49/11; [2011] VSC 605

SUPREME COURT OF VICTORIA

SEMENOV v PIRVU

Dixon J

28 July, 25 November 2011

CIVIL PROCEEDINGS – CONVERSION – DAMAGES – MEASURE – WRONGFUL RETENTION OF WINDOW SHUTTERS BY PAINTER LEADING TO VARIATION OF CONTRACT FOR SALE OF NEW CONSTRUCTED HOUSE BETWEEN VENDOR AND A THIRD PARTY – FINDING BY MAGISTRATE THAT PAINTER ONLY REQUIRED TO BE PAID THE SUM OF $625 – WHETHER MAGISTRATE IN ERROR.

S. and P. agreed that P. would paint shutters on a house owned by S. for a sum of $71,500. An amount of $43,170 was paid and S. failed to pay the remainder. Consequently, P. removed the shutters from the property a few days prior to the dispute about the progress payments. P. refused to return the shutters until S. paid his account. S. sold the property to Patons at a price which involved a reduction of $100,000. P. claimed the amount owing in the Magistrates' Court and was successful. S. sued in trespass and/or conversion and/or detinue for damages in the sum of $50,000 or alternatively $35,178 based on P.'s refusal to return the shutters on demand. The Magistrate awarded S. the sum of $625 in damages. Upon appeal—

HELD: Appeal allowed. Judgment set aside and judgment entered for S. in the sum of $10,000.

1. In relation to the correct measure of damages in conversion, the general rule, where a plaintiff has been permanently deprived of goods, is that the measure of damages, whether in conversion, detinue or trespass, is the value of the property converted, together with any consequential loss that may be proved by the plaintiff. The defendant to a claim bears the burden of showing that the general rule should be set aside. A further aspect of the general rule is a rebuttable presumption that damages are assessed as at the date of the conversion. While in most cases, the application of the general rule permits the injured party to recover the full value of the converted goods, the assessment of compensation will be directed to providing reasonable compensation for injury and loss. The broad principle, qualifying that general rule, is that the compensation awarded meet the objective of placing the wronged party, so far as is possible, in the position in which that party would have been but for the conversion.

2. S. was not required to provide painted shutters on the settlement of the property. Accordingly, the broad principle could not be met in the present case.

3. The question for the Magistrate was the application of the factors relevant to the assessment of the quantum of damages for conversion when the general rule did not apply. The Magistrate was required to examine the terms of the compromise agreement between S. and the Patons and compare it with the claims made. As the Magistrate assessed damages as the sum allowed for re-installing the painted shutters, the Magistrate did not address the correct issue on the assessment and accordingly, fell into error.

4. It was not open to the Magistrate to conclude on the evidence to value the contractual obligation to supply the shutters at $625. The value of the shutters obligation that contributed to the reduced residue payment to S. was $4375. In all of the circumstances, the quantum of S.'s damages in conversion was assessed at $10,000.

DIXON J:

Introduction

1. This is an appeal from a decision of the Magistrates' Court of Victoria,[1] regarding a dispute arising in the course of painting a newly constructed home at 17 Albert Street, Brighton. There were two proceedings brought before the Magistrates' Court. This appeal concerns only one of those proceedings.

2. In July 2007, Mr and Mrs Semenov contracted for sale of the property, with a newly constructed home, to Mr and Mrs Paton for $4.4 million, to settle in December 2007.

3. On 5 May 2008, the Semenovs engaged Mr Pirvu to perform painting works, which

included painting the window shutters on the house. The original contract price for the painting was for $71,500 with progress payments 'to be based on estimates of actual progress submitted fortnightly'. During the period that Mr Pirvu worked for the Semenovs, a number of his accounts, totalling some $43,170, were paid.

4. A proceeding brought by Mr Pirvu against the Semenovs concerned a dispute over progress payments for the painting works. Mr Pirvu's complaint sought $18,516.43. On 8 October 2008, Mr Pirvu left the property without completing the painting works, over a dispute with the Semenovs primarily for outstanding progress payments of $17,058.80 that the Semenovs refused to pay. Mr Pirvu stated he was willing to return and complete the contract on payment of the outstanding progress payments. The Semenovs claimed that Mr Pirvu's contract for painting works was with a building construction company, Buildquest Pty Ltd and refused to pay the account. The Magistrate found the contract for the works to be between Mr Pirvu and the Semenovs and awarded Mr Pirvu damages of $17,058.80, reduced by the value of preparation work completed prior to 5 May 2008. Mr Pirvu succeeded to the extent of $12,299.80 (before interest and costs). This judgment was not appealed.

5. The second proceeding in the Magistrates' Court, the subject of this appeal, was brought by the Semenovs against Mr Pirvu. It concerned the window shutters that Mr Pirvu had removed from the property a few days prior to the dispute over progress payments. Although the Semenovs made various demands for the return of the shutters from 8 October 2008 (the time Mr Pirvu left the job) until 5 December 2008 (the date of settlement with the Patons), Mr Pirvu did not return the shutters. Mr Pirvu refused to return the shutters until after the Semenovs paid his account and, further, gave him a general indemnity.

6. Thus, at the time of settlement of the sale contract, the shutters were still in Mr Pirvu's possession. Solicitors for the Semenovs and Patons negotiated, among other matters, a reduction of $100,000 in the eventual property sale price paid by the Patons. The allocation of this reduction in the sale price is the basis of the second proceeding. Mr Semenov gave evidence that was not accepted by the Magistrate that of the $100,000 reduction, $50,000 related to the absence of the shutters. There was evidence that the cost to replace the shutters was $35,178. On the hearing of the appeal, the Semenovs sought to tease out of the correspondence between the solicitors, a contention that the proper assessment of the loss was $72,000, a claim that had not been earlier made, although the basis of that calculation was put to the primary court.

