Court of Appeal
Supreme Court
New South Wales

Medium Neutral Citation:	**Bunnings Group Limited v CHEP Australia Limited [2011] NSWCA 342**
Hearing dates:	20 & 21 September 2011
Decision date:	10 November 2011
Before:	Allsop P at 1 Giles JA at 193 Macfarlan JA at 206

Decision:

1. Grant leave to the parties to file within 14 days draft orders and submissions in support thereof of no more than 10 pages that each submits should flow from these reasons.

2. Proceedings stood over to a date to be fixed for making of orders and any further argument.

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

Catchwords:

TORTS - intentional - conversion; elements of - mere possession not conversion in commercial context of fungible goods released into market on terms contemplating sub-bailment and transfer of possession - conversion established by refusal to make available or deliver-up goods in response to unconditional demand.

TORTS - intentional - conversion - user principle - whether nature of use of goods repugnant to rights of true owner - necessary to assess use considering all circumstances of case - Penfolds Wines Pty Ltd v Elliott [1946] HCA 46; 74 CLR 204 considered.

CORPORATIONS - attribution of knowledge of agent

- relevant factors.

DAMAGES - conversion - proper measure of damages - compensation - fee for hire - Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd [1952] 2 QB 246 and Gaba Formwork Contractors Pty Ltd v Turner Corporation Ltd (1991) 32 NSWLR 175 considered.

Legislation Cited:

International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed at Brussels, 25 August 1924, Art IV, rule 2(b) and (q)
International Convention relating to the Limitation of Liability of Owners of Sea-Going Ships, signed at Brussels, 10 October 1957, Art 1
Merchant Shipping Act 1894 (UK), s 502

Cases Cited:

Abington v Lipscomb (1841) 1 QB 776; 113 ER 1328
Aitken Agencies Ltd v Richardson [1967] NZLR 65
Armory v Delamirie (1722) 1 Strange 505; 93 ER 664
Attorney-General v Blake; [2001] UKHL 45; [2001] 1 AC 268
Barclay's Mercantile Business Finance Ltd v Sibec Developments Ltd [1992] 1 WLR 1253
Baud Corp, NV v Brook (1973) 40 DLR (3d) 418
BBMB Finance (Hong Kong) Ltd v EDA Holdings Ltd [1990] 1 WLR 409
Bilambil-Terranora Pty Ltd v Tweed Shire Council [1980] 1 NSWLR 465
Blackburn Law & Co v Vigors (1887) LR 12 App Cas 531
Bracewell v Appleby [1975] Ch 408
Brambles Australia Ltd v Tatale Pty Ltd [2004] NSWCA 232; Aust Torts Reports 81-759
Brambles Holdings Ltd v Carey (1976) 15 SASR 270
Butler v Egg & Egg Pulp Marketing Board [1966] HCA 38; 114 CLR 185
Caxton Publishing Co Ltd v Sutherland Publishing Co [1939] AC 178
Clayton v Le Roy [1911] 2 KB 1031
Commercial Union Assurance Company of Australia Ltd v Ferrcom Pty Ltd (1991) NSWLR 389
Cooper v Chitty (1756) 1 Burr 20; 97 ER 166
Douglas Valley Finance Co Ltd v S Hughes (Hirers) Ltd [1969] 1 QB 738
Egan v State Transport Authority (1982) 31 SASR 481

El Oldendorff H & Co GmbH v Tradax Export SA (The 'Johanna Oldendorff') [1974] AC 479
Empresa Exportadora de Azucar v Industria Azucarera Nacional SA (The 'Playa Larga') [1983] 2 Lloyd's Rep 171
Experience Hendrix LLC v PPX Enterprises Inc [2003] EWCA (Civ) 323; [2003] 1 All ER (Comm) 830
Finesky Holdings Pty Ltd v Minister for Transport for Western Australia [2002] WASCA 206; 26 WAR 368
Flowfill Packaging Machines Pty Ltd v Fytore Pty Ltd (1993) Aust Torts Reports 81-244
Fouldes v Willoughby (1841) 8 M & W 540; 151 ER 1153
Gaba Formwork Contractors Pty Ltd v Turner Corporation Ltd (1991) 32 NSWLR 175
General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd [1963] 1 WLR 644
Haines v Bendall [1991] HCA 15; 172 CLR 60
Hall & Co Ltd v Pearlberg [1956] 1 WLR 244
Hambly v Trott (1776) 1 Cowp 371; 98 ER 1136
Hillesden Securities Ltd v Ryjack Ltd [1983] 1 WLR 959
Hiort v London & North Western Railway Co (1878 - 1879) LR 4 Ex D 188
Hollins v Fowler (1875) LR 7 HL 757
Inverugie Investments Ltd v Hackett [1995] 1 WLR 713
Jaggard v Sawyer [1995] 1 WLR 269
Jeffries v Pankow 112 Ore 439; 223 Pac 903 (1924)
Krakowski v Eurolynx Properties Ltd [1995] HCA 68; 183 CLR 563
Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5) [2002] UKHL 19; [2002] 2 AC 883
Lamru Pty Ltd v Kation Pty Ltd (1998) 44 NSWLR 432
Lancashire and Yorkshire Railway Co v MacNicoll (1919) 88 LJ (KB) 601 (Eng)
Leman v Krentler-Arnold Hinge Last Co 284 US 448 (1932)
Lennard's Carrying Company Limited v Asiatic Petroleum Company Limited [1915] AC 705
McKenna and Armistead Pty Ltd v Excavations Pty Ltd [1957] SR (NSW) 515
Mediana, Owners of the Steamship v Owners, Master & Crew of the Lightship Comet (The 'Mediana') [1900] AC 113
Meridian Global Funds Management Asia Ltd v

Securities Commission [1995] 2 AC 500
Milk Bottles Recovery Ltd v Camillo [1948] VLR 344
Miller v UHL 37 Ohio App 276; 174 NE 591 (1929)
Model Dairy Pty Ltd v White (1935) 41 Ang LR 432
Mrs Eaton's Car Sales Ltd v Thomasen [1973] 2 NZLR 686
Oakley v Lyster [1931] KB 148
Pargiter v Alexander [1995] TASSC 62; 5 Tas R 158
Penarth Dock Engineering Co v Pounds [1963] 1 Lloyd's Rep 359
Penfolds Wines Pty Ltd v Elliott [1946] HCA 46; 74 CLR 204
Presidential Security Services of Australia Pty Ltd v Brilley [2008] NSWCA 204; 73 NSWLR 241
Real Estate Opportunities Ltd v Aberdeen Asset Managers Jersey Ltd [2007] EWCA (Civ) 197; [2007] 2 All ER 791
Roder Zelt-Und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd (In liq) [1995] FCA 1707
Rushworth v Taylor (1842) 3 QB 699; 114 ER 674
Sanderson v Marsden & Jones (1922) 10 LIL Rep 467
Schemmell v Pomeroy (1989) 50 SASR 450
Screenco Pty Ltd v R L Dew Pty Ltd [2003] NSWCA 319; 58 NSWLR 720
Sempra Metals Ltd v Inland Revenue Commissioners [2007] UKHL 34; [2008] 1 AC 651
Spackman v Foster (1882-1883) LR QBD 99
Stoke-on-Trent City Council v W & J Wass Ltd [1988] 1 WLR 1406
Stevens v Premium Real Estate Ltd [2009] NZSC 15
Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd [1952] 2 QB 246
Taylor v Yorkshire Insurance Co [1913] 2 IR 1
Swordheath Properties v Tabet [1979] 1 WLR 285
Tesco Supermarkets Ltd v Nattrass [1972] AC 153
Watson, Laidlaw & Co Ltd v Pott, Cassels and Williamson (1914) 31 RPC 104
Whitwham v Westminster Brymbo Coal & Coke Co [1896] 2 Ch 538
Wrotham Park Estate Co v Parkside Homes Ltd [1974] 1 WLR 798
Yakami Dairy Pty Ltd v Wood [1976] WAR 57

Texts Cited:

W Aldous et al Terrell on the Law of Patents (13th Ed, Sweet & Maxwell, 1982)
R P Balkin and J L R Davis Law of Torts (4th Ed, LexisNexis Butterworths, 2009)

	W Cornish et al Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights (7th Ed, Sweet & Maxwell, 2010) A M Dugdale et al (eds) Clerk & Lindsell on Torts (19th Ed, Sweet & Maxwell, 2006) J Edelman "The measure of restitution and the future of restitutionary damages", 18 Restitution Law Review 1 S Green and J Randall The Tort of Conversion (Hart Publishing, 2009) H McGregor McGregor on Damages (18th Ed, Sweet & Maxwell, 2010) N Palmer and E McKendrick (eds) Interests in Goods (2nd Ed, LLP, 1998) W Prosser "The Nature of Conversion" (1957) 42 Cornell Law Quarterly 168 J W Salmond "Note" (1905) 21 Law Quarterly Review 43 P Watts and F Reynolds Bowstead and Reynolds on Agency (19th Ed, Sweet & Maxwell, 2010)
Category:	Principal judgment
Parties:	Bunnings Group Limited (Appellant) CHEP Australia Limited (First Respondent) CHEP Equipment Australia Pty Ltd (Second Respondent) Transpacific Cleanaway Pty Ltd (Third Respondent)
Representation:	R Garratt QC, D Priestley (Appellant) F Douglas QC, N J Kidd, T French (Respondents) Ligeti Partners (Appellant) Allens Arthur Robinson (Respondents)
File Number(s):	2007/266437
Decision under appeal	CHEP v Bunnings [2010] NSWSC 301
Citation:	
Date of Decision:	07 May 2010
Before:	McDougall J
File Number(s):	2007/50102

JUDGMENT

1 **ALLSOP P:** The appellant ("Bunnings") was found by the primary judge to be liable to the respondents (together referred to as "Chep") in conversion and detinue in respect of a large number of pallets that, at all material times,

Chep owned and to which it had the immediate right to possession. The damages awarded by the primary judge, by reference to lost hire, amounted to $9,375,798, plus interest of $4,100,002.

The result of the appeal

2 In my view, the appeal should be allowed in part. There was a conversion by Bunnings from 8 August 2006 by failing to make available for return all pallets that had been demanded in March 2006. By 8 August 2006, the contingency that had been placed on the necessity to give up the pallets (a commercial negotiation suitable to both parties) had clearly expired. Chep is entitled to hire, at the Wesfarmers' discounted rate, for the quantity of pallets found by the primary judge to have been converted in that period. There was also a conversion of some pallets before 8 August 2006, being a small number of pallets turned to account and used by Bunnings after goods had been unloaded from them. Whether or not any relief flows from that conclusion should be the subject of further submissions. There should be submissions on the form of orders, including costs. The claim in detinue is co-extensive with the conversion after 8 August 2006 and adds nothing to the result.

The commercial background and its importance

3 To understand the operation of the principles of conversion and detinue, especially the former, in relation to any particular goods, one needs to understand the relevant commercial arrangements in question, in their practical and real commercial context - a context in which business people, using honest commonsense, operate. As Lord Denman CJ said in *Abington v Lipscomb* (1841) 1 QB 776 at 781; 113 ER 1328 at 1330, the "conduct of a defendant ... must be taken altogether, and with all its circumstances." This is so in order to understand what is an act repugnant to the true owner's property in the goods, including the owner's right to possession, such repugnancy being essential to the tort of conversion.

4 A helpful factual introduction was given by the primary judge at [1]-[2] of his reasons, as follows:

> "[1] The plaintiffs' distinctive 'Chep' pallets are widely used for the carriage, storage and display of manufactured goods. At all times relevant to these proceedings, one or other of the plaintiffs (to whom it is convenient to refer collectively as 'Chep') carried on the business of making those pallets available to hirers pursuant to a 'pooled pallet' system. In its simplest form, a hirer takes a quantity of pallets on hire from Chep and uses them until the immediate purpose of their use is fulfilled. The hirer then returns the pallets (not necessarily in specie, but an equivalent number to those hired from Chep). The hirer remains liable for hire charges until the pallets are passed onto another hirer who accepts responsibility for that hire, or until the pallets are, in the language of the trade, 'de-hired': returned to Chep or written off on payment of a 'loss fee'.

> [2] The defendant (Bunnings) carries on throughout Australia a retail hardware business. It is not, and (with some irrelevant exceptions) never has been, a hirer from Chep. Nonetheless, for many years up until October 2007, Bunnings was in possession of a substantial number of Chep pallets. After a series of demands made by Chep, Bunnings has returned, either to hirers from whom it obtained them or to Chep, all the Chep pallets that it held. The essential question for decision in these proceedings is whether Bunnings, by such use as it made of Chep pallets in its possession from time to time, is liable for the conversion of those pallets; or alternatively, whether, by reason of its failure to comply (until October 2007) with demands made upon it, it is liable in detinue."

5 The primary judge set out in some further detail the factual background. Before descending into aspects of the facts that were either contested or bear more on the contest on appeal, a largely uncontentious description of background is contained in [4]-[14] of the primary judge's reasons, as follows:

> "[4] Chep is the market leader in Australia in the pallet hire market, and is a major competitor in the worldwide pallet hire market. Its wooden pallets are painted blue and are branded in white with the 'Chep' logo.
>
> [5] No Chep pallet is uniquely identifiable. Any Chep pallet is interchangeable for any other. No Chep customer is obliged to return *in specie* any pallet that has been hired to it; its obligation is to return pallets equal in number to those hired, or to pay daily hire charges until the pallets are returned or otherwise de-hired.
>
> [6] Chep does not sell, nor has it ever sold, branded Chep pallets to any user. For many years, Chep pallets have been hired pursuant to the pallet pooling scheme to which I have already referred. Hirers obtain and return pallets according to their needs. Where the pallets are passed from one hirer to another, there is a scheme for documenting the transfer so that each hirer is liable for hire charges only for the time that pallets are in its possession. When pallets are no longer required, they are returned to a Chep depot.
>
> [7] As pallets are damaged, Chep repairs them. When pallets are deemed to have reached the end of their useful life, they are broken up and recycled or "defaced" (by removal of the Chep logo and other means) and disposed of.
>
> [8] From time to time, hirers sell or ship goods to non-hirers. Chep's terms of trade permit that to happen, on terms including that the hirer remains liable for hire charges until the pallets are passed on to another hirer, or returned to Chep, or otherwise dehired.
>
> [9] As I have said, Bunnings operates a chain of retail hardware stores throughout Australia. Increasingly, those stores are what is known as "warehouse" stores. Those stores, which are usually of substantial size, give the impression of being warehouses. Goods for sale, and goods held in stock, are displayed on steel racking. Some goods are offered for sale from pallets. This is usually done at conspicuous places such as at the ends of aisles, adjacent to registers and entrances, and in the garden section of each store. Further, goods not required for immediate sale may be from time to time stored on pallets placed on top of the steel racking on which other goods are displayed for sale.
>
> [10] At least until October 2007, many of Bunnings' suppliers delivered goods to it loaded on Chep pallets. When a loaded pallet was delivered to a Bunnings store, it might be dealt with in one of three ways:

(1) the pallet might be unpacked shortly after delivery; the goods placed onto racks; and the pallet made available for return to the supplier or its carrier;

(2) the pallet might be placed on the floor of the store so that goods could be offered for sale from it; or

(3) the pallet might be stored on top of the steel racking (or, in the jargon of the trade, in "high rise") until needed.

