usual hire rate.

[49] As *Bunnings* held, the second defendant will only be liable to damages in the amount of the usual hire rate if, inter alia, it used the plaintiff's buildings. Allsop JA said of the use required:

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19 Cf *England v Cowley* (1873) 8 Ex 126, 128-9. That case was a claim for trover by detention.

20 Cf *Caley v Rogers* [1938] St R Qd 25, 32; *Oakley v Lyster* [1931] 1 KB 148, 155.

> **"**If use is required for the legitimate employment of a hiring charge to assess damages or compensation or monetary relief, it is necessary to consider what kind of use will suffice. Conversion or detinue has been found. If the wrong is the mere non-return of chattels that lie idle and contribute not at all to the life, work or business of the wrongdoer it may be difficult to justify conceptually, in the absence of proof of actual loss or damage, the awarding of a hiring fee.
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> Hire is, after all, in its nature, a payment for use. Nevertheless, one need not be overly precise about the nature of the use. For instance, in *Strand Electric*, the switchboards were not actively operated. There was use in the relevant sense, however, because without the equipment the theatre could not be let or sold — it made the theatre more attractive and readily disposable.
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> Here some of the use was possession, for display and storage. Possession for these purposes was after a demand to return. In a sensible commercial sense, it was the deployment of the pallets in the business of Bunnings, even to the extent that they were recirculating pallets for returns. The refusal to return enabled the continued smooth operation of the Bunnings business to take place, without the inconvenience (and hence business cost) of doing that which they were legally obliged to do — return all pallets to Chep. This, in my view, is use enough for the *Strand Electric* principle."[21]

[50] Prior to the termination of the agreement to occupy or lease on 13 June 2014, the second defendant did not directly use any of the buildings. Until a date in December 2013 before Christmas, the first defendant was using them to conduct its accommodation services business.

[51] That business was the source of cashflow for the first defendant to pay any rent due to the second defendant. The first defendant did not pay any rent from a date in April 2013.

[52] After the date in December 2013 before Christmas, there was no further occasion when the plaintiff's buildings were used. The first defendant looked to obtain customers to use the camp's facilities, and for that purpose advertised availability, including on the internet, and showed prospective customers the camp's facilities. I infer that that may have included the plaintiff's buildings. But there was no actual use of them by either the first defendant or the second defendant.

[53] Since termination of the agreement to occupy or lease, the second defendant has not re-let or licensed use of the camp so as to permit another person or tenant to use the plaintiff's buildings. The second defendant has not apparently deployed the plaintiff's buildings in any way.

[54] Among the decided cases, there is no precisely analogous case to the present of "use" for the purpose of the *Strand Electric* principle. In *Strand Electric* itself, the defendant's use was confined to the use of the plaintiff's portable switchboard to power and light the defendant's theatre while it was shown to potential tenants by

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21 (2011) 82 NSWLR 420, 468-9 [179]-[180].

agents of the defendant. That was held to be enough. In *Bunnings*, the defendant's use was the use of the plaintiff's pallets to move, store and display chattels in the defendant's warehouses. That was held to be enough. In *Sadcas Pty Ltd v Business Professional Finance Pty Ltd*,[22] the defendant's use was re-letting to a new tenant of the cafe in which the plaintiff's cooking vat was installed. That was held not to be enough.

[55] There may be some tension between the outcomes in *Strand Electric* on the one hand and *Sadcas* on the other hand. I note that *Sadcas* was not referred to in *Bunnings*, even though the latter was decided only months after the former. In the end, I approach the question on the basis that the use required is an inference or finding of fact as to use which is not "overly precise" but which has regard to the "life, work or business of the wrongdoer".

[56] In my view, the second defendant did not "use" the plaintiff's buildings in a way that engages the *Strand Electric* principle of assessment of damages by reference to the usual rate of hire.[23] It follows, in my view, that the plaintiff's claim against the second defendant for damages for the usual hire rate of the chattels must fail.

Rate

[57] In case I am wrong in that conclusion, it is appropriate to make a finding as to the appropriate rate of hire.

[58] The plaintiff claims the rate of $58,443 per month because that was the rate that the first defendant had agreed to pay for the hire of the buildings. Two of the plaintiff's employees gave evidence that where a hirer extends a contract of hire the rate of hire for the extended period is usually the same as that previously agreed. Examples were put into evidence.

[59] Alternatively, the plaintiff claimed the rate at which it had agreed to hire comparable buildings to other customers in November and December 2013, which was approximately $35,700 per month.

[60] The difference between the two rates reflected that the market for such buildings was more competitive in December 2013 than it was more than a year before.

[61] The plaintiff's analogy between this case and an extended hire contract is not perfect. Under all of the hire contracts put into evidence, the hirer agreed to pay the plaintiff for, or personally bear the cost of, transporting the buildings to the site, installing the buildings on the site and returning the buildings to the plaintiff. The second defendant was not responsible for those things under any pre-existing hire contract.

[62] In my view, the obligation to pay to have the existing buildings removed and returned to the plaintiff (and to pay to have replacement buildings transported to site and installed under any new contract) might weaken the commercial bargaining

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22 [2011] NSWCA 267, [79].

23 Other potentially relevant cases are *Thomas v APL Co Pte* [2013] FCA 911, [31]; *Rapid Metal Developments (Australia) Pty Ltd v Rildean Pty Ltd* [2010] NSWSC 7, [20]; *Reynolds v Aluma-Lite Products Pty Ltd* [2009] QSC 379, [107]; *Gaba Formwork Contractors Pty Ltd v Turner* (1991) 32 NSWLR 175, 188.

position of a party wishing to extend an existing hire contract. Such a person otherwise faces the alternative of a new contract with another supplier.

[63] On the other hand, in December 2013, had the second defendant applied to the plaintiff to hire the plaintiff's buildings as installed at the Banana Camp, it might have been able to avoid the costs of transporting replacement buildings to the site and installing them, if it could agree an acceptable hire rate with the plaintiff. This would have been a commercial factor or reason why the second defendant might have been prepared to pay a rental for the plaintiff's buildings, as installed, which was more than the then market rate, under a contract where the hirer also paid for those costs.

[64] As well, this hypothetical negotiation would have taken place in respect of a relatively short hire term or period. Both parties would have been aware of the relative amounts of the hire over that period and the comparative costs of transport and installation.

[65] In my view, in those circumstances, it is not unreasonable to infer that the hire rate agreed in an hypothetical negotiation would have been not less than $45,000 per month for nine months. That amount is likely to have been less expensive to the second defendant than the combined costs of a rate of $35,700 per month from another supplier, and the costs of transport to the site and installation of alternative buildings, if those items would have had to be paid for by the second defendant.

[66] Although there is a fair degree of speculation involved, I have reached that amount by inferring from the other contracts in evidence that the cost of transport is likely to have been no less than $40,000 or $50,000 and that the installation of 21 buildings would cost not less than $50,000 or $60,000. In fact, the cost of installation was likely to have been more, if the contract from the plaintiff to FKG is any guide, but the plaintiff led no evidence about it.

Conclusion

[67] In the result, I dismiss the plaintiff's claim for damages against the second defendant.

[68] I will hear the parties on costs.