7. The Semenovs sued in trespass and/or conversion and/or detinue, for damages based on Mr Pirvu's refusal to return the shutters on demand. The claim was for $50,000 or alternatively $35,178 in the event that the court did not accept there was a reduction in the property's sale price of that magnitude, or at all, attributable to the shutters. The Semenovs were awarded $625 (before interest and costs).

8. The Semenovs now appeal against that judgment, contending the assessment of the quantum of damages is vitiated by error of law. The Semenovs seek a substantive order in their favour of $72,000, or alternatively $50,000, or alternatively $35,178 (together with correspondingly revised orders as to interest and costs).

Issues to be determined

9. The issues are as follows:

(a) What is the correct measure of damages in conversion?

(b) Was the assessment of damages at $625 arrived at by legal error, by application of wrong principle or a finding not reasonably open on the evidence?

(c) If yes, how did the primary court fall into legal error?

(d) Was there a conversion at all?

(e) What is the correct assessment of damages?

The reasoning of the court below

10. To allow a proper understanding of the issues, I will explain in a little more detail the events giving rise to the dispute and the reasons of the primary court for its decision.

11. The Semenovs contended the painting contract was between Mr Pirvu and a builder, Buildquest Pty Ltd, who was liable to pay Mr Pirvu. That contention was lost. The Magistrate held that the builder's contract for the construction of the home did not include Mr Pirvu's work. While Mr Pirvu had discussions from time to time with the builder relating to the painting works, he did not enter into any contract with him.

12. Mr Pirvu came to be in possession of the shutters when the Semenovs directed Mr Pirvu to remove the shutters so they could be painted, then to rehang the shutters once painted. Mr Pirvu asserted, when the payment dispute arose, that he held the unpainted shutters as security for works already undertaken by him, that is, he asserted a possessory interest in the shutters as security only. There was no evidence that Mr Pirvu rendered any account to the Semenovs for costs associated with removing or painting the shutters, and the majority of the unpaid account was unrelated to the shutters. The primary court found Mr Pirvu was not entitled to hold the shutters as a lien to secure his unpaid account.

13. Turning to the issue of who had better interest in the shutters, the primary court held the Patons to be the true owners of the shutters at that time. The day before settlement, Mr Paton and the Semenovs agreed that Mr Paton could deal with Mr Pirvu with respect to the shutters. The Magistrate found that the Semenovs, as between themselves and the Patons (although not between themselves and Mr Pirvu), 'waived their rights' against Mr Pirvu to possession of the shutters. The subsequent dealings between the Patons and Mr Pirvu were consistent with both this waiver of rights and Mr Pirvu's attitude of not assuming ownership of the shutters. Mr Pirvu painted and installed the shutters at the property after the Patons took possession.

14. The primary court held that Mr Pirvu had, as against the Semenovs, converted the shutters. The Magistrate:

> (a) rejected the contention that of the $100,000 reduction of the contract price on settlement the true cost of the shutters was $72,000. The Semenovs were claiming only $50,000 or, in the alternative, $35,178;
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> (b) did not accept that the Semenovs had allowed a $50,000 reduction in the sale price for the absence of the shutters. The Magistrate accepted Mr Paton's evidence that the reduction in the sale price was not in any way related to the shutters. The Magistrate preferred Mr Paton's evidence that he had claimed a $400,000 reduction for variations to the original contract, delays, costs associated with alternative accommodation, costs associated with storage of furniture and effects, and pain and suffering, and had agreed to a $100,000 reduction in that context;
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> (c) accepted that while Mr Paton's evidence was truthful, his solicitors correctly documented the negotiated agreement on the settlement reduction when they stated, *inter alia*, that the purchaser allowed a $100,000 reduction in the purchase price to cover the cost associated with installation of the shutters, installation of the watering system (agreed at nil) and completion of the patio/ conservatory (agreed at $27,880.88);
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> (d) found Mr Pirvu had provided to the Semenovs in September 2008, a re-amended quotation for removing, painting and re-installing the shutters for $9,250 comprising 'cost of painting of the Louvres' - $8,000 and 'Taking off the louvers and re-installing' - $1,250;
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> (e) found that Mr Pirvu ultimately charged the Patons $12,000–$14,000 for painting and installing the shutters;
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> (f) found the shutters had, by the time of the trial, been painted and re-installed; and
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> (g) held the figure actually claimed by the Semenovs was well outside what might be a reasonable allowance for the cost of painting and installing the shutters.

15. The learned Magistrate concluded that, having agreed the Patons would deal with Mr Pirvu about installing the shutters, the Semenovs only needed to allow the cost of installing the shutters to the Patons on settlement. Even if Mr Semenov had to pay for painting the shutters

(as well as installation), the total cost in issue for adjustment was between $12,000 and $14,000, or on Mr Pirvu's quotation, the lesser sum of $8,625. The Magistrate was satisfied that although the Semenovs did not state in evidence that the allowance for the shutters was in that range, they were aware of Mr Pirvu's quotation for taking off, painting and re-installing the shutters at a total of $9,250, and that Mr Pirvu was trying to come to a negotiated position for return of the shutters.

16. For these reasons, the primary court rejected the Semenovs' claim for damages of $50,000 or alternatively $35,178. However, as Mr Pirvu was not entitled to hold the shutters as a lien for the outstanding account on the painting work, and as some amount was allowed for the 'installation of the shutters' on settlement, the Magistrate found Mr Pirvu liable for damages limited to the extent of the cost of installation.