[11] Where the suppliers to Bunnings were customers of Chep who had entered into a hire contract with Chep, those customers remained liable for the hire and well-being of Chep pallets whilst those pallets remained in Bunnings' possession. The suppliers would only cease to be liable when, having regained possession of the pallets, they either transferred them in the course of business to another Chep customer who accepted responsibility for the pallets, or returned them to a Chep distribution centre and thereby de-hired them.

[12] Further, Bunnings imports goods directly. Those goods are usually brought in containers, but in some instances on pallets. Once the goods have cleared customs, they are taken (still in their container or on their pallet) to a Bunnings distribution centre. The consignments are then broken down and repackaged for distribution to individual stores.

[13] Bunnings has always held a substantial number of its own branded pallets, which it replenishes by purchase from time to time. In addition, it has entered into terms of hire with Loscam, which is Chep's major competitor in the pallet hire business. When goods are despatched from Bunnings' distribution centres to stores, they are loaded onto pallets (or, again in the jargon of the trade, 'palletised') and shipped out. Bunnings' evidence was to the effect that when this was done, the distribution centres sought to use Bunnings' own pallets or Loscam pallets; but that, from time to time, it was necessary for any Chep pallets that were on hand to be used for this purpose.

[14] Bunnings' evidence was also to the effect that, when goods were delivered to stores on Chep pallets, the supplier either:

(1) took back, in exchange for the loaded pallets, an equivalent number of empty Chep pallets; or

(2) took an 'IOU' for the number of unrequited pallets, which IOU would be redeemed on a later occasion."

6 At this point, it is to be noted that very few IOU documents were discovered by Bunnings in the litigation, leading to the conclusion that there may have been no satisfactory IOU system in existence.

7 Chep's arrangements with its customers were contained in its terms of hire. The primary judge set them out at [19] of his reasons, as follows:

" **1 DEFINITIONS**

In these terms:

...

CHEP means CHEP Australia Limited ABN 11 117 266 323 (and its successors and assigns);

...

Equipment means items of property lent or hired out by CHEP from time to time;

...

Hirer means any person, firm or corporation to whom Equipment is lent or hired by CHEP, and its legal personal representatives, successors and permitted assigns;

...

Quantity on Hire means, in respect of any day, the quantity of Equipment lent or hired by CHEP to the Hirer;

...

2. HIRE OF EQUIPMENT

(a) Equipment will be added to and deducted from the Equipment held by the Hirer and the Hirer's Quantity on Hire when:

(1) Equipment is hired to the Hirer (issue);

(2) hired Equipment is returned to CHEP at a Service Centre authorised to accept that Equipment (return);

(3) there is an approved transfer of hired Equipment by the Hirer (Sending Party) to another Hirer (Receiving Party) or by a Receiving Party to the Sending Party; or

(4) there is an adjustment under these terms.

An item of Equipment will not be recorded as returned until the whole of the item is returned or compensation is paid under clause 4.

...

(c) The Hirer must not part with possession of any Equipment unless:

(1) it is returned to CHEP;

(2) it is transferred onto another Hirer's account with CHEP; or

(3) the Hirer keeps and makes available to CHEP on demand approved CHEP documentation, CHEP electronic records or other control records approved by CHEP identifying the name and address of the person in possession of the Equipment, the date of the change of possession, the quantity and type of Equipment, and the terms (if any) on which the Hirer parts with possession. The Hirer must ensure that those terms are at all times subordinate to and will be overridden by these terms. If CHEP requests, the Hirer must provide to CHEP (at CHEP's reasonable expense) a copy of all or any part of such records.

...

4. OWNERSHIP, LOSS, CONDITION AND REPOSSESSION OF EQUIPMENT

The Hirer acknowledges that each item of Equipment has a special value to CHEP in that, as part of CHEP Australia, CHEP repairs, maintains, handles and otherwise administers the circulation of all Equipment. The Hirer expressly agrees to all the following matters as a condition of CHEP agreeing to lend or hire Equipment to the Hirer:

(a) Despite any other clause in these terms, CHEP remains the owner of the Equipment at all times. No person is entitled to use, dispose of or otherwise deal with Equipment in any way that is inconsistent with CHEP's ownership or these terms. Payment of compensation, or any other circumstance or event, does not constitute or result in any transfer of property or interest in the Equipment from CHEP.

(b) (1) If the Hirer establishes to CHEP's satisfaction that Equipment on hire is destroyed (Destroyed Equipment), the Hirer must pay CHEP compensation in an amount equal to the then current value, as determined by CHEP, of that quantity of new Equipment. The Hirer remains liable to CHEP for hiring charges in respect of Destroyed Equipment until payment of the compensation required by this clause.

(2) If the Hirer establishes to CHEP's satisfaction that Equipment on Hire is lost (Lost Equipment), the Hirer must pay CHEP compensation in an amount agreed between the Hirer and CHEP or, if they do not agree, at CHEP's posted Lost Equipment Compensation Rate from time to time. ...

(3) If the Hirer subsequently recovers possession of Lost Equipment in respect of which compensation has been paid, or if CHEP retakes possession of Equipment for which CHEP considers that the Hirer has paid compensation, CHEP will refund to the Hirer the amount of compensation paid for the Lost Equipment, after deducting any costs of recovery or retaking possession and an amount equal to the amount of hiring charges not paid by the Hirer and which would otherwise be due and owing if CHEP has not agreed to treat the Equipment as Lost Equipment.

...

(d) CHEP has the right to immediate possession of all CHEP Equipment, whether on hire or not, and may take possession of any Equipment immediately and without notice to any person. The Hirer gives CHEP an irrevocable licence to enter property occupied by the Hirer at any time and take any steps CHEP considers reasonably necessary or appropriate to obtain possession of Equipment. The Hirer must pay CHEP's actual costs of obtaining possession of Equipment. CHEP may credit the Hirer's account with Equipment so recovered. If CHEP takes possession of any Equipment which the Hirer demonstrates to CHEP's satisfaction was then on hire to the Hirer, CHEP will, at the Hirer's request, make available the same quantity of Equipment to the Hirer, if the Hirer demonstrates to CHEP's satisfaction that the Hirer would then have no more Equipment than its Quantity on Hire.

...

14. TERMINATION

> CHEP may at any time give the Hirer written notice terminating the hire of Equipment and further or alternatively any licence granted under these terms. On receipt of a notice terminating the hire of Equipment, the Hirer must deliver to CHEP (at no cost to CHEP) within 7 days of the date notice is given, or by any later date specified in the notice, all Equipment held by the Hirer. CHEP may treat any Equipment not so delivered as Lost Equipment for the purposes of clause 4(b) (2), or may seek to recover the Equipment from the Hirer. If CHEP chooses to recover the Equipment, the Hirer must indemnify CHEP's [sic] for its costs of recovery, including legal costs on a solicitor and own client basis. The Hirer's obligations under this clause survive termination of the hire of the Equipment.
>
> ..."

8 The pallets were, in practice, and by reference to the terms of trade, fungible. There was no obligation on a hirer to return the same pallet as hired to Chep, as long as the same number of pallets were returned. Pallets could be moved from one hirer's account to another, with notice to Chep. Hirers were authorised to transfer possession to third parties, if records described in cl 2(c)(3) were made by the transferring hirer. A hirer, however, remained responsible to pay hire on a pallet, even if possession of it had been transferred to a third party. Thus, any sub-bailment of any one pallet to a third party did not extinguish the hirer/bailee/sub-bailor's obligation to pay hire to Chep. This was so at least until the hirer notified Chep that it had lost a pallet, at which point the hirer would pay a lost compensation fee (roughly equivalent to the cost of a new replacement pallet) to Chep.

9 Chep launched into the commercial sea a huge number of pallets. As the facts revealed in this case, over time, and at any one time, there circulated in commerce a significant number of pallets that were not the subject of present hire payments by any hirer to Chep. All (except for any originally stolen from Chep, a circumstance not relevant to the proceedings here) had been, at some time, the subject of a hiring agreement and the payment of hire. Indeed, even after the payment of any lost compensation fee, until terminated otherwise, there remained contractual rights and obligations between Chep and the hirer - such as those dealing with the return of the lost compensation fee if the pallet were found and returned to Chep.

10 Under these terms and arrangements, Chep no longer had possession of the pallets, but at all times had the immediate right to possession of all its pallets. Thus, all the hirings were bailments at will. There was no requirement for there to be a breach of the terms of hire in order that Chep have an immediate right to possession of the pallets hired. Chep maintained that incident of property right, notwithstanding the parting with possession, by the terms of the hiring.

11 In that commercial context, no third party in a position such as Bunnings could know, or be in a position to know (at least without enquiry of commercial or business counterparties that it had no entitlement to make), whether a

particular pallet received was the subject of current hire payments or whether its transfer was the subject of record keeping of the transferor of possession that satisfied cl 2(c)(3). Indeed, even the transferor of possession could not know whether the particular pallet was one in respect of which hire was paid. All it could know was whether it was one of the number in respect of which hire was being paid by it.

12 Of their nature the pallets were goods on which other goods were placed, whether fastened or not, to facilitate transport, movement and storage of goods thereon. They were shaped such that forklift trucks and machines could pick them up and deposit them on trucks or in storerooms or on the ground or on some horizontal surface. The Court can take from all the evidence that pallets are an essential, or very common, integer of modern stock management and logistics.

13 The attributes and apparent consequences of use of any such goods by someone who does not own them or have any contractual arrangement with the owner to use them are to be understood against the background that I have just described.

14 A company which was not a hirer from Chep and not aware of Chep's commercial terms would not be aware of the precise legal basis of Chep's rights, though it would be aware that Chep owned the pallets (its name being marked on each pallet) that were in wide commercial circulation, the possession of which was often transferred from person to person in the transport, handling and storage of goods. No evident limitation was placed on the use of the pallets by any warning, use being governed by honest commercial practice according to law.

15 The expected and reasonable use of pallets was described by Mr Austin, a Vice-President (Business Development) of Chep. He described the "pallet pooling system" being the use of hired pallets treated as fungible, removing the requirement for people to buy, use and retain their own pallets. He described the benefits at paras 63 and 64 of his affidavit sworn 29 October 2008 (Blue Book Vol 1 pp 36-37):

> "[63] The wide-spread use of pallets has led to standardisation of the materials-handling industry. For example, many delivery trucks fit exactly 2 standard-sized pallets across and 2 or more pallets deep. Many warehouses have racking that enables standard size pallets to be stored above each other ... Many manufacturers have incorporated pallets into the start of their production lines. The use of forklifts and pallets (which can hold up to 10 tonnes, or 2 tonnes if stored on racks) has enabled efficient handling of bulk goods through various industries and supply chains in Australia and globally.

> [64] The pooling system enables goods to be passed from customer to customer through the supply chain without the need to unload goods from pallets at each point in the chain. If pallets were hired on a non-pooled basis, it would be necessary for goods to be unloaded and reloaded at each point in the supply chain. This would cause delay and increase handling costs. In 1972 the National Materials Handling Bureau estimated that the national economy benefited by around $1 from every CHEP pallet movement."

(The phrase "customer to customer" in para 64 can be taken from its context in his affidavit to mean Chep customer.)

16 Similar evidence was given by Mr Davis, the Chief Operating Officer of Bunnings at para 23 of his affidavit sworn 6 April 2009 (Blue Book Vol 1 p 100), as follows (upon which evidence he was not cross-examined):

> "Business practice is that suppliers and carriers do not receive back the pallet on which goods are delivered at the time of delivery in the absence of terms of dealing to that effect. Instead the practice is to take back an equivalent empty pallet at the time of delivery or at a later date. Business practice further permits the consignee or purchaser to leave goods on the delivered pallet until it is cleared in the ordinary course of the consignee's business. I am not aware of a supplier ever asking Bunnings to return the pallet on which goods have been delivered at a sooner time."

17 The evidence permitted the conclusion that a significant number of pallets were unloaded by Bunnings the day or day after delivery making many, if not most, available for exchange shortly thereafter. This was at least the position in Western Australia, and in some stores in New South Wales. Eighty per cent of stock was on shelves, not pallets, and on average stock was turned around in three months. One cannot be precise about the proportion of pallets unloaded within a day or so; but the evidence permits the conclusion that a significant proportion, "most" in Western Australia were. There was evidence that the return of all pallets in 2007 caused some disruption to Bunnings' business and the demand that did occur in 2007 caused Bunnings to bring forward the delivery to it of 110,000 new pallets. Nevertheless, the evidence of Bunnings' employees, Mr Pearce, Mr Doyle and Ms McDonald enables the conclusions to which I have referred to be drawn.

The case run below

18 The case of conversion made against Bunnings, by the terms of para C24 of the Commercial List Statement ("CLS"), depended on paras C1-C21 and C23 of the CLS. It was not based on para C23 alone. The importance of this is that, on one view, a necessary part of Chep's case at trial, in conversion, was what appeared in para C19 of the CLS: that from 16 May 2002, Chep told Bunnings that it withdrew its consent for the latter possessing what were referred to in the pleadings and in the litigation as "non-commercial pallets" or NCPs. These were pallets which were not the subject of hire payments to Chep by hirers. It is in that context that the acts performed in para C23 were said to be a conversion in that Bunnings had:

"(a) received and taken into its possession or otherwise procured CHEP Pallets in the course of and for the purposes of carrying on its business;

(b) used and continues to use CHEP Pallets in the course of and for the purposes of carrying on its business;

(c) provided or disposed of CHEP Pallets to its customers or suppliers; and

(d) otherwise dealt in CHEP Pallets."

19 No case was run at trial that depended in any way upon characterising the initial transfer of possession to Bunnings by the supplier/transporter as not complying with the terms of cl 2(c)(3). What was therefore not run, and is thus not necessary to deal with on appeal, was any case based on a conclusion that Bunnings received pallets from suppliers/transporters without contractual authority or otherwise wrongfully. The importance of the absence of this issue in the case at trial is that the assessment of Bunnings' conduct is not to be made on the basis that its initial possession was in some fashion unauthorised or wrongful or unlawful.

20 Four considerations may be seen to inform the claim for conversion, depending on how it was put and in what alternative ways: first, Chep's immediate right to possession (which was not in contest on appeal); secondly, the asserted lack of consent by Chep to Bunnings' use of pallets not the subject of hire payments; thirdly, any demand for return of the pallets; and, fourthly, the type of use made of the pallets by Bunnings. As is apparent, the second and third of these considerations are closely related.

21 In setting out the submissions on the question of conversion of Mr Bathurst QC (as he then was), who, with Mr Kidd, appeared for Chep at the trial, at [187]-[188] of his reasons, the primary judge set out two ways the conversion case was put:

"[187] Mr Bathurst submitted that the use made by Bunnings of Non-Commercial Chep Pallets during the Relevant Period amounted to conversion, because it was a use inconsistent with Chep's dominion over those pallets - its right to their immediate possession. He submitted that the evidence showed that Bunnings was more than a mere repository (or depository) of the pallets, and that it actively employed them for its own purposes (as, in dealing with issue 3, I have found it did). That degree of use, Mr Bathurst submitted, amounted to Bunnings' employing the pallets as though they were its own.

[188] Further, Mr Bathurst submitted, Bunnings had been aware at all material times during the Relevant Period (or from August 2001, at the latest) that Chep maintained that Bunnings was in possession of Non-Commercial Chep Pallets, and that it required Bunnings either to hire those pallets or to return them. Bunnings refused to accept either alternative, and continued to use the pallets in question for its own purposes. That conduct too, Mr Bathurst submitted, amounted to conversion."

22 These submissions put two independent arguments: first, the use of the pallets by Bunnings was of itself of a character to amount to acts of dominion over the goods, repugnant to the rights of the true owner; and, secondly, being aware that Chep maintained that Bunnings was obliged to hire or return NCPs, it refused to do either and continued to use the pallets.

23 The detinue case put by Mr Bathurst was described by the primary judge at [189] of his reasons:

> "For essentially the same reasons as those summarised in the preceding paragraph, Mr Bathurst submitted that, in the alternative, Bunnings was liable for detinue. He submitted that the repeated statements that Bunnings should either hire the pallets in question or return them were effective to amount to a conditional demand for the return of the pallets, and that in circumstances where Bunnings had declined to accept the condition, the demand should be regarded as unconditional. Alternatively, Mr Bathurst submitted, Bunnings' conduct, both over the years in question and in its defence of these proceedings, showed that demand would have been futile."

The approach and findings of the primary judge

24 The primary judge addressed 15 issues propounded by the parties for decision. Some were not live on appeal.

Immediate right to possession

25 The first issue concerned the immediate right to possession. The primary judge concluded that Chep had the immediate right to possession of all Chep pallets in Bunnings' possession from January 2002 to October 2007 (which his Honour defined as the "Relevant Period"). This depended on a construction of cl 4(d) of the terms of hire to the effect that its operation was not limited to pallets on hire. No appeal was brought from this conclusion.

Numbers of NCPs in Bunnings' possession

26 The second issue concerned possession during the Relevant Period of NCPs. The primary judge concluded that in the Relevant Period, Bunnings had possession of significant numbers of NCPs. As will be seen from the discussion below about the communications between the parties, Bunnings' contemporaneous position was as described by the primary judge at [15] of his reasons:

> "Thus, Bunnings said, all Chep pallets in its possession from time to time were pallets on hire to its suppliers who were Chep customers, and Chep was receiving hire charges for those pallets (or, if it were not, that had nothing to do with Bunnings)."

27 A significant part of the trial was taken up resolving this factual question. Using a reconciliation process based on analysing the 82,216 pallets collected by Chep in October 2007 by reference to interrogation of suppliers of Bunnings, the identities of whom were established by discovery in the proceedings, it was established that 64,690 of these were NCPs. The primary judge found that during the periods 1 January 2002 to 31 March 2002, 1 April 2002 to 31 March 2003, 1 April 2003 to 31 March 2004, 1 April 2004 to 31 March 2005, 1 April 2005 to 31 March 2006, 1 April 2006 to 31 March 2007 and 1 April 2007 to 1 October 2007, Bunnings had in its possession and used 46,326, 46,326, 48,413, 52,169, 54,673, 59,264 and 64,690 NCPs, respectively.

28 There was no appeal from these findings, except as to the nature of use of the pallets insofar as it was relevant to conversion.

29 It should be noted at this point, however, that at [201] and [209]-[215] of his reasons the primary judge concluded that the Relevant Period for the calculation of damages commenced on 16 May 2002.

30 Some incidental findings that were made by the primary judge and which were in contest, or the significance of which were in contest, on appeal were as follows:

(a) The primary judge found that had an audit of pallets during the Relevant Period been carried out with Bunnings' co-operation, it would have enabled Chep to calculate the number of NCPs in Bunnings' possession. The primary judge said at [84]:

> "... Thus, I think, an audit was likely to have produced a reasonable estimate of the true number of Non-Commercial Chep Pallets held by Bunnings at any given time."

(See a similar finding at [96] of the reasons.)

(b) The primary judge found that Bunnings' position did it no commercial credit, his Honour saying at [85]:

> "Further, whilst I accept that Bunnings could not have been forced to undertake or to participate in an audit process, its refusal to do so does not do it much credit. Bunnings' stated position (to Chep) at all times was that all Chep pallets held by Bunnings from time to time were the subject of legitimate hire arrangements between Bunnings' suppliers and Chep. However, it is clear from the evidence of Bunnings' witnesses that Bunnings had never attempted to satisfy itself on this point; it had never undertaken any investigation, or made any inquiry. The statement repeatedly made to Chep seems to have been, if not an article of faith, then in effect an unreasoned statement of position."

(c) The primary judge found at [95] Bunnings' knowledge by 17 November 2005 to be as follows:

"... Bunnings through at least Mr Gilsenan knew and understood that it had accumulated more Chep pallets than could be accounted for by IOU arrangements with its suppliers. Thus, Bunnings had every reason (at least, in a commercial sense) to be "adamant" that it would not permit Chep to undertake an audit."

The use made of the pallets by Bunnings

31 The third issue concerned the use made of pallets by Bunnings. The primary judge made various findings about Bunnings' use of the pallets in its possession (these findings being as to all pallets, NCPs and those under hire to Chep customers). These findings, which were not contentious below or on appeal appear in [106]-[114] of the primary judge's reasons:

"[106] For present purposes, stock delivered into Bunnings' stores over the relevant period may be divided into four principal categories:

(1) stock required immediately to re-stock the shelves on which goods are exposed for sale;

(2) stock not required for immediate display;

(3) heavy stock, such as bagged cement or potting mix; and

(4) other stock (for example, promotional items) sold from pallets from time to time.

[107] When palletised goods were received into a Bunnings store, they were dealt with as follows:

(1) stock in the first category was transferred from the pallet to shelves. Initially, this was done during the day. However, for safety reasons, the practice was adopted of re-stocking the shelves at night, after normal trading had ceased. Either way, as I understand it, loaded pallets would be moved onto the floor of the store and Bunnings' staff would unpack items of stock from the pallets and place them onto the shelves or racks.

(2) Pallets of stock in the second category were stacked into 'high rise': on top of the steel racking. Again, as I understand it, this was done after hours as it involved the use of machinery to transport the pallets and lift them into position.

(3) Stock in the third category comprised stock that was typically sold direct from pallets. It was apparently undesirable to attempt to unload those pallets and to reload the goods onto other pallets. The individual items were heavy, and difficult to move. The pallets were loaded by special machines, which distributed the weight of the items evenly and guarded against slippage. If attempts were made to move the stock onto other pallets, there was the risk of slippage. Accordingly, the goods were sold direct from the pallets.

(4) The fourth category is self-explanatory.

[108] As pallets were emptied (either in the process of re-stocking or as goods were sold from them), they were taken back to the receiving area of the store, to await exchange. As I have noted already, it was Mr Skermer's evidence that when individual stores had more Chep pallets than they needed (for the purpose of exchange), they would send those surplus pallets to Bunnings distribution centres.

[109] Mr Wilkinson-Beards said that approximately 80% of the goods received on pallets in Bunnings' stores were unloaded immediately, and 20% were retained on pallet either for sale off the pallet or in high rise.

[110] Mr Juhani said that, on occasion, seasonal stock that was left over at the end of its selling season (for example, heaters unsold at the end of winter) might be placed onto a pallet with other goods (not necessarily those delivered on the pallet). The pallet would then be shrink-wrapped and placed in high rise. Mr Juhani said that this was usually done with Bunnings' own or plain pallets, but I infer that it was also done from time to time with Chep pallets.

[111] In addition, from time to time, Bunnings' distribution centres used Chep pallets for the movement of goods. Most goods were received into distribution centres in containers, and were unpacked from those containers. They were then loaded onto pallets for dispatch to individual stores. Generally, Mr Skermer said, Bunnings' own pallets or Loscam pallets were used. However, he said, when supplies were low, Chep pallets were used for this purpose. Mr Skermer said that only 1% to 2% of pallets used by the distribution centres for sending stock to stores were Chep pallets; and that this use was against Bunnings' policy.

[112] Mr Wilkinson-Beards gave evidence to the like effect: that distribution centres would use non-Chep pallets where possible to send goods to stores, but that they did on occasion use Chep pallets.

[113] There was in evidence an email dated 27 February 2007 from Ms Chris Raftery, the manager of Bunnings' imports distribution centre in Queensland, copied to what appear to be all Bunnings' stores in that state. The email, which was said to be of "high" importance, read:

> Hi all, Qld D.C is in need of pallets.
>
> In the month of February we paid $22,000.00 for Loscam rental (19,500 plts) for one month. We are unable to de-hire any as they are full of stock. We are reluctant to hire more.
>
> Could all stores please send back to the D.C. ASAP any empty Loscam or Chep that they do NOT owe to any other suppliers.
>
> We also still use all plain/Bunnings standard hardwood pallets that don't belong to anyone else.
>
> Your prompt action on this matter would be appreciated, thanks.

[114] In short, as Chep submitted, Bunnings' use of Chep pallets over the Relevant Period included the following:

(1) The display of goods for sale in promotional displays and displays at aisle-ends registers etc. As Chep submitted, the display of goods on pallets was an integral part of the warehouse retail concept.

(2) For storing in high rise stock not immediately needed.

(3) For storing heavy goods until needed, so as to avoid the safety and cost issues associated with unloading, handling and restacking those goods.

(4) For swapping with suppliers who delivered goods on Chep pallets, so as to avoid the time, cost and other problems of unloading goods delivered on pallets from those pallets forthwith upon delivery.

(5) For transporting surplus stock (on the pallets on which it was delivered) between stores or between stores and delivery centres.

(6) From time to time, for palletising and delivering to stores imported goods received at distribution centres."

32 Whilst the above was not contentious, there was a debate on appeal about the evidence of the kind referred to in [109] of the reasons and whether it supported a conclusion that some 80 per cent of the pallets received by Bunnings were almost immediately returned to loading bays to use for exchanges and meeting IOUs. The available conclusions on this have been discussed at [17] above.

The knowledge of Bunnings about NCPs

33 The fourth issue concerned the questions of the knowledge of Bunnings about NCPs and its refusal either to hire pallets from Chep or to deliver up NCPs to Chep. This body of facts was contentious on appeal. The primary judge dealt with this issue at [116]-[130] and some earlier paragraphs of his reasons. The relevant findings (and present contest about them) were as follows:

(a) The finding in [95] (to which I have already referred at [30] above) about Bunnings' knowledge of non-IOU Chep pallets, in effect, of NCPs.

(b) The finding in [98] about Bunnings' knowledge of Chep's position, as follows:

"Bunnings chose, for some years, to deal with Chep's pallets in circumstances where it knew that Chep maintained that not all those dealings were authorised by Chep's contracts with its suppliers. Bunnings chose not to investigate the right of its customers to deal as they did, and chose not to keep (at least, so far as the discovery and evidence in these proceedings shows) adequate records of those dealings. For at least the last 18 months or so of the time when Bunnings used Chep pallets, it had actual notice of the terms on which Chep's customers were entitled to part with possession of the pallets in Bunnings' favour. In those circumstances, I think, Bunnings dealt with the pallets at its peril ..."

(c) The primary judge traced the history of communications between Chep and Bunnings from 2000 to 2007 and concluded at [130] of his reasons that:

"... as the history that I have just recounted shows, Bunnings did refuse either to hire or to deliver up to Chep such Non-Commercial Chep Pallets as from time to time it held during the Relevant Period, until the process of return to Chep began on 1 October 2007."

34 A central aspect of the dispute on appeal is the proper characterisation of and conclusions from the events from 2000 to 2007 and described by the primary judge from [116] to [129] in support of the conclusion in [130], to which I have just referred.

Conversion and detinue

35 The fifth and sixth issues were whether Bunnings converted the NCPs, and if so, in what quantities.

36 The seventh and eighth issues were whether Bunnings had "unlawfully detained" NCPs (that is committed the tort of detinue), and, if so, in what quantities.

37 These four issues were dealt with by his Honour at [179]-[200] of his reasons. He concluded that there had been conversion and detinue in respect of all NCPs from 16 May 2002 to 1 October 2007.

38 The primary judge's reasoning was as follows. After setting out legal principle concerning conversion in a way that has not been criticised, his Honour referred to what he saw as the lack of need for a formal demand in conversion, referring to *Baud Corp, NV v Brook* (1973) 40 DLR (3d) 418 and *Brambles Australia Ltd v Tatale Pty Ltd* [2004] NSWCA 232; Aust Torts Reports 81-759.

39 The evidence that his Honour saw as relevant was the evidence in connection with the fourth issue (knowledge of Bunnings about NCPs). This tends to indicate that central to his Honour's reasoning was the refusal of Bunnings to accede to either elements of the choice given to it by Chep: hire or deliver up the NCPs.

40 The critical reasoning of the primary judge was in [195]-[199]. In [195] Chep was found to have made out its case in conversion in relation to any NCPs as were from time to time in its possession. His Honour said at [195]-[196]:

> "[195] In my view, Chep has made out its case in conversion, in relation to such Non-Commercial Chep Pallets (i.e., Chep pallets not at any time on hire to a Chep customer) as were in Bunnings' possession from time to time over the Relevant Period. That is because, as Mr Davis conceded, Bunnings understood at all material times over the Relevant Period that Chep did not consent to Bunnings' using those pallets for the purposes of its business, unless of course Bunnings entered into a hire agreement: something that Bunnings was not prepared to do.

> [196] It follows, in my view, that for Bunnings to continue to use the pallets, for the various purposes described above, was a conversion because it was inconsistent with Chep's immediate right to possession of those pallets. Of course, not all the pallets used in that way were Non-Commercial Chep Pallets and not all of that use amounts to conversion. But if, as I have concluded, there were at all material times in Bunnings' possession substantial quantities of Non-Commercial Chep Pallets, the various uses that Bunnings made of those pallets amounted to conversion: particularly in the face of Chep's clear and repeated statements of its position."

41 The uses to which his Honour was referring in both [195] and [196] were all the uses described in [114] of his reasons set out at [31] above. These two paragraphs, [195] and [196], were at the centre of the challenge on appeal to the primary judge's conclusions on conversion.