17. Mr Paton's evidence was that the combined cost of installing and painting the shutters cost the Patons between $12,000 and $14,000. This evidence does not reveal the actual cost of re-installation. The Magistrate returned to Mr Pirvu's re-amended quotation where Mr Pirvu assessed the total cost attributable to 'Taking off the louvers and re-installing' at $1,250. Assuming that the cost of removal would approximate the cost of installing the shutters, the Magistrate assessed the cost of re-installation and thus the damages recoverable by the Semenovs at $625.

What is the correct measure of damages in conversion?

18. It is immediately apparent that the dealings between vendor and purchaser, and the re-installation of the shutters prior to trial, have complicated the assessment of damages in this dispute.

19. The general rule, where a plaintiff has been permanently deprived of goods, is that the measure of damages, whether in conversion, detinue or trespass, is the value of the property converted, together with any consequential loss that may be proved by the plaintiff.[2] The defendant to a claim bears the burden of showing that the general rule should be set aside.[3] A further aspect of the general rule is a rebuttable presumption that damages are assessed as at the date of the conversion.[4] While in most cases, the application of the general rule permits the injured party to recover the full value of the converted goods, the assessment of compensation will be directed to providing reasonable compensation for injury and loss. The broad principle, qualifying that general rule, is that the compensation awarded meet the objective of placing the wronged party, so far as is possible, in the position in which that party would have been but for the conversion.

20. Illustrative of both the broad principle and the relevance of contractual rights affecting the plaintiff's interest in the goods is *Butler v Egg and Egg Pulp Marketing Board*.[5] Property in eggs vested in the Board by statute. Butler was obliged to deliver up his eggs in exchange for a statutory claim for payment, but his act of conversion was to sell to a person other than the Board. The Board claimed the full value of the eggs converted. The High Court preferred Butler's contention that the Board's loss was represented by the difference between the price for which the Board would have sold the eggs had Butler delivered them, and the amount which, in that event, it would have had to pay to Butler by statutory obligation plus expenses. Taylor and Owen JJ held that the Board's loss must be determined by considering what sum of money would be required to place it in the same position as it would have been in if Butler had performed his statutory obligation. If the case had been one in which Butler had failed to deliver the eggs to the Board under a contract and instead had converted the eggs by sale to a third party, in breach of his contractual obligation, the Board would not have been entitled to recover the full value of the eggs. Its loss was the difference between that value and the agreed price payable had Butler, as vendor carried out his contract.[6]

21. Events that occur after the conversion happens may reduce the damages otherwise payable by application of the general rule. The goods may be recovered prior to trial. A plaintiff accepting the later return of the converted goods must give credit for their value at the time of return and must mitigate his or her loss. The convertor may have paid what the plaintiff himself would have had to pay in respect of the goods and that payment may reduce the damages. The convertor may have improved the goods. It is not every subsequent payment by a convertor that is to be taken into account. In *Associated Midland Corporation Ltd v Bank of New South Wales*,[7] Mahoney JA recognised two bases, one in law and one in equity, which may produce such a reduction in

damages. The first of these acknowledges that situations may exist where a convertor may properly rely upon a legal right to reclaim some of the money paid to the plaintiff, whilst that which arises in equity is concerned with the possibility of the unjust enrichment of the plaintiff.

22. Here, the Semenovs did not recover possession of the shutters prior to settlement. The Semenovs were relieved of the obligation to provide painted shutters by the Patons, who recovered possession of the shutters prior to trial. The payments or benefits related to the shutters, embedded in the agreement to adjust the sum payable on settlement of the sale contract, were relevant. It matters not that Mr Pirvu was not a party to that particular agreement. He had dealt with each of the Semenovs and the Patons separately.

23. Provided it is established that the payment or benefit was not made or received collaterally to the commission of the tort, nor was it a *res inter alios acta*,[8] such payments or benefits are relevant and represent the application of the principle that compensation for loss occasioned by the commission of the wrongful act meets the objective of placing the wronged party, so far as is possible, in the position in which that party would have been but for the conversion. In *Hunter BNZ Finance*, the Appeal Division of this Court faced the question of whether to take account, in the assessment of the damages awarded against the convertor, of payments received by the plaintiff, when considering the principles of assessment of damages for conversion of a cheque in different circumstances from those of this dispute. The transaction was a chattel lease. The plaintiff purported to pay the supplier for the goods using a cheque that was converted in circumstances that I need not describe. The conversion was not immediately discovered and the plaintiff received monthly lease payments for some months.

24. The trial judge awarded the plaintiff, as damages, the full amount of the cheque without deducting the payments received by the plaintiff, and that assessment was upheld on appeal. Murphy and Vincent JJ held that there is a requirement that before a payment or benefit can be taken into account, it must be established that the payment or benefit was not made or received collaterally to the commission of the tort, or that it not be a *res inter alios acta*. Payments made by or on behalf of a convertor in satisfaction of obligations independently owed to a plaintiff who claims damages for conversion may be, on this basis, excluded from consideration.[9] Similarly, whether a plaintiff was entitled to retain moneys received by it from or on behalf of a convertor, or whether the convertor or some other person could possibly reclaim them, can assume relevance in this context. In a situation where a plaintiff was not able to retain money received by it, there would almost certainly be no proper justification for considering that money in determining the actual loss suffered.[10]

25. The Semenovs, in this proceeding, contended that the primary court fell into error in assessing damages, as there were no matters warranting departure from the general rule. The Semenovs point to the following matters:

- The Semenovs were permanently deprived of their goods (the shutters);
- Mr Pirvu was not entitled to retain the shutters;
- It matters not that following the sale of the property, the Semenovs may be said to have had no use for the shutters;[11]
- Even had the Semenovs not allowed a reduction on the purchase price of the property due to the absence of the shutters, they were still wrongfully deprived of the shutters;[12] and
- There were no other circumstances, such as payments to the Semenovs by or on behalf of Mr Pirvu sufficiently connected to the wrongful retention of the goods,[13] which could be taken into account in reduction of the damages.