42 At [197] of his reasons, the primary judge dealt with the unidentifiability of the NCPs, saying the following:

> "I accept, of course, that Bunnings could not send people to each store and distribution centre, to look at the Chep pallets there on display and identify those that were, and those that were not, the subject of current hire arrangements between Chep and a customer. But that position could have been established, with reasonable accuracy, had Bunnings agreed to Chep's repeated requests to conduct an audit. (I note that Mr Garratt submitted that an audit would establish no such thing, but I have dealt with that submission at [96] above. I infer, from the evidence relating to Mr Gilsenan's state of mind referred to in detail at [86] to [92] above, that Bunnings' reason for refusing the audit was that it did not want to discover, or be put on notice of, the situation that an audit would reveal. In those circumstances, I think, it is apt to apply the observations of Latham CJ and Williams J in *Penfolds Wines* , and to conclude that Bunnings, with the knowledge that it had, dealt with Chep's pallets at its peril. Someone who wrongfully uses the goods of another should not be in a better position through ignorance than through knowledge: particularly where the state of ignorance is self-inflicted, because the person suspects, but fears to have confirmed, the truth."

(Bunnings had submitted that the audit would not establish this last-mentioned state of affairs: see [30] above.)

43 It is not entirely clear, with respect to the primary judge, whether he was accepting the two ways of putting the conversion case submitted by Mr Bathurst or whether his conclusion depended upon Bunnings' awareness of Chep's lack of consent to its possession and use of NCPs, or, if it be different, upon a refusal to return NCPs.

44 The rejection of the submissions of Mr Garratt QC, who, with Mr Priestley, appeared for Bunnings (below and on appeal), as recorded in [192]-[193] of his Honour's reasons, may tend towards the latter of the two views in the last paragraph (lack of consent, or, if it be different, a refusal to return).

45 The reasoning in relation to detinue was contained in [198]-[199] as follows:

"[198] Equally, in my view, Chep has made good its case in detinue. That is so for two alternative reasons. The first is that the demands that it made over the years were sufficient. True it is that they were conditional. But the condition was one that Bunnings, upon whom the demands were made, was never prepared to accept. It follows that the alternative was the only option available. As I have said already, it is clear that Mr Davis and Mr Gilsenan understood the position in this way.

[199] Alternatively, and even if the requests made by Chep from time to time ought not be so characterised, it is clear on the whole of the evidence that the making of formal demand would have been futile. Bunnings' position was always that it was entitled to use the pallets as it did because they were all the subject of legitimate hire arrangements between Chep and its customers. Bunnings refused to give any credence or weight to the evidence to the contrary put before it by Chep. It refused to participate in a process that would have illuminated the true position. Through Mr Gilsenan, it understood from at least November 2005 that if an audit were undertaken, the true position would be revealed and Bunnings' stated position would be falsified."

Implied licence and estoppel

46 The ninth to twelfth issues concerned the case made by Bunnings that: (a) Chep gave its customers an implied licence to sub-bail the pallets that was contrary to, and defeated, any immediate right to possession of Chep; and (b) Chep was estopped from asserting any wrong of Bunnings by its acquiescence in Bunnings' use. The primary judge rejected these contentions and no appeal was brought in respect of them.

Damages

47 The thirteenth to fifteenth issues concerned damages. The issues were articulated as follows in [3] of the reasons:

"13. What loss, if any, have the plaintiffs suffered by any conversion or detention of pallets by the defendant?

14. If damages are appropriate, what is the proper measure of damages for any conversion and/or detinue of the CHEP pallets?

15. Applying the proper measure, what is the quantum of damages (if any) to which the first and third plaintiffs are entitled?"

48 Initially, Chep claimed that it had suffered loss in three ways, set out at [202] of the reasons, as follows:

"(1) it lost the opportunity to put those pallets out to hire;

(2) because those pallets continued to circulate through the distribution network, and from time to time came into Chep's service centres, it incurred the costs of repair; and

(3) it was forced to replace those pallets, so as to ensure the sufficiency of stock, before the end of their useful life."

49 At the trial it limited its claim to loss of hire.

50 After a discussion of the evidence and the principles of damages for conversion and detinue, the primary judge awarded the daily hire fee foregone on 90 per cent of the NCPs found to have been in the possession of Bunnings. The figure of 90 per cent was chosen based on evidence that 90 per cent of Chep's pallets would have been on hire at any one time. In calculating the loss by reference to the daily hire fee, the primary judge relied on *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 and *Gaba Formwork Contractors Pty Ltd v Turner Corporation Ltd* (1991) 32 NSWLR 175.

51 In order to avoid duplication, it is convenient to defer any further discussion of his Honour's reasoning to the resolution of the arguments on appeal.

The grounds of appeal

52 Bunnings' attacks on the primary judge's conclusions were as follows:

(a) that his conclusion that Bunnings "knew and understood" that it had accumulated more Chep pallets than it could account for with IOU arrangements with its suppliers was wrong (ground 1);

(b) that his conclusions in [195] and [196] as to conversion were wrong (grounds 2 and 3);

(c) that his conclusions about detinue were wrong in that he concluded:

(i) at [184]-[185] that a demand may not be required (ground 4);

(ii) at [198] that detinue was made out in the absence of an effective, unconditional demand for identifiable goods (grounds 5, 6 and 8);

(iii) at [199] that making a formal demand would have been futile (ground 7);

(d) that his conclusions about damages were wrong because:

(i) he failed to take into account compensation fees received by Chep from its hirers in respect of NCPs (ground 9);

(ii) he found at [264] that Chep had not already been compensated in full by receiving the compensation fees (grounds 10 and 11);

(iii) on the facts of the current dispute he applied *Strand Electric* and *Gaba Formwork* (ground 12); and

(e) that he erred in awarding pre-judgment interest when Chep had not established any actual loss (ground 13).

Communications between the parties and Bunnings' understanding

53 What passed between the parties over the years and what Bunnings understood and appreciated was central to the primary judge's approach and is central to the resolution of the appeal. We were taken in detail to the various communications. I will deal with events chronologically.

54 Mr Doyle, who had been with BBC Hardware before that hardware chain was taken over by Bunnings' parent, Wesfarmers Ltd, and who was Bunnings' Project Manager Finance and Administration, knew from Chep's communication with BBC in 2000 (before the takeover) that it would want hire paid on pallets that were not the subject of hire arrangements. BBC had returned pallets identified in number by Chep after an audit that had been conducted with the co-operation of BBC. The primary judge said the following at [116] and [117], from which there was no appeal:

> "[116] ... Mr Doyle understood that the letter [dated 25 August 2000] demanded that BBC either take on hire the 'unclaimed' at its stores in NSW or make arrangements for the redelivery of those pallets to Chep.
>
> [117] Mr Doyle was asked whether the understanding of Chep's position that he gained from this letter informed his understanding, as to Chep's position, whilst he was employed by Bunnings. His answer was non-responsive (T194.32 - '[i]n my role with Bunnings I would have no role to do with anything to do with Chep or with pallet control'), but it cannot seriously be suggested that if Mr Doyle had turned his mind to the subject, he would have thought that Chep's position had changed over the years."

55 Between 2002 and 2005, Chep officers approached various BBC Hardware Stores (after the Wesfarmers takeover of BBC) in Tasmania that had Chep accounts, asserting that the stores had more Chep pallets than on their hire accounts. After review, the BBC Stores closed their Chep accounts and returned all Chep pallets to Chep.

56 Up to November 2005, Chep made one proposal to Bunnings (in Western Australia) in May 2002 that it enter into a hiring arrangement. It was not a demand of any kind for return of any pallets. It put forward a commercial negotiation. At [119] of his reasons the primary judge said about this proposal in Western Australia:

> "The proposal suggested that Bunnings should enter into a hire agreement so as not to receive demands for the return of pallets."

Care must be taken with the finding in the last clause of this sentence. The receipt of "demands" referred to was not a reference to any demands **from Chep** , but those of suppliers, not of Chep. The proposal stated (Blue Book Vol 1 p 230) the following:

"The benefits of the implementation of this proposal can be stated as but not exclusive to:

...

eliminate the risk **of Suppliers** pressuring Bunnings for the return of Hire Equipment"

(Emphasis added.)

57 Set against the background of the commercial operation of Chep's business, it could not be said that Chep could be seen as authorising Bunnings' possession of NCPs, but at this point the assumption is a toleration of it, at least in order to obtain a commercial arrangement.

58 November 2005 is an important date. On 17 November 2005, Mr Hammond, an "asset manager" of Chep, met with Mr Gilsenan, Bunnings' then National Supply Chain Manager. The primary judge made findings about this meeting at [87]-[90] of his reasons as follows:

"[87] Mr Hammond said that his primary objective, in meeting with Mr Gilsenan on 17 November 2005, was to undertake an audit to identify the number of Chep pallets that Bunnings held, and the number of those pallets which were on hire to Chep's customers. Based on that, Mr Hammond said, he could estimate the number of pallets that Bunnings required to run its business. No doubt, that was of interest to Mr Hammond (and Chep) because Bunnings might be persuaded to open an account with Chep. Certainly, Mr Gilsenan thought that the thrust of the meeting was to persuade Bunnings to open an account with Chep.

[88] As I have said, Mr Hammond sent an email to his colleague Mr Pfeiffer on 21 November 2005, in which he reported on the meeting with Mr Gilsenan four days earlier. Mr Hammond said in his affidavit that this email summarised the discussions that took place.

[89] Mr Hammond's account of this aspect of the meeting is corroborated not only by his email but by a handwritten note that he made immediately after the meeting.

[90] According to the email, Mr Gilsenan said the following things:

(1) 'he and the Bunnings Board are against having a Chep account but ... they will always have an ongoing need to use Chep hire pallets in their business';

(2) 'future discussions could be amicable up to a point where Chep insist they have a Chep account or return any pallets not legitimately owed, then ... "it could get ugly"';

(3) 'Michael ... was quite adamant that they [Bunnings] would never allow Chep to do a National stocktake in the future. He added that if we did a National audit it would show that not all pallets they have are owed to suppliers and that Chep would want the surplus back which would leave them short and therefore create a cost to Bunnings by forcing them to replace the recovered Chep's [sic] with plain pallets'."

Based on various matters, including a preference for Mr Hammond's evidence

over that of Mr Gilsenan, the primary judge accepted the email as an accurate record. This was the foundation of the finding at [95] (see [30] above) that is challenged in ground 1 of the appeal.

59 In March 2006, the question of pallets not on hire was taken up again by Chep. A meeting took place at Bunnings on 3 March 2006. In his affidavit sworn 29 October 2008, Mr Austin (of Chep) described the purpose of the meeting from his perspective (Blue Book Vol 1 p 67):

> "The purpose of that meeting was to further engage Bunnings in discussions to resolve the ongoing legal and commercial issues arising out of Bunnings' historical and then current use of CHEP pallets."

60 The minutes of the meeting kept by Mr Austin recorded the "Introduction & Objectives" of the meeting, as follows (Blue Book Vol 1 p 400):

> "PM outlined primary issues for CHEP - we understand that Bunnings have over $1M of CHEP assets in their possession on which CHEP derives no income, that the same assets incur CHEP over $500k in recurring annual expenditure, and that we need to resolve this commercial reality.
>
> Further, we believe that the current pallet 'system' utilised by Bunnings causes significant supply chain inefficiency, loss, pool inequality, that goes to the heart of dissatisfaction for CHEP customers.
>
> A process was then agreed by the parties for CHEP to outline both the research and principles on which this assertion was made, and thence to listen to Bunnings understanding of the position, which was expressed as being considerably different."

("PM" was Paul McGlone, Chep Vice-President (Marketing and Sales).)

Chep's case was then put forward ("PA" being Mr Austin), as follows (Blue Book Vol 1 p 400):

> "PA tabled initial principles of CHEP ownership of assets (agreed and understood), CHEP needing to maintain a commercial relationship with its assets (wither [sic: whether] in a direct relationship with a hiring customer, or through the controlled & accountable movement of assets between a CHEP customer and an asset user (being someone who has no commercial relationship with CHEP)."

The minutes recorded that Bunnings was shown research revealing significant numbers of off-hire pallets in Bunnings' stores, and recorded that the following was said (Blue Book Vol 1 p 401):

> "Bunnings seriously questioned the validity of this position, saying they believed and maintained that all pallets in their possession were on hire, that the 8k was erroneous and significantly understated, and that all pallets in Australia were effectively in a commercial relationship with CHEP.

PA outlined, using whiteboard, standard process for controlled pallet flows, how an uncontrolled flow could create a black pool, how CHEP suffered economic damage through one-off compensation payments vs. ongoing repair and cycle costs, and that it was our position that the pallets in Bunnings represented 'black pool' pallets, being physically exchanged between 2 users, with no commercial connection to CHEP.

After some further discussion and numbers, this understanding was acknowledged by Bunnings as being possible and/or likely - but remained assertive that 8k, or even doubling to 16k, was likely to be significantly understated."

61 Following this meeting on 3 March 2006, on 16 March 2006, Chep delivered a commercial proposal to Bunnings. The document outlined Chep's position with some degree of force, stating (Blue Book Vol 1 pp 421 and 428):

"Bunnings have stated an ongoing need to use 'Hire Pallets' in their business to satisfy supply chain management transactions with their suppliers. From CHEP's investigation of Supply Chain movement, Bunnings use hire pallets to exchange with suppliers/transporters on delivery, but in some circumstances an IOU system is utilised where hire pallets delivered under load are dropped off and redeemed at a later date.

Bunnings has accumulated over time a 'floating pallet pool,' (where no CHEP customer is responsible for hire charges) which is estimated to be in the order of 80,000 to 100,000 CHEP pallets. CHEP's most recent analysis has identified that only 10 - 20% of this total is identified and traceable as IOU pallets for redemption by parties known to Bunnings.

In effect, Bunnings has the use and benefit of approximately 80,000 of CHEP's assets being 'Hire Pallets', from which CHEP derives no income, whether from Bunnings as the user of the assets, or from any other source. CHEP continues to incur capital and repair costs on these assets.

...

CHEP can not [sic], in good faith to its customers and shareholders, allow the current situation to continue.

While a number of elements can be considered in effecting a transition from the current unacceptable situation. CHEP require Bunnings to recognise the issue as a matter of urgency and agree to a resolution plan.

The Options available to Bunnings are:

1. Bunnings to open an active CHEP Hire Account(s) with all CHEP pallets in your possession (less legitimate IOU's) placed on account as a first step. With an account in place to track the CHEP assets, utilise the transfer hire system to manage the receipt and transfer of pallets between Bunnings and its suppliers, or

2. Return all CHEP 'Hire Pallets'.

...

CHEP proposes the following course of action

> 1. CHEP undertakes a comprehensive audit of all CHEP equipment within the Bunnings business. This audit would include stocktakes at every store and distribution centre nationally, reconciliation of any existing IOU registers and reconciliation with suppliers to confirm IOU numbers. The result of the audit would determine opening account hire balances.
>
> 2. Bunnings open a parent CHEP ... account with each store and distribution centre having a sub account ..."

A response was requested by the end of March 2006.

62 It should be noted that the form of the proposal was not that as set out by the primary judge at [122] of his reasons.

63 The proposal contained a copy of Chep's hire terms, enabling the conclusion which his Honour made ([96] of his reasons) that, from these communications, Bunnings was aware of Chep's terms.

64 On 30 March 2006, Bunnings refused the proposal, saying in a letter of that date signed by Mr Gilsenan (Blue Book Vol 1 p 440):

> "Bunnings do not agree with the methodology and the conclusions contained in the proposal. As such we refute the Chep position and will continue to do business with our suppliers using the model that is currently in place."

65 The fact that the 3 March meeting did not involve mere commercial negotiations can be seen in Mr Gilsenan's report to his CEO, Mr Gillam, in late July 2006 in a briefing for correspondence to which I will come. He said about this meeting (Blue Book Vol 1 p 525):

> "The whole meeting was focused on them dictating their views of pallets in our stores, the random audit, the supplier interviews and that we had two choices - agree to an audit and sign up to rent pallets or give all Chep pallets back. It was all one-way traffic. There was no looking to work through an issue in a collaborative manner."

66 Mr Gilsenan said the same in cross-examination (Black Book pp 162-163):

> "Q. Mr Austin and the other Chep representatives made it clear at that meeting, did they not, that Bunnings had two choices: agree to an audit and sign up to Chep pallets, or give all the Chep pallets back; do you agree with that?
>
> A. I do.
>
> ...
>
> Q. So whether you classify it as a demand or as a statement, you're under no illusion that the consequence of you refusing to pay for the pallets was, so far as Chep was concerned, that you had to return them; correct?
>
> A. Correct."

67 It is tolerably plain that from early March 2006, the second alternative posited was the return of **all** Chep pallets.

68 At [123] of his reasons, the primary judge commented on the cross-examination of Mr Davis (Bunnings' CEO) as follows:

> "Mr Davis was questioned on this hire proposal. He said that Chep's statement of its position (the two alternatives just quoted) was not 'a new demand' (T132.5) and that to his knowledge, from his personal involvement, 'they had attempted this back in the early 2000's' (T132.14)."

The apparent purport of this paragraph is that the two alternatives were in fact standing demands by Chep of Bunnings. However, as was pointed out in submissions on appeal, Mr Davis (at T132) was referring to what was in his affidavit. At paras 25 and 26 of his affidavit, he described an approach by Chep in the early 1990s requesting Bunnings to enter a pallet hire arrangement. Mr Davis' affidavit evidence was as follows (Blue Book Vol 1 p 101):

> "[25] I was approached by Chep representatives (whose names I do not recall) in the early 1990's requesting Bunnings to enter into a Pallet Hire Agreement. I spoke to a major supplier to Bunnings at the time and ascertained that this supplier, who delivered goods to Bunnings on Chep pallets, paid pallet hire charges to Chep while the pallets were in the possession of Bunnings, and that lost pallet fees would be incurred if pallets were not returned. The supplier was content to swap empty pallets when fresh pallets of stock were delivered and the supplier paid Chep for any lost pallets if any audit of those pallets was undertaken.
>
> [26] Having made these enquiries, I told the Chep representatives at around that time that the issue of pallet hire was a matter between Chep and its customers, not Bunnings."

His evidence at Black Book p 132 (in being cross-examined about the March proposal) was as follows:

> "Q. And because CHEP had made equivalent demands of this nature to your knowledge at least in November 2005; correct?
>
> A. I can't respond to that because I don't know the dates.
>
> Q. Leaving aside the dates, you were certainly aware that the demand in March 2006 was not a new demand?
>
> A. No.
>
> HIS HONOUR
>
> Q. When you say no, you are agreeing with that proposition, are you, that March 2006 was not the first time that CHEP had demanded either hire or send back?
>
> A. Your Honour, they had attempted this back in the early 2000s and I was personally involved and that's within my affidavit, so my knowledge of this matter was many years before, and every time I checked with our suppliers as part of our trading term arrangements that the pallets be supplied with the goods and then we return them when the truck drivers come to the back of the stores."

69 This is not any basis to conclude that the clear alternative in the March 2006 discussions and proposal was the standing demand or statement of position by or of Chep. This is important, because this part of the evidence appears to have been the basis or a substantial basis for the finding at [195] of the reasons, set out at [40] above and the subject of appeal ground 2.

70 Chep continued to seek to persuade Bunnings to enter a commercial arrangement. On 3 April 2006, Mr Hammond wrote to Mr Gilsenan stating the following (Blue Book Vol 1 pp 441-442):

> "CHEP desires to work co-operatively with Bunnings to resolve the issues currently between ourselves. However, for Bunnings to 'continue to do business with our suppliers using the model that is currently in place', places Bunnings at risk of significant business interruption and protracted litigation.
>
> It is preferable that Bunnings and CHEP meet to discuss your concerns with the methodologies and conclusions in our proposal, and then work together to reach an understanding on the issues, and to agree a common action plan for the required changes.
>
> For the sake of clarity, should CHEP and Bunnings be unable to resolve these issues by 13 April 2006, CHEP would be required to formally request the release by Bunnings of the CHEP assets within your possession. Should the assets not be handed up, CHEP would serve a Letter of Demand for return of its assets. Failure to comply with the Letter of Demand would initiate legal redress.
>
> Again, should such a demand fail, CHEP reserves the right to issue proceedings immediately without further notice and seek injunctive relief to prevent Bunnings from otherwise disposing of any CHEP equipment which is currently, and in the future, in your control or possession.
>
> CHEP wishes to finalise this matter by working co-operatively with you in order to reach a mutually satisfactory commercial solution. Your current response appears to preclude such an outcome.
>
> CHEP therefore respectfully requests that Bunnings reconsider its position as outlined on the 30 th March 2006, and then confirm in writing prior to the 13 th of April 2006 its willingness to co-operate in the resolution of this matter. Failing co-operation, please advise the appropriate contact details within your organisation for the service of legal documents."

71 Mr Gilsenan responded a week later on 10 April 2006, as follows (Blue Book Vol 1 p 443):

> "We also hope the matter can be resolved in a co-operative manner.
>
> However, it should be noted that we have no commercial relationship with Chep, and the issues you raise are clearly a matter between other parties and Chep.
>
> Bunnings suppliers have contractual relationship [sic] with pallet providers, obtain pallets as required, store stock for Bunnings on those pallets in both their premises and our warehouse stores. Once the pallets in our stores are empty, they are returned to our suppliers.

As such any issues with pallets need to be addressed to our suppliers.

We trust this clarifies this matter, and should there be any further discussion required please feel free to contact the writer."

72 Mr Austin did not wish, just yet, "to move to a Letter of Demand" (internal email 13 April 2006, Blue Book Vol 1 p 444). Mr Hammond wrote again to Mr Gilsenan on 18 April 2006, as follows (Blue Book Vol 1 p 445):

"As outlined specifically in our meeting of March 3 rd , a significant proportion of the CHEP pallets in use by Bunnings are not the subject of a commercial relationship between CHEP and suppliers of Bunnings, whilst at all times remaining the property of CHEP.

Whilst we retain the desire for a co-operative and commercial resolution to this matter, please be advised that we have given instructions to our legal representatives, Freehills, to proceed with the issuing of a letter of demand for all CHEP pallets in the possession of Bunnings."

73 On 19 April 2006, Mr Gilsenan spoke with Wesfarmers' in-house lawyer, Ms Krause. The following day, 20 April, he sent her a memorandum which stated the following (Blue Book Vol 1 p 450):

"Thanks for the opportunity to discuss this issue yesterday.

As agreed, please find attached, copies of the correspondence to date, in chronological order from the top.

The interesting documents from CHEP are:

1. The CHEP Proposal of the 16 th March, 2006.

2. Their letter dated 3 rd April 2006, which is a follow up to our response to the March proposal and

3. The email to me on the 18 th April indicating they will instruct Freehills to proceed with legal action.

The Proposal of the 16 th March is more of a demand than a proposal - two options for Bunnings page 4, one - open an account or two - return all CHEP pallets.

I will leave it to you and the team to read and digest and of course will be available to discuss when ready.

In terms of next steps, I assume we need to decide whether wait [sic] and see what Freehills come up with or whether we respond in some way now to the correspondence we have."

74 The correspondence then was elevated to the lawyers. On 24 May 2006, Allens Arthur Robinson ("AAR") (for Chep) wrote to the 'Legal counsel' for Bunnings' parent, Wesfarmers. The letter recounted the events, stating amongst other things (Blue Book Vol 1 p 461):

"The fact that CHEP does not have a contractual relationship with Bunnings in relation to the use of CHEP Pallets does not entitle Bunnings to maintain possession of CHEP Pallets in disregard of CHEP's proprietary rights as the owner of the pallets. To do so in circumstances in which a demand has been made for the return of the pallets (in the absence of reaching a commercial arrangement for their use), amounts to conversion and detinue.

In these circumstances, we are instructed to demand that Bunnings confirm by 7 June 2006 that:

(a) It will negotiate in good faith with CHEP the terms of a commercial arrangement for the hire of CHEP Pallets (the terms of such an arrangement to be finalised within 60 days of the date of this letter); or

(b) It will make arrangements with CHEP for all CHEP Pallets **(except those on loan to Bunnings from CHEP customers)** to be removed from Bunnings stores and distribution centres.

We reiterate that CHEP's preferred option is that it and Bunnings work together to reach a mutually acceptable arrangement that meets the needs of both parties. We are, however, instructed that, if the matter cannot be resolved commercially, CHEP will instruct us to commence proceedings to:

(a) recover the pallets and seek compensation for the use of the pallets by Bunnings; and

(b) seek injunctive relief preventing the removal of CHEP Pallets in Bunnings' possession."

(Emphasis added.)

75 Two matters at least need be noted about this letter. First, in the first paragraph quoted above, conversion and detinue are said to have been committed by use, after a demand had been made, being inferentially the March 2006 communications. Secondly, the demand now made, in the alternative, was for the return of pallets "except those on loan to Bunnings from Chep customers". This may or may not have been intended as a reference to what are NCPs, but it does not necessarily mean the same thing as pallets in respect of which no hire fees are being paid.

76 Bunnings responded on 13 June 2006 by a letter from its CEO, Mr Gillam, to the CEO of Chep's parent, Brambles Industries Ltd, Mr Turner. The letter rejected the existence of any pallets in the possession of Bunnings not the subject of an arrangement with a supplier, stating the following (Blue Book Vol 1 pp 513-514):

"Whilst Bunnings' suppliers may be extensive users of CHEP pallets, Bunnings itself is not. Bunnings' suppliers deliver stock to Bunnings stores on CHEP (and other) pallets. We operate a warehouse store concept, as such each store carries a large range of stock, of which a proportion is stored on pallets, some of which are supplied to our suppliers by CHEP. As far as Bunnings is concerned, any CHEP pallets that we may have in our stores are the subject of specific arrangements between CHEP and its customers. On this basis we consider the rental of any CHEP pallets that may be in our stores temporarily to be the responsibility of our suppliers and not Bunnings.

> The arrangements that we have with our suppliers are such that when stock arrives at a store on a pallet delivered by a contractor of our supplier, an empty pallet is provided in return. If for whatever reason a pallet cannot be handed over at that time, then the requirement to provide the pallet thereafter, is recorded and an empty pallet provided to the supplier's delivery contractor as soon as possible. As goods are generally delivered by contractors engaged by our suppliers, often the decision whether to take empty pallets in return is out of our hands.
>
> On the assumption that CHEP does not put pallets into the course of trade, unless it has an appropriate hire/rental arrangement in place, there is no basis to suggest that we have pallets in our stores that are not under such arrangements. Further to suggest that Bunnings enter into a separate hire/rental arrangement would in our view amount to 'double dipping', as there are no pallets in our business (excluding those we own outright) that are not under rental arrangements between our suppliers and the providers of those pallets.
>
> We consider any CHEP pallets that may be temporarily in our stores are there for legitimate reasons, ie to store produce from our suppliers who have rental arrangements with CHEP, or who themselves have received the pallets from or originating from customers of CHEP.
>
> Quite frankly, CHEP's demands are commercially unrealistic. CHEP puts its pallets into the course of trade, knowing they are to be used to distribute, supply and store goods by its customers and those dealing with its customers, and receives a 'hiring' fee from its customers, and then, apparently, if your solicitor's letter is to be believed, fails to keep track of the pallets themselves, or to ensure that its customers do so. A suggestion that in these circumstances CHEP is entitled to demand or extract additional hiring fees as the price of not interfering with the conduct of Bunning's business in the normal course of trade is extremely difficult to understand.
>
> Bunnings and its suppliers deal with one another in good faith, and it is a serious matter for CHEP to suggest it is entitled to interfere in Bunnings' arrangements with them or with the normal conduct of Bunnings' business.
>
> I would like to understand from you the commercial basis (if any) for CHEP to ask Bunnings to pay a second fee (or any fee) for the pallets, which are already under separate rental arrangements, or alternatively for CHEP to take pallets out of our stores that are there for legitimate purposes."

77 Mr Turner (Brambles' CEO) responded nine days later on 22 June 2006. The reply emphasised that Chep's concern was with pallets that were not the subject of hire payments to Chep by a Bunnings supplier. The letter stated the following (Blue Book Vol 1 pp 517-518):

> "With respect, your rejection of the claims made on behalf of CHEP Australia in the letter from Allens Arthur Robinson dated 24 May 2006 is based on a fundamental misunderstanding of the nature of those claims and the status of the vast majority of the CHEP pallets in Bunnings stores.

As you rightly point out, CHEP does not put pallets into the course of trade without a commercial arrangement with a CHEP customer. CHEP customers do, however, extend the usage of CHEP pallets to third parties who do not have commercial arrangements with CHEP (such as Bunnings). As a result of this transfer of pallets to third parties (who are not CHEP customers), over time some pallets are not returned to CHEP and end up in the 'black pool'. The 'black pool' in the pool of CHEP pallets circulating in the market which are no longer subject to commercial arrangements with CHEP. There are a significant number of 'black pool' CHEP pallets in Bunnings stores.

CHEP's only concern in its dealings with Bunnings is the CHEP pallets in Bunnings stores which are no longer subject to a commercial arrangement with a CHEP customer (ie those pallets which form part of the 'black pool'). These are pallets which Bunnings has the use of without it or anyone else having to compensate CHEP for their use through the payment of hire fees.

CHEP is not seeking to enter into separate arrangements with Bunnings in relation to the CHEP pallets in its stores which are the subject of a current hire arrangement between CHEP and its customers. In these circumstances, CHEP is not attempting to 'double dip' in the way you have suggested.

...

The bottom line for CHEP is that Bunnings has a significant number of CHEP pallets in its possession in respect of which neither it nor anyone else is paying hire fees. This situation is unacceptable and I fully support the management of CHEP in its attempts to resolve the situation. I should note that those attempts are consistent with our approach in relation to many other entities both in Australia and overseas.