26. I reject this contention. For the reasons I have stated, the last three grounds advanced in support of that proposition are misconceived. There were sound reasons for the Magistrate to depart from the general rule. They included the following:

- Once the Semenovs settled the sale contract on the negotiated terms, they were not entitled to possession of the shutters and had expressly relinquished their interest in and ownership of the shutters to Mr Paton as part of that transaction;
- The sense in which the Semenovs were deprived of the shutters should be properly understood. The true issue concerned the obligation owed by the Semenovs to the Patons under the sale contract to provide painted shutters on settlement. The Magistrate was right to reject the notion that it would be reasonable to claim the value of the shutters at $72,000, or alternatively $50,000, or alternatively $35,178, when the Semenovs were able to pass the obligation to re-install painted shutters for a

negotiable sum between $8,650 and $14,000;

- The Semenovs gave consideration to the Patons for their acceptance of the obligation to deal with Mr Pirvu for the shutters by accepting an adjustment to the residue payable under the sale contract. Consequently, the Patons released the Semenovs from the obligation to supply painted shutters. Plainly the Semenovs had no interest in the shutters after settling the sale contract on these terms;
- The Semenovs did not pay Mr Pirvu to complete the painting and shutter re-installation; and
- Mr Pirvu delivered the painted shutters to the Patons who were satisfied with the condition of the shutters and paid Mr Pirvu.

27. Mr Pirvu contends a damages award for conversion requires that the Semenovs had both:

(a) an immediate right to possession of the converted shutters at all material times; and

(b) been deprived of the shutters.

28. The primary court found those matters in favour of the Semenovs when it rejected Mr Pirvu's lien. To the extent that Mr Pirvu's submission extends temporally beyond the agreement to settle the dispute over the residue payable under the sale contract, the submission as to timing is misconceived. As I have explained, the primary court was entitled to have regard to the benefit to the Semenovs from the settlement agreement, as it was not a benefit received collaterally to the conversion and was not a *res inter alios acta*. The Semenovs were relieved of the obligation to provide painted shutters on settlement, a matter of great relevance in the assessment of the loss for the conversion of the shutters.

29. The broad principle, that compensation awarded meet the objective of placing the wronged party so far as is possible in the position in which that party would have been but for the conversion, cannot be met in these circumstances by the application of the general principle. It is unnecessary then to examine issues arising about the replacement value of the shutters.

30. The next question is whether the primary court fell into error in its application of the particular factors that are relevant to the assessment of the quantum of damages for conversion when the general rule does not apply.

Was the assessment of damages at $625 open in principle as a correct assessment of the plaintiffs' loss?

31. It is plain enough that the primary court recognised the significance of the dealings between the Semenovs and the Patons when the sale contract settled. The correct application of principle required that the Semenovs give credit to Mr Pirvu for returning the shutters prior to trial in the unusual context that had arisen. To allow the Semenovs the value of the shutters, rather than the value of the release of the obligation to provide them, would result in overcompensation unless the court was satisfied that such full value of the shutters had been agreed as part of the adjustment of the residue payable under the sale contract. If it had not been agreed, the proper measure of the Semenovs' loss was the amount by which the residue payable under the contract was reduced by the Semenovs' inability to perform the contractual obligation to give possession of a house with painted shutters.

32. Receipt of the agreed amount, paid to the Patons for the release of that obligation, would place the Semenovs in the position they would have been in if Mr Pirvu had not detained and wrongfully converted the shutters. Put another way, as Mr Pirvu returned the shutters at the Patons' expense, the factual inquiry to determine the credit for returning the shutters required that the Semenovs establish the value allowed for surrendering their obligation to supply painted shutters.

33. The value of that obligation formed part of a compromise of a number of other items in dispute when the time came to settle the sale contract. To resolve these disputed claims, there was an agreed global adjustment to the residue payable to the Semenovs. As plaintiffs, the Semenovs bore the burden to establish the quantum of their loss. Although the convertor bears the burden of showing that the *prima facie* rule — that the measure of damages is the value of the goods converted — should not be applied, the Magistrate was entitled on the evidence to consider that burden discharged for the reasons already discussed.

34. How ought the primary court have approached the assessment of the allowance made for one issue among many in a negotiated global sum for the compromised claims? Drawing on the approach to settled or adjudicated claims between parties in the context of multiple tortfeasors,[14] I consider that, as between the Semenovs and the Patons, the value of the shutters was to be determined by the following principles.

35. The court must examine the terms of the compromise agreement and compare it with the claims made. The fact of compromise, in order to conclude a settlement forms part of the background and the extent of the element of compromise, will vary from case to case. The intention of the parties reveals the significance of the compromise made. That a settlement sum involves an element of compromise does not mean that it is not intended to be paid, or received, in full satisfaction (using that term with the meaning it has in the expression accord and satisfaction) of a party's claims. If, either expressly or by implication, a settlement agreement manifests the parties' common intention that the settlement sum is paid and received in full satisfaction of each party's rights in relation to the issues between them, then the parties will be bound to that outcome. The value agreed for the obligation to provide the shutters is thereby set, revealing the quantum of the claim of the Semenovs in conversion.