We would like to resolve this matter commercially by entering into a mutually beneficial arrangement with Bunnings for the ongoing use of those pallets. If Bunnings is not interested in coming to such an arrangement, we would like to work with Bunnings in order to remove from Bunnings stores all CHEP pallets which are not subject to a commercial arrangement with CHEP customers. If Bunnings is not prepared to work with CHEP to achieve either of these outcomes, CHEP will take such action as our lawyers advise, in order to secure the return of our pallets. Such action, if taken, will have my full support.

Although representatives of CHEP have met with representatives of Bunnings at various times since October 2005 in an attempt to resolve this matter commercially, Howard Wigham (Chief Executive officer, CHEP Asia-Pacific) and Phillip Austin (Director, Asset Management, CHEP Asia-Pacific) would be happy to come to Melbourne to meet with you to discuss the issue further. The earliest dates on which they could do this are the afternoon of Monday 26 June 2006 or the morning of Tuesday 27 June 2006. Please let me know if you would like to take the opportunity to meet with Howard and Phillip and, if so, if either of those times are convenient to you."

78 The reference to "black pool" (perhaps because of its connotation of impropriety) provoked an angry response from Mr Gillam, rejecting the existence of such as follows (Blue Book Vol 1 p 519):

"I take particular exception to the outrageous slur in paragraph 3 of your letter that Bunnings knowingly holds the so-called 'black pool' CHEP pallets in our stores.

I previously outlined the arrangements that we have with our suppliers for the return of empty pallets that are used to deliver stock into our stores. Apart from pallets received from suppliers (which are generally provided by CHEP or other pallet providers), the only other pallets in our stores are those that we purchase second hand for use by our stores. We estimate that we have acquired 35,000 second hand pallets in the last 12 months from a number of suppliers.

As previously explained Bunnings has a system whereby pallets received from suppliers are returned to those suppliers.

It is not possible that we have 'black pool' CHEP pallets in our stores if the pallets in our stores are from suppliers or alternatively we purchase them second hand.

On the basis outlined above we do not understand how CHEP comes to the conclusion that we have a large number of unaccounted for pallets in our stores. Bunnings operates its business on the basis that any pallets in our stores that have not been purchased by us are all under financial arrangements between our suppliers and their respective providers."

79 On 25 July 2006, the CEO of Chep Asia-Pacific, Mr Wigham, replied to Mr Gillam, reasserting Chep's position that Bunnings had significant numbers of Chep pallets that were not the subject of "commercial arrangements between Chep and its customers". The letter stated (Blue Book Vol 1 p 521):

"CHEP does not suggest that Bunnings has acted dishonestly or in bad faith in acquiring the 'black pool' pallets over time. It does, however, maintain that Bunnings does not have a legal right to retain possession of those pallets without compensating CHEP for their use."

The letter set out, in terms that remained to a degree conciliatory, the attempts to resolve the matter. The letter concluded (Blue Book Vol 1 p 522):

"This is, however, a very serious commercial issue for CHEP and it intends to pursue it. If the issue cannot be resolved commercially, I will instruct CHEP's lawyers to commence legal proceedings against Bunnings in order to resolve the issue. I would, however, much rather work with Bunnings in order to resolve the issue on mutually agreeable terms. Litigation will be very expensive and time consuming for both of our companies irrespective of the final outcome.

Indeed, given that Bunnings says that all of the pallets in its stores are either on loan from suppliers or owned by it and CHEP does not make any claims in respect of pallets in Bunnings' possession which are the subject of commercial arrangements with its customers or which are legitimately owned by Bunnings, the only issue between us seems to be the status of the CHEP pallets in Bunnings' possession. This is a simple matter of fact which could be resolved with minimal disruption to Bunnings' business by conducting an audit of the CHEP pallets in Bunnings' possession.

Please let me know by Tuesday August 8 th 2006 if you are willing to discuss a commercial resolution to this issue - I can be contacted on my mobile ... **If I do not hear from you within this timeframe, I will assume that you are not interested in exploring the potential for a commercial resolution of this dispute and I will instruct CHEP's lawyers to commence proceedings against Bunnings."**

(Emphasis added.)

80 Mr Gillam's response on 7 August 2006 was blunt (Blue Book Vol 1 p 530):

> "At no point in any discussions with CHEP has Bunnings acknowledged that it was both probable and likely that Bunnings had 'black pool' CHEP pallets in its possession. I consider CHEP's claims in this regard and generally in relation to the supposed number of 'black pool' pallets in stores to be outrageous and without basis.
>
> Any legal action taken against Bunnings in relation to this matter will be very strongly defended and Bunnings will aggressively pursue any avenue legally and/or commercially available to ensure its reputation and financial position are protected."

81 On 9 August 2006, Mr Gillam and Mr Wigham spoke on the telephone. Mr Wigham's notes were in evidence (Blue Book Vol 1 p 533). Mr Gillam rejected the claim by Chep in blunt language, based on a rejection of the existence of any "black pool pallets".

82 There was then a gap in communications until 30 May 2007, when Mr Wigham wrote to Mr Gillam, stating the following and making an unequivocal demand for all Chep pallets (Blue Book Vol 2 p 570):

> "I refer to my previous correspondence in relation to this matter. I also refer to the correspondence from the lawyers acting for CHEP Australia Limited (*CHEP*) in this matter.
>
> As you know, CHEP operates a pallet and container pooling service in Australia. The core element of CHEP's business is the pooling of the distinctive blue CHEP pallets which are stencilled with the CHEP logo and the words 'Property of CHEP' (*CHEP Pallets*). CHEP Pallets are pooled on a hire basis. CHEP maintains ownership of all CHEP Pallets at all times. CHEP does not sell CHEP Pallets under any circumstances.
>
> Bunnings Group Limited (*Bunnings*) is an extensive user of CHEP Pallets. Bunnings does not, however, have a contractual arrangement with CHEP for the use of CHEP Pallets.
>
> Each of the CHEP Pallets in the possession of Bunnings is owned by CHEP. As Bunnings does not have an arrangement with CHEP for the hire of CHEP Pallets, it has the benefit of the use of those pallets without having to compensate CHEP for their use through the payment of hire fees. This situation is unsatisfactory to CHEP and has resulted in it suffering, and continuing to suffer, significant economic loss. Various attempts made by CHEP to resolve this issue on commercial terms have been rejected by Bunnings.
>
> In these circumstances, CHEP demands that Bunnings deliver up to CHEP all CHEP Pallets in its possession by 20 June 2007."
>
> (Emphasis in original.)

83 At the same time, Chep wrote to its own customers. Whilst in one sense irrelevant to the meaning of the communications between Bunnings and Chep, such communications may provide evidence of the effect of the communications between Bunnings and Chep by any relevant admissions.

They are also some evidence of what can be taken as the reasonable commercial operation and use of Chep pallets by Chep's hirers and by third parties. The circular stated (Blue Book Vol 2 pp 908-909):

> "CHEP began discussions with Bunnings in late 2005 about joining the CHEP pallet pool.
>
> Our aim was to improve the visibility of CHEP pallets moving in and out of Bunnings to protect pool integrity so paying customers were not disadvantaged.
>
> Following a stock count as part of this process, CHEP identified a significant surplus of pallets in Bunnings outlets that were not on hire to any CHEP customers.
>
> It is these pallets, and these pallets only, that are at the centre of the current commercial dispute between CHEP and Bunnings.
>
> Pallets that customers have supplied to Bunnings under load - controlled as exchanges under Clause 2(c)(3) of our Terms and Conditions of Hire - are not the focus of the dispute.
>
> **The Next Step**
>
> Bunnings has not accepted CHEP's efforts to commercially resolve the surplus pallet concerns since late 2005.
>
> Given this, CHEP will shortly issue a letter of demand to Bunnings requesting the return of all CHEP pallets in their possession.
>
> **How This Affects CHEP Customers**
>
> There is no need to change your pallet supplier from CHEP.
>
> So far as CHEP is concerned, CHEP customers can continue to send pallets to Bunnings under the IOU or the 'one for one exchange system' currently in place at Bunnings.
>
> As always, CHEP would encourage you to keep and maintain accurate records of your pallet exchanges so that you can receive CHEP pallets in return from your customers.
>
> The CHEP pallet pool delivers efficiency of goods movement throughout the supply chain. We remain committed to ensuring the integrity of the pool is maintained for all customers."

84 Three matters should be noted in particular about this circular. First, Chep stated that it "began discussions with Bunnings in late 2005". While reflecting the correspondence to which I have referred, it is evidence that the expressed lack of consent or demands for return did not precede that date. Secondly, compliance with cl 2(c)(3) of the terms is raised as relevant to the pallets in question; but the encouragement "to keep and maintain accurate records of ... pallet exchanges" can be seen as a nod towards the reality that this did not always occur. Thirdly, Chep had demanded the return of all pallets but the circular only refers, in effect, to NCPs.

85 Mr Gillam wrote to Mr Wigham on 18 June 2007 pointing out what he saw as the inconsistency of Chep's demand on Bunnings and the circular to Chep's hirers. Mr Wigham responded on 20 June saying the following (Blue Book Vol 2 p 912):

> "I reiterate that, as stated in my letter dated 30 May 2007, CHEP demands that Bunnings deliver up to CHEP all CHEP pallets in its possession by 20 June 2007. This request is not an attempt to exert commercial leverage. It is a demand CHEP expects Bunnings to comply with.
>
> CHEP's demand does not prevent the pallet exchange/IOU system that Bunnings currently operates from continuing after 20 June 2007. Initially, an IOU can be provided (as is currently the case) and, subsequently, pallets received from suppliers, once uploaded, can be exchanged. Accordingly, the implication in Bunnings' letter of 16 June 2007 to its suppliers that it is CHEP's demand which is causing Bunnings to ask its suppliers to use Loscam pallets is incorrect and CHEP will be writing to its customers to clarify the position.
>
> In relation to its demand, CHEP will deal with the practical issues, if any, the removal of all CHEP pallets from Bunnings stores raises for its customers."

86 Mr Gillam responded on 28 June 2007 (Blue Book Vol 2 p 914):

> "Clearly, it was not possible for Bunnings to deliver up to CHEP all CHEP pallets in Bunnings' possession on the same day as requested in that facsimile. Your request is clearly inconsistent with your representations to Bunnings' suppliers, and our obligations to those suppliers under our pallet exchange/IOU system.
>
> Without any admission of liability to do so, Bunnings intends returning to suppliers all CHEP pallets in Bunnings' possession in compliance with our obligations to suppliers under the IOU system. This process has commenced and will enable suppliers to return the pallets to CHEP in accordance with CHEP's respective agreements with them.
>
> As you will appreciate it will take a little time to return all CHEP pallets to suppliers given Bunnings operates more than 200 warehouses and distribution centres across Australia.
>
> Bunnings expects to have all CHEP pallets removed from its premises by the end of September 2007. To achieve this result within a shorter time frame would be completely unreasonable."

87 Legal counsel for Brambles responded to Mr Gillam on 4 July (Blue Book Vol 2 p 915):

> "Your letter amounts to a clear refusal to comply with CHEP's demand that Bunnings deliver up to CHEP all CHEP pallets in its possession by 20 June 2007. Bunnings' intention to return all CHEP pallets in its possession to its suppliers does not in any way constitute compliance with the demand. Furthermore, Bunnings' intention relates only to those pallets which Bunnings considers it is obliged to return to its suppliers under the IOU system. Based on CHEP's calculations, this ignores approximately 90% of the pallets CHEP believes are in the possession of Bunnings that are not the subject of a hire arrangement between CHEP and its customers.

> During the 4 weeks which Bunnings has had available to it to respond to the demand, Bunnings has taken no steps whatsoever to comply with it. As stated in Mr Wigham's letter dated 20 June 2007, CHEP had (and still has) resources available including a team of personnel ready to collect the pallets from Bunnings stores and distribution centres."

88 Ms McDonald gave evidence of what Bunnings did from June 2007 to deliver up pallets. The matter came to Court in August 2007.

89 Bunnings contended on appeal that no separate case was run at trial that if the 30 May 2007 demand was the only operative demand for return, Bunnings committed conversion or detinue in 2007, by an unreasonable delay in making the goods available. Given the views that I have come to, this issue need not be considered.

What can be taken from the correspondence and communications

90 An understanding of Chep's stated position to Bunnings and what Bunnings could or should have understood that to be is relevant to a number of the grounds of appeal, in particular grounds 1-8.

91 The primary judge discussed the underlying facts to some degree under the fourth issue ([116]-[130]) and the fifth and seventh issues ([179]-[199]). To the extent that he made findings about the communication of Chep's position and Bunnings being aware of it, one finds them in [123], [130] and [195]-[199].

92 In my view, the evidence does not support a conclusion that Chep demanded the return of any of its pallets before March 2006, at the earliest. The use of Mr Davis' evidence, as reflected in [123] and [195] of the reasons to that extent was not legitimate. No evidence existed of any demand before then. To the extent that his Honour concluded that any demand in that period would have been futile, that is difficult to sustain in the face of what Mr Davis said occurred in the 1990s (see [68] above) and the response of the Tasmanian stores between 2002 and 2005.

93 It may be that Mr Doyle's understanding was as set out at [116] and [117] (see [54] above). Further, in November 2005, Mr Gilsenan knew the matters set out in the email referred to by the primary judge at [90] (see [58] above). These matters are a foundation for a conclusion that Bunnings was aware, to the extent that it had pallets in its possession from time to time that were not subject of hire arrangements between its suppliers and Chep, that Chep would want hire for them or would want them back. However, from May 2002 to November 2005, Chep did not tax Bunnings with its possession or use of pallets, other than in the Tasmanian stores.

94 Thus, for the period May 2002 to November 2005, conversion and detinue must be assessed by reference to the fact that there was no demand for return of any pallets, but an appreciation in some Bunnings' officers' minds that, if there were pallets not the subject of hire arrangements in Bunnings' possession, Chep would want to make arrangements with Bunnings about them or have them returned. Whether this knowledge of lack of consent can be attributed more widely is the subject of ground 1 of the appeal.

95 From November 2005 to March 2006, Bunnings, through at least Mr Gilsenan, was aware that Chep wanted to audit Bunnings' possession of its pallets in order to resolve the question of the number of pallets not the subject of hire arrangements. This was not a demand for return of any pallets. Whilst it was perhaps clear that Chep did not want the current position to be maintained, the discussions reflected a willingness to tolerate the position until a commercial arrangement was put in place.