36. If the amount allowed pursuant to the settlement is, or ought to be, regarded as the value of the Semenovs' obligation to provide the shutters no longer in their possession, then action against the convertor for a greater sum must fail. Otherwise, the consequence would be unjust enrichment of the plaintiff at the expense of the convertor, a matter recognised in the cases as warranting departure from the general principle. Departure is warranted because the proper value of the shutters is recognised between the parties negotiating the consequence of their presence, or absence, in the completed building.

37. The most obvious way to negative the intention that the settlement fixed that value would be by an express reservation of rights, that is, a reservation by the Semenovs to contend that their loss from the absence of the shutters was some particular sum. The Magistrate can be taken to have found the Patons would not have agreed to fixing the value of the missing shutters at $72,000 or even $35,178. The effect of the settlement agreement, in the ordinary case, will be the most significant factor bearing upon the issue, and that is so in this case. However, depending on the reasons for the inquiry, other circumstances may indicate unconscientiousness or loss of the subject matter of a claim. Bearing in mind the obligation to give credit for the amount already recovered, such as the value of the converted chattels returned, a convertor who could show that the actual loss or damage incurred by the plaintiff did not exceed the amount already recovered would succeed. Leaving aside questions of onus of proof, to say that there is no such excess is simply to say that the loss has been fully recouped.

38. The primary court did not determine the value of this obligation. Rather, the Magistrate assessed damages as the sum allowed for re-installing the painted shutters. It follows that the primary court did not address the correct issue on the assessment and has fallen into error.

39. The settlement agreement between the Semenovs and the Patons manifested their common intention that the residue paid to complete the sale contract was paid and received in full satisfaction of the rights of each party in relation to the issues between them. The Magistrate found there was a reservation by the Semenovs of rights against Mr Pirvu, but this must be understood in the context of a wider scope of works in the painting agreement than simply painting the shutters. More significantly, the Semenovs and the Patons agreed between themselves that Mr Paton would deal with Mr Pirvu.

How did the primary court fall into legal error?

40. The evidence before the primary court was that the Patons were entitled to receive on settlement vacant possession of a home with fitted, painted shutters on the windows. At settlement, that obligation was not satisfied. Although the Magistrate accepted Mr Paton's evidence that he allowed nothing for the absence of painted shutters when negotiating with the Semenovs, the solicitor's correspondence told a different story, which the Magistrate accepted. The influential statement was that 'the cost associated with the installation of the shutters' was part of the $100,000 adjustment of the residue paid on settlement.

41. With great respect to the learned Magistrate, who was faced with issues of some complexity in a busy court, I consider that he adopted an unjustifiably narrow interpretation of the language of the solicitor's correspondence by reading 'associated with' as 'of'. As I have already stated, the Magistrate calculated the cost of re-installation of the shutters at $625. This finding gives full effect to his finding that Mr Paton was being truthful when he said he allowed nothing for the shutters in negotiations, but it cannot stand as it misconceives the proper analysis of the settlement agreement. The obligation was to provide painted shutters and the Magistrate found that, at the time of this negotiation, the parties knew not only that Mr Pirvu had possession of the shutters but also that they were not painted, or not completely painted. So much is clear from the evidence of Mr Semenov that he had a re-amended contemporaneous quotation that included $8,000 for painting. As the estimated cost to the Patons of $12,000-$14,000 to complete the painting and installation of the shutters came later, the best evidence available to the Magistrate of the costs was Mr Pirvu's re-amended quotation. Some of that work had been done, namely the removal of the shutters for painting. The Magistrate assessed the value of that work at $625, leaving the quotation of Mr Pirvu to make the shutters compliant with the contract at $8,625. This was the best evidence before the primary court of the cost of making the shutters compliant with the contract at the time of negotiation of the $100,000 variation. Of course, the terms of the settlement cast the obligation to pay the costs associated with the shutters onto the Patons, which has the effect of reducing the allocation of the reduction in the residue for other claims being made by the Patons. That was a benefit for the Semenovs that did not extinguish the detriment of accepting a reduced residue.

42. The other evidence about the negotiation of the disputed claims on settlement of the sale contract was not specific. The Patons claimed $400,000 on various grounds, but the strengths or weaknesses of the assertions of either party as to both liability and costs was not the subject of findings by the primary court. That is commonly the case with settlements. Further, the Magistrate interpreted the Patons' solicitor's correspondence as relating the $100,000 reduction in the residue to only three items: the cost associated with installation of the shutters, installation of the watering system and completion of the patio/conservatory. The course of the solicitor's correspondence reveals that the Patons had served a rescission notice on the Semenovs. Settlement was well overdue. There were negotiations as to the terms on which that rescission notice might be resolved to allow the sale to proceed. The Paton's solicitor's letter on 2 December 2008 set out the state of the negotiations. The competing claims were for:

> (a) variations in favour of the Semenovs;
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> (b) delay costs in favour of the Patons — the proposal was that these items (a) and (b) be set off;
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> (c) entitlement to interest on the deposit investment account — the proposal was that this item be split equally;
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> (d) a reduction of the purchase price — $200,000 was sought by the Patons and $75,000 was offered by the Semenovs;
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> (e) the cost associated with installing the shutters, installing the watering system and completing the patio/conservatory — the proposal was that the Patons assume responsibility subject to an obligation of reasonable assistance from the Semenovs; and
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> (f) the completion of items marked on a list agreed between the parties — the proposal was that these items be completed prior to settlement.

The Patons' solicitor states that these issues are all in discussion, but the Patons would agree to a reduction in the purchase price of only $100,000, adamant that it be no less, subject to due resolution and confirmation of the items (a) to (f). The Patons maintained that the proposed reduction was fair and reasonable, and that default could not be remedied under the rescission notice. Termination of the sale would be the result. A difference of $25,000 did not warrant a continuing dispute.

43. The Semenovs solicitors did not respond by letter, but must have responded by another means. On 3 December 2008, the Patons' solicitor further elaborated on the proposed settlement. A retention sum of $25,000 was proposed to deal with point (f). The reduction in the price of $100,000 was stated to be related both to point (e) and to a further requirement — a statement

by the Patons that they accepted the works required by the sale contract to be complete. A further letter by facsimile transmission later that day must have followed further discussions between the solicitors to finalise the terms of the deal, and it expresses the terms to which the Magistrate referred.

44. There are two matters arising from this analysis of the matter that impugn the primary court's approach. First, the proper inference to draw from this settlement is that the $100,000 reduction was a component in a package deal that concerned a wide range of issues. Second, the words 'costs associated with' when used about the installation of the shutters are not as limited as the primary court construed them to be. Thus, the primary court did not approach the resolution of the valuation of the contractual obligation correctly. Although the Magistrate concluded that the settlement agreement included an express reservation of the Semenovs' rights against Mr Pirvu, it was not open to the Magistrate, on this evidence, to value the contractual obligation to supply shutters at $625.

45. Proper principle applied to this evidence did not permit a dissection or accounting allocation approach to the $100,000 in the manner undertaken below. There were two options for an accounting allocation, but neither is appropriate. Option A, contended for by the Semenovs before me,[15] resulted in an assessment of $72,000. The sum of $72,000 was calculated by deducting from the $100,000, the cost, not in issue, of completing the patio/conservatory for $28,000. [16] The claimed sum of $50,000 was an assessment put in evidence by Mr Semenov that was rejected by the Magistrate. No reference is made to the saving from not paying the balance of Mr Pirvu's re-amended quote. Option B, adopted by the Magistrate, was to isolate the cost of simple installation, without more, of the shutters from Mr Pirvu's re-amended quotation, resulting in an assessment of $625. Either option for an accounting allocation approach does not correctly assess the evidence of a global settlement of many issues that were not specifically valued or allocated by the solicitor against the price reduction. Adopting that approach necessarily excludes those unallocated items from the accounting allocation. The consequence is either that the Semenovs are overcompensated, where the 'costs associated with the shutters' are assessed by option A, or under compensated where option B is adopted.

46. Further, Option A is nonsensical, as the result is about double the cost of replacement shutters. Option B should also be rejected on a commonsense assessment of whether the assessment satisfied the general principle that compensation awarded meet the objective of placing the wronged party, so far as is possible, in the position in which that party would have been but for the conversion. Had they been in possession of the shutters to complete the sale contract, the Semenovs would have had an obligation to pay something to Mr Pirvu.

47. For these reasons, I am satisfied that error of law is established. However, before turning to the issue of the correct assessment of damages on the evidence, I need to briefly deal with a further issue contended for by Mr Pirvu — that there was no conversion.

Was there a conversion?

48. While Mr Pirvu has not formally appealed against the primary court's finding in this regard, Mr Pirvu contends there was no conversion by him. Mr Pirvu boldly contends that it matters not that this issue was not raised on the appeal. This court must, if satisfied that the submission is correct, allow the appeal and dismiss the claim. He contends that where goods have not been brought to the state of completion required by the contract, the duty to deliver them does not arise, and the seller's right to retain the goods exists. Mr Pirvu contends that such a principle applies in this dispute because:

- Mr Pirvu removed the shutters from the house for the purpose of painting them, in the context of the agreement with the Semenovs, and with their knowledge and consent;
- Mr Pirvu had not painted the shutters at the time the Semenovs demanded the shutters' return; and
- there was no allegation or evidence that the contract had been validly terminated by either party.

Mr Pirvu contends the obligation to return the shutters did not arise, and Mr Pirvu remained entitled to possession of the shutters in order to complete his contract by painting them. Once painted, Mr Pirvu restored the shutters to the Semenovs' successor in title by the date of judgment and credit for their full value must be given accordingly. In support of this contention, counsel

referred to the decision of the Full Court of this Court in *Bolwell Fibreglass Pty Ltd v Foley*.[17]

49. There are at least two reasons to reject this submission.

50. The Semenovs rightly object to Mr Pirvu raising on appeal the proposition that where goods have not been brought into the state of completion required by a contract the duty to deliver them up does not arise, as this proposition was not pleaded in the primary proceeding nor was any argument or evidence directed towards it.[18] Moreover, there is no appeal by Mr Pirvu on that or any other ground.

51. Even were I to permit the submission, it is misconceived. *Bolwell Fibreglass* is altogether a different case from the present dispute. The issue of whether the plaintiff or the convertor had an immediate right to possession was resolved in the primary court by a finding that Mr Pirvu was not entitled to the lien that he asserted as the basis for his right to possession. In *Bolwell Fibreglass*, the issue of an immediate right to possession turned on a close analysis of the terms of an agreement for the construction by the defendant of a fibreglass catamaran for the plaintiff. The resolution of that question was a matter of interpretation of the particular contract before the court and the evidence concerning the state of completion of the catamaran on a particular date to determine the point in the fabrication of the catamaran when property in it passed from manufacturer to purchaser. No such question is relevant here. On the evidence before the primary court, the Semenovs licensed Mr Pirvu to remove the shutters for ease of painting. There was no question of property or title passing.