96 Undoubtedly, Chep's position hardened by March 2006, after the unilateral survey of Bunnings' stores was conducted by Chep in February 2006. The communications by mid-March were tolerably clear: enter a hire arrangement with Chep or return all Chep pallets. Bunnings submitted on appeal that this was not a demand. It characterised it as a statement of conditional position. That is not how Mr Gilsenan understood it; nor is it how I understand the communications. There was, in my view, a clear statement that Bunnings were to return all pallets, if a commercial resolution could not be reached. What is also clear, however, is that Chep continued up to July 2006 to want to resolve the position commercially. The letter of Mr Hammond of 3 April 2006 (see [70] above) is inconsistent with Bunnings being obliged to deliver up all Chep pallets at that time. From April onwards (see Mr Gilsenan's letter of 10 April 2006 at [71] above) Bunnings' position was clear and adamant - that pallets were a matter between it and its suppliers. Chep's position was that it desired commercial resolution, but that instructions to lawyers to issue a letter of demand had been conveyed. AAR's letter of 24 May 2006 might be seen to vary the demand by reference to all pallets "except those on loan to Bunnings from Chep customers" (see [74] above).

97 Plainly, from March, Chep asserted that Bunnings had pallets Chep wanted to be the subject of a commercial arrangement or, failing that, returned. Embedded within that was a clear statement that Chep did not consent to Bunnings using Chep pallets not the subject of hire. There was, however, no unconditional demand for return in March, or the months following. Chep's communications: the proposal of mid-March 2006, the Chep letters of 3 April and 18 April 2006, AAR's letter of 24 May 2006, Mr Turner's letter of 22 June 2006 and Mr Wigham's letter of 25 July 2006, all contemplate the possibility of commercial negotiation. That being so, on the face of these communications the **choice** was clear, but, until Chep terminated its attempts at commercial negotiation,

it had not brought into effect the second of the two alternatives. Even though from the evidence it can be concluded that Bunnings was not willing to negotiate, Chep held the offer of negotiation out to Bunnings until, by the terms of Mr Wigham's letter to Mr Gillam of 25 July 2006 ([79] above), 8 August 2006, when time for negotiation ended. This was confirmed by Mr Gillam's letter of 7 August 2006 ([80] above), and by the blunt discussion of 9 August 2006. At that time, the demand for return of all pallets became operative.

98 What was that demand? Had the clarity of the March 2006 second alternative been varied or withdrawn by August? I do not consider that it had. It was repeated on 3 April and 18 April. AAR's letter introduced the exception, which was picked up in Mr Turner's letter of 22 June ([77] above). In that letter, however, Mr Turner said that if Bunnings was not interested in a commercial arrangement and if they could not co-operatively work out what were non-hire pallets they would have to "secure the return of our pallets". Thus, properly understood these letters were saying: enter a commercial arrangement, or, failing that, work co-operatively with us to identify non-hire pallets (and, inferentially, return them) or, failing that, return all pallets.

99 These communications from November 2005 should be understood in a commonsense business-like way. Doing so, it can be concluded that Chep did not want (i.e. consent to) Bunnings using pallets not the subject of hire; that such pallets could not be identified without Bunnings' co-operation, which was not forthcoming; that if negotiation and co-operation were not possible, all Chep pallets were to be returned; that Chep kept open the period for discussion and commercial negotiation until 8 August 2006; that whilst no formal demand was made until the end of May 2007, there could be no doubt that Chep had called for all its pallets in March 2006 and the condition suspending required compliance with that demand expired on 8 August; and that Bunnings made its position clear that it was not obliged to return any pallets because its arrangements as to all pallets in its possession were with its suppliers. Thus, in my view, the conditional demand made in March 2006 for the return of all pallets became unconditional on 8 August 2006. That is what the business people must have understood. Thus, any use of Chep pallets by Bunnings after that date was contrary to the demand made in March 2006 and operative on 8 August 2006.

The resolution of the grounds of appeal

Ground 1: attribution of Mr Gilsenan's knowledge

100 Though it was contested in written submissions filed prior to the appeal, at the appeal Mr Garratt did not contest the finding of the primary judge that Mr Gilsenan said what his Honour found at [90]-[95] of his reasons.

101 The challenge under ground 1 was to the attribution of Mr Gilsenan's knowledge to Bunnings. The assessment of this question must begin with an appreciation of the nature and scope of Mr Gilsenan's duties. From February 2005 he was employed as "National Supply Chain Manager". Prior to that he had worked as a consultant for Bunnings from July 2004. He had significant experience in transport prior to then (Blue Book Vol 1 pp 127 and 107K). He began to look at pallets in the Bunnings supply chain in 2004 (Blue Book Vol 1 p 128). From 2005, the distribution centres reported to Mr Gilsenan (Blue Book Vol 1 p 107). Mr Gilsenan reported to Mr Wilkinson-Beards who was Bunnings' "General Manager Business Improvement". When Chep approached Bunnings in October 2005, its officers were told by a Bunnings financial manager to see Mr Gilsenan. In November 2005, Mr Gilsenan carried on the discussions with Chep representatives about pallets. He participated in the March 2006 meeting. The proposal of 16 March 2006 was sent to him. Mr Gilsenan signed the letter of 30 March 2006 ([64] above) rejecting the proposal. He engaged in the correspondence with Chep in April. No denial was made at any time of Mr Gilsenan's authority to speak with Chep on behalf of Bunnings. Mr Gilsenan briefed Mr Gillam directly for the latter's response to Mr Turner. Mr Gilsenan was part of senior management and his duties concerned Bunnings' supply chain.

102 Mr Gilsenan, however, was not the person who made the decisions in respect of the refusal of the audit. Though it is tolerably clear that he recommended or agreed with that refusal (Black Book pp 166 l 24-167 l 4).

103 Mr Skermer sought to give inadmissible evidence (which was rejected) as to what Bunnings knew or should have known. He did not give evidence as to what he knew and was not cross-examined. That lack of evidence does not favour Bunnings: *Commercial Union Assurance Company of Australia Ltd v Ferrcom Pty Ltd* (1991) NSWLR 389 at 418-419 per Handley JA.

104 Mr Wilkinson-Beards, in discussing the meeting of 3 March 2006, said in his affidavit at para 14 (Blue Book Vol 1 p 108):

> "I was not aware of any such black pool of pallets in the Bunnings business. At the meeting neither Michael Gilsenan nor I accepted or acknowledged the existence of such a black pool."

He was not cross-examined on this and the primary judge accepted him as a witness of truth. Nevertheless, at the meeting in March 2006, as shown by the notes of the meeting (Blue Book Vol 1 p 401) and by Mr Wilkinson-Beards'

answers in cross-examination (Black Book Vol 1 pp 143-144), there was an acceptance of a possibility of Bunnings' possession of non-hire pallets, but of a much lower number, if there were any.

105 Mr Davis, the CEO of Bunnings, whom the primary judge accepted as a witness of truth, sought to deal with the topic in an affidavit but it was rejected. His oral evidence in cross-examination was that he was not aware (as he could not have been aware) that Bunnings had Chep pallets in its possession not the subject of hiring agreements; though he knew from March 2006 that Chep were asserting such (Black Book p 129 ll 45-49). In giving his evidence at Black Book p 132 (to which I have already referred at [68] above) he had been told many years before that they returned pallets to suppliers, though he did nothing to check the position (Black Book p 134 ll 15-24).

106 The other evidence of Bunnings' knowledge is the correspondence to which I have referred. Mr Gillam was not called.

107 The evidence of the meetings of November 2005 and March 2006 are sufficiently clear, in my view, to found the clear conclusion Mr Gilsenan knew that some of the pallets they used and handled could well not be subject of hire and that an audit would disclose how many. What Mr Gilsenan knew or assumed was that Chep would want them back and that this would be in sufficient number as to create a cost to Bunnings (see [90] of the primary judge's reasons). The evidence does not permit the finding of a similar appreciation by Bunnings before late 2005.

108 It was submitted by Bunnings that Mr Gilsenan's knowledge should not be attributed to it. The first reason put forward was that Mr Gilsenan was not high enough in the decisional structure at Bunnings to be the mind of the company. Reliance was placed on cases such as *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 at 171.

109 Attribution of knowledge to a principal from an agent and to a company from an employee has its conceptual and theoretical difficulties at times: see the discussion in P Watts and F Reynolds *Bowstead and Reynolds on Agency* (19 th Ed, Sweet & Maxwell, 2010) at 514-531. Relevant always is the context of the question. The organic theory of attribution reflected by cases such as *Tesco* is often required by the statutory or common law context, such as in limitation provisions in statutes or conventions or criminal responsibility of corporations where the identification of the true mind of the company is called for: see for example in respect of limitation of liability, the *International Convention relating to the Limitation of Liability of Owners of Sea-Going Ships* , signed at Brussels, 10 October 1957, Art 1 and the *Merchant Shipping Act 1894* (UK), s 502 ("actual fault or privity" of the owner) the latter being discussed in *Lennard's Carrying Company Limited v Asiatic Petroleum*

Company Limited [1915] AC 705, and the *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading* , signed at Brussels, 25 August 1924 (the " *Hague Rules* ") Art IV rule 2(b) and (q); and, in respect of crime, *Tesco* and *Presidential Security Services of Australia Pty Ltd v Brilley* [2008] NSWCA 204; 73 NSWLR 241.

110 Here, Mr Gilsenan was an agent of Bunnings, acting within the scope of his duties, at a relatively senior level, having and gaining knowledge relevant to the conduct of his duties with an obligation to pass such knowledge as he had relevant to decisions concerning it on to his supervisors, Mr Wilkinson-Beards and Mr Gillam. Mr Gilsenan's responsibility required him to understand, to the extent he was able, from his experience and his enquiries, what Bunnings' position was: see *Blackburn Law & Co v Vigors* (1887) LR 12 App Cas 531 at 537-538; *Taylor v Yorkshire Insurance Co* [1913] 2 IR 1 at 20-21; *Krakowski v Eurolynx Properties Ltd* [1995] HCA 68; 183 CLR 563 at 582-583; and *Brambles Holdings Ltd v Carey* (1976) 15 SASR 270 at 275-276, 279 and 281-282; and see generally as to the importance of legal context: *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 506-512; and *Real Estate Opportunities Ltd v Aberdeen Asset Managers Jersey Ltd* [2007] EWCA (Civ) 197; [2007] 2 All ER 791 at [49]. This was ample basis to conclude that his knowledge about these matters was the knowledge of Bunnings.

111 The second reason put forward for not attributing Mr Gilsenan's knowledge or belief to Bunnings was, it was said, the contradictory views of more senior people, Mr Wilkinson-Beards and Mr Davis. The difficulty with this submission is that it is factually wrong. Mr Wilkinson-Beards, to whom Mr Gilsenan reported, was at the meeting of 3 March 2006. His version of the possibility of non-hire pallets being in Bunnings' possession is sufficiently close to the minutes of the 3 March meeting and Mr Gilsenan's appreciation reflected by the November email as not to be different. Mr Davis did not have a view. If admissible evidence was to be led to the contrary, the responsibility was upon Bunnings to do so. Thus, no question of "schizophrenia" of the kind referred by Bray CJ in *Brambles Holdings v Carey* at 276 arises.

112 The knowledge of Mr Gilsenan and Bunnings as to the existence or possibility of an audit revealing that some pallets Bunnings had were not owed to suppliers in a sufficient number as would create a cost to Bunnings may not be ultimately relevant. To the extent that his Honour may have used the finding as a basis for impropriety and so affecting mechanics of proof, there may be a problem. However, there is no appeal in respect of any finding about the numbers of NCPs.

113 Thirdly, it was said that Mr Gilsenan only had an opinion, not a knowledge of any fact. I think the distinction in this context is without a difference. His opinion about what an audit would show reflected a knowledge of underlying facts about the realities of the pallet system and Bunnings' business.

114 Whilst I would reject ground 1 of the appeal, it should not be taken that the knowledge of Mr Gilsenan exhibited in November 2005 reflected knowledge of the numbers of NCPs calculated by his Honour. All the evidence about the communications in 2006 is contrary to Bunnings (Mr Gilsenan or anyone else) having that belief.

Grounds 2 and 3: conversion

115 Bunnings' submissions were based on three broad propositions: first, that there was no clear demand for return of pallets until 30 May 2007; secondly, that use without consent referred to by the primary judge in [195] of his reasons was not an element of conversion; and thirdly, that the primary judge had failed to analyse the different uses made by Bunnings of the pallets and list them by reference to the true elements of the tort - acts or dealings amounting to asserted dominion over the goods repugnant to the proprietary rights of the true owner, including the immediate right to possession.

116 As to the first proposition, the consequences of my analysis of the events and communications of 2006 are that Bunnings failed to deliver up or make available Chep's pallets after 8 August 2006 and, as a consequence, its possession and use of them were acts of dominion contrary to Chep's asserted (and actual) immediate right to possession.

117 Conversion can, of course, occur by retaining goods after a demand. The act of retention is one that is repugnant to the owner's right to possession expressed by the call for making available or return of the goods. Mere unauthorised possession of another's chattel is not a conversion of it: *Clayton v Le Roy* [1911] 2 KB 1031 at 1048-1050; *Barclay's Mercantile Business Finance Ltd v Sibec Developments Ltd* [1992] 1 WLR 1253 at 1257; *Spackman v Foster* (1882-1883) LR QBD 99 at 100-101. For possession or keeping to be a conversion a demand is required: *Clayton v Le Roy* at 1052; and *General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd* [1963] 1 WLR 644 at 649.

118 The character of any demand to enliven the obligation to make the goods available has been said to be unconditional: *Rushworth v Taylor* (1842) 3 QB 699; 114 ER 674 and specific, not as to an unspecified portion of a whole collection: *Abington v Lipscomb* .

119 In *Rushworth v Taylor* , the demand was for the chattel to be delivered in good repair ("in the same good plight as when ... received" at QB 700; ER 675). The qualification was the need to repair the chattel. The refusal to return was held not to be evidence of conversion.

120 In *Abington v Lipscomb* seven animals were marked for delivery to the lord of the manor as heriots, a heriot being the rendering to the lord of the best live beast on the death of the tenant. Only five were due. Seven were called for. The refusal to deliver **any** was held not to be evidence of conversion because the nature of the heriot was the five best animals, involving a qualitative judgment. If this element of qualitative judgment had been missing, the refusal to deliver any would have been a refusal to deliver five and as such evidence of conversion of five: see at QB 781; ER 1330. Leaving the antiquarian nature of the facts of *Abington v Lipscomb* to one side, at its core is an important principle. A demand for return, or making available for collection, goods of a description not capable of being identified is not one with which the failure to comply, of itself, evidences conversion. Thus, a statement that you have 1,000 of my pallets, give me back or make available those of them that my hirers are no longer paying hire on is not a demand that can be complied with, even if the goods are not fungible. A demand to make available 80 out of every 100 substantially identical pallets in the possession of a party, on the other hand, can be complied with, and a refusal to make available such pallets would be evidence of conversion.

121 A refusal must be unconditional and the person is entitled to a reasonable time to comply with the demand: A M Dugdale et al (eds) *Clerk & Lindsell on Torts* (19 th Ed, Sweet & Maxwell, 2006) at 1017 [17.26].