What is the correct assessment of damages?

52. The first question is the value to the Semenovs of the contractual variation affecting the shutters. I begin by looking at the evidence of estimated costs, before turning to the evidence of the negotiations of the residue reduction.

53. In removing the shutters, Mr Pirvu had performed work valued at $625 for the Semenovs. Then the dispute about progress payments intervened. The Magistrate found the Semenovs could have completed their obligation to provide painted shutters on settlement by a payment of $18,608.80, of which $8,625 related to the shutters, and the remainder to Mr Pirvu's demands for payment, which were resisted by the Semenovs on grounds that largely failed.[19] It is probable that, if commercial resolution of Mr Pirvu's demands was then possible, the Semenovs may have had to pay more than the re-amended quotation, although the Semenovs did not accept any of Mr Pirvu's additional demands above the price he quoted. So much is clear from their conduct. What was apparent was at least $8,625. I am satisfied this was the minimum cost to the Seminovs to complete the shutter obligation had Mr Pirvu observed his painting agreement and not converted the shutters.

54. The Patons agreed to assume responsibility for the obligation to provide painted shutters, whether by dealing with Mr Pirvu or otherwise, and the evidence before the primary court was that the Patons later paid Mr Pirvu $12,000-$14,000 to obtain the shutters, painted and installed. Had Mr Pirvu not converted the shutters, that amount would not have been paid by the Patons, and part of it would not have been received by Mr Pirvu. On the Magistrate's findings and the evidence he received, it is probable that the settlement of the disputed residue payment would not have been on different terms, save to exclude that particular item.

55. In *Furness v Adrinum Industries Pty Ltd*,[20] Ormiston J, speaking of what I have referred to as the general rule — damages for conversion in relation to goods like shutters are measured by reference to the price at which identical or equivalent goods are available to the plaintiff — approved, save that the word 'never' may be an overstatement, the following passage from the judgment of Greer LJ in *J & E Hall Ltd v Barclay*[21]:

> Where you are dealing with goods that can be readily bought in the market, a man whose rights have been interfered with is never entitled to more than what he would have to pay for a similar article in the market. That rule has been acted upon over and over again, and that, I think, means that, where there is a market, the man whose rights have been interfered with is bound to diminish the damage by going into the market and buying the goods in the market, so as to put himself in the position in which he is entitled to be put, namely the position which he would have been if he had not suffered any wrong at all ...

That observation is equally applicable to services, such as painting and installation work performed by a painter. Although there was a submission put on this basis to the Magistrate, no finding was either made, or able to be made, by the primary court regarding the value of the painting services in the Melbourne market. The only other evidence to which the primary court might have had regard was that of the cost to the Patons of Mr Pirvu's painting services, which is hardly evidence of market value. The parties had focussed on the market value of the replacement shutters.

56. In passing their contractual responsibility for the shutters to the Patons consequent on the conversion, the Semenovs passed an obligation that saved them at least $8,625, and which was later to cost the Patons no more than $14,000. The range of the saving for which a discount might be allowed can be tested by looking at the cost from the perspective of the Patons, as there was no evidence that the scope of works for painting and installing the shutters had varied. Mr Pirvu is not entitled to any benefit from his wrongful conversion and did not prove the exact sum paid to him by the Patons for the shutters. Therefore, the proper assessment of the costs associated with the shutters that formed part of the reduction in the residue paid on the evidence before the primary court, may be compared with the sum that the Magistrate found Mr Pirvu was paid on the scope of works remaining to be completed, less the saving made by the Semenovs. The Magistrate accepted Mr Paton's evidence that such payment was in the range $12,000-$14,000, and I will fix it at $13,000. The saving made by the Semenovs was at least $8,625. By this analysis, the value of the shutter obligation that contributed to the reduced residue payment to the Semenovs is $4,375.

57. Turning next to determine the net payment by the Semenovs for the transfer of the shutter obligation by the conversion of the shutters, for that is their true loss, I face the 'package deal' global settlement that I have already described. The proper construction of the settlement on the evidence before the Magistrate is that the reduction in the price related both to installing the shutters, installing the watering system and completing the patio/conservatory, and to a further requirement — a statement by the Patons that they accepted the works required by the sale contract to be complete. The solicitor's letter that the Magistrate accepted as expressing the compromise makes this clear. The value of this further requirement appears not to have been considered. The evidence shows that the negotiation was conducted in rounded estimates of distinct claims, not by tallying up the actual cost of the gains and losses for each party in those claims. Finally, those estimates were subject to further substantial compromise for intangible factors, essentially to resolve a dispute.

58. Mr Paton's evidence, that he made no allowance for the shutters in negotiations, cannot lead to the conclusion that the contractual obligation he assumed had no value to the Semenovs. Mr Semenov's evidence was that one of his claims, for $50,000, comprised an allowance of $35,000 for replacement shutters and $15,000 for painting and installation. The Magistrate did not reject the assessment of $15,000 for painting and installation, which is about what the Patons actually paid, and broadly supports Mr Paton's evidence that no allowance was needed. I am satisfied on the evidence before the Magistrate and on the Magistrate's findings that the Semenovs, when agreeing to accept a lesser sum, could not have been contemplating that the value of the shutter obligation for which an allowance was made was outside of the range of $4,375—$15,000.

59. Doing the best that I can to quantify the damages in these circumstances, I assess the quantum of the Semenovs' damages in conversion at $10,000.

Resolution of the appeal

60. The appeal is allowed and the judgment of the primary court is set aside. I will enter judgment for the appellants against the respondent for damages in the sum of $10,000. I will hear from counsel as to interest and costs.

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[1] Under the *Magistrates' Court Act* 1989 s109.

[2] *Australia and New Zealand Banking Group Ltd v Hunter BNZ Finance Ltd* [1991] VicRp 79; [1991] 2 VR 407, 409; [1991] Aust Torts Reports 81-074 (Murphy and Vincent JJ, Fullagar J in agreement); *Ley v Lewis* [1952] VicLawRp 19; [1952] VLR 119, 121; [1952] ALR 266 (O'Bryan and Dean JJ, Scholl J in agreement); *General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd* [1963] 1 WLR 644, 649, 650; [1963] 2 All ER 314 (Diplock LJ); *Caxton Publishing Co Ltd v Sutherland Publishing Co* [1939] AC 178, 203; [1938] 4 All ER 389 (Porter LJ); *J & E Hall Ltd v Barclay* [1937] 3 All ER 620, 623 (Greer LJ); Sappideen and Vines, *Fleming's The Law of Torts* (Lawbook Co, 10th ed, 2011) 66, 80. See also *The Mediana* [1900] AC 113, 118 (the Earl of

Halsbury LC).
[3] *Australia and New Zealand Banking Group Ltd v Hunter BNZ Finance Ltd* [1991] VicRp 79; [1991] 2 VR 407; [1991] Aust Torts Reports 81-074.
[4] *Caxton Publishing Co Ltd v Sutherland Publishing Co* [1939] AC 178; [1938] 4 All ER 389.
[5] [1966] HCA 38; (1966) 114 CLR 185, 192; [1966] ALR 1025; 40 ALJR 114.
[6] Citing *Chinery v Viall* [1860] EngR 451; 29 LJEx 180; (1860) 5 H & N 288; 157 ER 1192.
[7] [1983] 1 NSWLR 533, 550. Cited with approval in *Hunter BNZ Finance* [1991] VicRp 79; [1991] 2 VR 407, 410; [1991] Aust Torts Reports 81-074.
[8] *Res inter alios acta, aliis nec nocet nec prodest* (Latin phrase meaning 'a thing done between others does not prejudice one who is not a party to it'). In common parlance, a matter between others is not our business.
[9] Citing *Lloyds Bank Ltd v Chartered Bank of India, Australia and China* [1929] 1 KB 40.
[10] *Australia and New Zealand Banking Group Ltd v Hunter BNZ Finance Ltd* [1991] VicRp 79; [1991] 2 VR 407, 411; [1991] Aust Torts Reports 81-074.
[11] *Caxton Publishing Co Ltd v Sutherland Publishing Co* [1939] AC 178; [1938] 4 All ER 389; *The Mediana* [1900] AC 113, 117-8.
[12] *Caxton Publishing Co Ltd v Sutherland Publishing Co* [1939] AC 178; [1938] 4 All ER 389; *The Mediana* [1900] AC 113.
[13] As was argued (unsuccessfully) in *Australia and New Zealand Banking Group Ltd v Hunter BNZ Finance Ltd.*
[14] See generally *Baxter v Obacelo Pty Ltd* [2001] HCA 66; (2001) 205 CLR 635, 656 [46] and following; 184 ALR 616; 76 ALJR 114; [2001] Aust Torts Reports 81-628, (Gleeson CJ & Callinan J) citing *Castellan v Electric Power Transmission Pty Ltd* (1967) 69 SR (NSW) 159, 176; [1968] 1 NSWR 286 (Walsh JA), 180-181 (Asprey JA); *Thompson v Australian Capital Television Pty Ltd* [1996] HCA 38; (1996) 186 CLR 574, 608-611; (1996) 141 ALR 1; (1996) 71 ALJR 131; [1997] Aust Torts Reports 81-412; (1996) 20 Leg Rep 24 (Gummow J); and *Jameson v Central Electricity Generating Board (No 1)* [2000] 1 AC 455, 473.
[15] This option was not put to the Magistrate at all, being raised for the first time on the appeal. I have developed the option to demonstrate that, like the assessment of the Magistrate, it is erroneously premised, without accepting that the Semenovs are entitled to now assert an entitlement in that sum.
[16] It was not in issue that there was no cost adjustment referable to the watering system mentioned in the correspondence.
[17] [1984] VicRp 8; [1984] VR 97, 116 (Brooking J).
[18] *Coulton v Holcombe* [1986] HCA 33; (1986) 162 CLR 1, 7-8; 65 ALR 656; (1986) 60 ALJR 470 (Gibbs CJ, Wilson Brennan and Dawson JJ); *University of Wollongong v Metwally (No 2)* [1985] HCA 28; (1985) 60 ALR 68; (1985) 59 ALJR 481 (17 April 1975) 483; *Tyson v Brisbane Market Freight Brokers Pty Ltd* [1994] HCA 67; (1994) 120 ALR 1; (1994) 68 ALJR 304, 310-311; [1994] Aust Contract Reports 90-042 (24 March 1994) (McHugh J).
[19] The position of the Semenovs on the progress payments was the subject of the proceeding that was not appealed.
[20] [1996] VicRp 49; [1996] 1 VR 668, 680.
[21] [1937] 3 All ER 620, 623.

APPEARANCES: For the appellants (Semenov): Mr CR Hanson, counsel. Quinn & Quinn, solicitors. For the respondent Pirvu: Mr PT Duggan, counsel. MW Law, solicitors.