122 On a fair and commonsense appreciation of the communications of 2006, the demand to return all Chep pallets became unconditional on 8 August 2006. The refusal of Mr Gillam was unconditional. I do not consider the qualification made by AAR in their letter of 24 May 2006, destroyed the clarity of the underlying demand in March, renewed or reclarified in June and July. That said, if I be wrong about that, I would agree with the submissions of Bunnings that a refusal to return or make available an unspecified part of a body of goods without clarity in definition would not of itself be evidence of conversion: *Abington v Lipscomb* . Whether the primary judge was correct or not to say that Bunnings' refusal to permit an audit did it no credit need not be considered. The fact was that Chep did not know how many of the pallets were NCPs. If it only wanted the NCPs back it could have called for a defined percentage of all pallets in Bunnings' possession or a defined number. That would have been clear. It was not done.

123 The second and third propositions are only relevant to any asserted conversion before 8 August 2006. As to the second and third propositions, it is necessary

to say something more of underlying principle.

124 The framing of a precise definition of the tort of conversion has been described as "well nigh impossible": Lord Nicholls of Birkenhead in *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19; [2002] 2 AC 883 at 1084 [39]; and see also *Hiort v London & North Western Railway Co* (1878 - 1879) LR 4 Ex D 188 at 194 per Bramwell LJ. The essential elements, or basic features, involve an intentional act or dealing with goods inconsistent with or repugnant to the rights of the owner, including possession and any right to possession. Such an act or dealing will amount to such an infringement of the possessory or proprietary rights of the owner if it is an intended act of dominion or assertion of rights over the goods: see generally *Penfolds Wines Pty Ltd v Elliott* [1946] HCA 46; 74 CLR 204 at 217-221 (Latham CJ), 228-230 (Dixon J, with whose statements of principle Starke J agreed at 221), 234-235 (McTiernan J), and 239-244 (Williams J); and *Kuwait Airways* at 1084 [39]-[42] (Lord Nicholls of Birkenhead), 1104 [119] (Lord Steyn) and 1106 [129] (Lord Hoffmann).

125 The tort is one of strict liability and thus a mental element in knowing that a wrong is being committed is not required. Nevertheless, intention is not irrelevant. The act or dealing in question must be intentional; further, the intention must be the exercise of such dominion as is repugnant to the rights of the owner. Thus, in *Fouldes v Willoughby* (1841) 8 M & W 540; 151 ER 1153 the ferry manager did not commit trover by taking the plaintiff's horses off the ferry and putting them ashore after the plaintiff had refused to remove them. This was so because the acts were to take the horses to the river bank, not to take them to his own use or some other person's, but merely to remove them from his ferry. Whilst there can be a conversion for a limited period of time, this would occur only if there was an intention to exercise dominion over the goods inconsistent with the rights of the owner, including the right to possession. As Rolfe B said in *Fouldes* at M & W 550; ER 1157:

> "In every case of trover, there must be a taking with the intent of exercising over the chattel an ownership inconsistent with the real owner's right of possession."

126 Whilst criticised by J W Salmond in a note in (1905) 21 *Law Quarterly Review* 43, *Fouldes v Willoughby* retains its authority being cited in *Penfolds Wines* , as does the distinction it makes between trespass and conversion: *Penfolds Wines* , at 218 per Latham CJ.

127 It is important to appreciate that the intention as to the act or dealing should be assessed in the real (here commercial) context in which the act takes place. To paraphrase the words of Thesiger LJ in *Hiort v London & North Western Railway Co* (1878-1879) LR 4 Ex D 188 at 199, conversion has been surrounded in technicality, but the courts will attempt to apply commonsense

in its application. That someone has a right to possession of goods does not mean that he or she is at all times calling for the possession or return of the goods. This can be seen here especially where Chep runs a business placing into commerce goods for use in transport, handling and storage. How people use those goods in transport, handling and storage and whether their use is repugnant to Chep's legal rights incidental to its ownership of the goods is to be assessed in the context of the realistic, practical and honest conduct of business of use of the goods for the evident purposes for which they have been released into the commercial community by Chep.

128 The absence of the intention to exercise dominion over the goods may not alleviate the act or dealing from all tortious character - it may be trespass, suit for which is available to the party in possession, not merely someone with a right to possession: *Penfolds Wines* at 216-217, 224 and 241. The distinction between conversion and trespass and the importance of finding, in the relevant commercial circumstances, the intention to act in a way repugnant to the true owner's rights are illustrated in *Sanderson v Marsden & Jones* (1922) 10 LIL Rep 467 at 470 (Bankes LJ) and 472 (Atkins LJ), where a mistaken collection of timber from a wharf was held not to be conversion.

129 A clear enunciation of the character of dealing amounting to conversion is found in Dixon J's reasons in *Penfolds Wines* . That case involved the sale of wine by Penfolds in bottles the ownership of which it retained. Each bottle was embossed with Penfolds' name and stated that it was Penfolds' property. The defendant was also in the business of selling wine. He would fill empty Penfolds bottles brought to him by customers with his own wine. Penfolds claimed this amounted to conversion. Though Dixon J was in dissent, his statement of principle is not discordant in any way with that expressed by Latham CJ, McTiernan J or Williams J. Dixon J said at 229:

> "The essence of conversion is a dealing with a chattel in a manner repugnant to the immediate right of possession of the person who has the property or special property in the chattel. It may take the form of a disposal of the goods by way of sale, or pledge or other intended transfer of an interest followed by delivery, of the destruction or change of the nature or character of the thing, as for example, pouring water into wine or cutting the seals from a deed, or of an appropriation evidenced by refusal to deliver or other denial of title. But damage to the chattel is not conversion, nor is use, nor is a transfer of possession otherwise than for the purpose of affecting the immediate right to possession, nor is it always conversion to lose the goods beyond hope of recovery. An intent to do that which would deprive 'the true owner' of his immediate right to possession or impair it may be said to form the essential ground of the tort."

In discussing the re-delivery of bottles to persons who left them to be filled with wine, his Honour said at 229-230:

> "The re-delivery could not amount to a conversion because, though involving a transfer of possession, its purpose was not to confer any right over the property in the bottles, but merely to return or restore them to the person who had left them there to be filled...
>
> To fill the bottles with wine at the request of the person who brought them could not in itself be a conversion. It was not a use of the bottles involving any exercise of dominion over them, however transitory. There was, of course, no asportation and the older cases to the effect that an asportation of chattels for the use of the person taking them, or of a third person, may amount to a conversion can have no application. In any event, an intention cannot be imputed to the respondent of taking to himself the property in the bottles or of depriving the appellants thereof or of asserting any title therein or of denying that of the appellants. It was not an act derogating from the proprietary right of the appellant. There was no user on the footing that the respondent was owner or that the appellants had no title, in short no act of ownership. The essential elements of liability in trover are lacking."

130 It is clear that taking and asportation may be a conversion, especially if taken from the possession of the owner without authority and thereafter used. Such conduct may be, of its very character, repugnant to the dominion of the owner in possession (though the facts and context may not permit this conclusion to be drawn: see *Sanderson v Marsden & Jones*). If one finds a party in possession after an apparently lawful transfer of possession, not involving the purported transfer of title or proprietary interest, some care must be taken before a conclusion of conversion can be drawn from subsequent use by that party. In *Hollins v Fowler* (1875) LR 7 HL 757 at 766 in a passage cited by McTiernan J in *Penfolds Wines* at 234-235, Blackburn J, in explaining the fundamental elements of the tort, said at 766-767:

> "'It is generally laid down that any act which is an interference with the dominion and right of property of the plaintiff is a conversion, but this requires some qualification. From the nature of the action, as explained by Lord Mansfield, it follows that it must be an interference with the property which would not, as against the true owner, be justified, or at least excused, in one who came lawfully into the possession of the goods ... I cannot find it anywhere distinctly laid down, but I submit to your Lordships that on principle, one who deals with goods at the request of the person who has the actual custody of them, in the *bona fide* belief that the custodier is the true owner, or has the authority of the true owner, should be excused for what he does if the act is of such a nature as would be excused if done by the authority of the person in possession, if he was a finder of the goods, or entrusted with their custody.'"

The reference by Blackburn J to Lord Mansfield was to the latter's reasons in *Cooper v Chitty* (1756) 1 Burr 20; 97 ER 166.

131 It is true that in *Penfolds Wines* , Williams J at 239 (quoting Cleasby B in *Fowler v Hollins* (1872) LR 7 QB 616 at 639) said:

> "The principle of English law is that persons deal with the property in chattels or exercise acts of ownership over them at their peril"

132 Two things are to be noted about this passage. First, his Honour and his Lordship did not say "use chattels" at their peril but "deal with **the property in** or **exercise acts of ownership over** [chattels] ... at their peril." The reference was dealing with property or exercising ownership. So much can be accepted. The principle of *nemo dat quod non habet* is a related concept. Secondly, it was not an expression of principle, but a salutary warning of the effect of English Law.

133 In *Penfolds Wines* , Williams J also said the following at 243-244:

> "The importance of rights attached to ownership vary according to the nature of the particular property. Bottles are meant to be filled so that to fill the bottle of another person is to deprive him of the use of his property. In the present case the brother purported to place the defendant in possession of the bottles as a bailee for him. If they had been 'clean bottles,' although in fact the property of the plaintiff, the defendant might not have been guilty of conversion in filling and returning them to the person from whom he got them, unless the plaintiff had made a claim that they were its bottles and had demanded their return (*Union Credit Bank Ltd. v. Mersey Docks and Harbour Board*). But the endorsements on the bottles proclaimed that they were the property of the plaintiff. In *Hollins v. Fowler* , Blackburn J. said that 'In considering whether the act is excused against the true owner it often becomes important to know whether the person, doing what is charged as a conversion, had notice of the plaintiff's title. There are some acts which from their nature are necessarily a conversion, whether there was notice of the plaintiff's title or not. There are others which if done in a *bona-fide* ignorance of the plaintiff's title are excused, though if done in disregard of a title of which there was notice they would be a conversion.' The use which the defendant made of the bottles with knowledge of the plaintiff's title was, in the words of Blackburn J. on the same page, 'an interference with the property which would not, as against the true owner, be justified, or at least excused, in one who came lawfully into possession of the goods.' He was, in the words of Brett J. 'using the goods with the intent to exercise an act of ownership on his own behalf, or of some one (that is, his brother) other than the plaintiff.'"
>
> (Footnotes omitted.)

134 It is, of course, necessary to assess and understand judges' reasons properly coloured by reference to the factual dispute before them and reasons should not be treated like an Act of Parliament: *El Oldendorff H & Co GmbH v Tradax Export SA* (*The 'Johanna Oldendorff* ') [1974] AC 479 at 530 (Lord Reid) and 555-556 (Lord Diplock). In *Penfolds Wines* , the bottles were stamped as the property of Penfolds (as the pallets were stamped the property of Chep here) and the terms of the bailment permitted only resale and consumption once. It does not follow, in the circumstances here, that any use by Bunnings of pallets it knew to be owned by Chep without its own hire agreement was a conversion, merely because Chep had an immediate right to possession. To be such, the use would still be required to be an act or dealing that was repugnant to the ownership or right to possession of Chep.

135 The principles to which I have referred do not permit the conclusion, in my view, that "lack of consent" is equivalent to a demand to return or make available or deliver up. The forms of conversion may be many, but essential to all of them is the act or dealing amounting to an act of dominion repugnant to the proprietary rights of the true owner including the immediate right to possession. *Clerk & Lindsell op cit* at 1007-1008 [17-08] list seven categories:

> "(a) when property is wrongfully taken or received by someone not entitled to do so;
>
> (b) when it is wrongfully parted with;
>
> (c) when it is lost by a bailee in breach of his duty to the bailor;
>
> (d) when it is wrongfully sold, even without delivery, so as to pass good title to the buyer;
>
> (e) when it is wrongfully retained;
>
> (f) when it is wrongfully misused or destroyed; and
>
> (g) when the defendant, without physically interfering with it, wrongfully denies access to it to the claimant."

136 W Prosser "The Nature of Conversion" (1957) 42 *Cornell Law Quarterly* 168 at 174 gave the following list:

> "... taking the chattel, removing it, transferring it, withholding it, damaging or altering it, and using it."

137 All the examples given by Prosser of use (at 183-184) involve physical use and application of the chattel beyond mere possession, in a context and in a manner that can be seen as contrary to the rights of the true owner.

138 It can well be seen that taking from the possession of the owner and using goods (even if temporarily) may be a conversion. If someone takes a horse and rides it and redelivers it there may have been a conversion: *Clerk & Lindsell op cit* at 1009 [17-11]; and see *Aitken Agencies Ltd v Richardson* [1967] NZLR 65 (taking a car for a joy ride). That, however, is because the act of taking without permission and using as one's own would, or may, be seen as an act of dominion, even if temporary: see *Clerk & Lindsell op cit* at 1010 [17-11] and the cases cited at ftnts 47 and 48 thereat. Mere unpermitted possession is not conversion: see [117] above.

139 In *Lancashire and Yorkshire Railway Co v MacNicoll* (1919) 88 LJ (KB) 601 (Eng) at 605 Atkin J expressed the requirement of the user in order to amount to conversion as follows:

> "It appears to me plain that dealing with goods in a manner inconsistent with the right of the true owner amounts to a conversion, provided that it is also established that there is also an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right. That intention is conclusively proved if the defendant has taken the goods as his own or used the goods as his own. Here there is no question but that the defendant did use the goods as his own. He poured them - the carbolic acid - into his own vat or tank. The cases in which the intention of the defendant becomes material are cases where the goods have come into the possession of somebody who acts as an agent or bailee, and where the dealing with the goods is a transfer of the custody from himself to somebody else, and where it may well be that the intention is not to exercise any right inconsistent with the right of the true owner. In those cases the question of intention becomes material. In a case where a man deals with goods as his own, no such question can arise."

The first sentence of the above quotation was approved by Scrutton LJ (with whom Slesser LJ agreed) in *Oakley v Lyster* [1931] KB 148 at 153 and Lord Porter in *Caxton Publishing Co Ltd v Sutherland Publishing Co* [1939] AC 178 at 201. See also *Douglas Valley Finance Co Ltd v S Hughes (Hirers) Ltd* [1969] 1 QB 738 at 750 (McNair J).

140 The character of the use involving the intention to exercise dominion can be a fine one to evaluate. There is no requirement for permanent deprivation or an intended act of permanent deprivation: *Empresa Exportadora de Az u car v Industria Azucarera Nacional SA (The 'Playa Larga')* [1983] 2 Lloyd's Rep 171 at 181.

141 The question of the sufficiency of the act or dealing is the qualitative act of interference - the extent in terms of right, not time. Prosser *op cit* at 173-174 put it thus: "an intentional exercise of dominion or control over a chattel, which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel", citing the preliminary draft of [222A], *Second Restatement of Torts* . See also S Green and J Randall *The Tort of Conversion* (Hart Publishing, 2009) at 58-65. The capacity for difference of view as to the quality of the act as an interference or not can be illustrated by the different views in *Penfolds Wines* . Latham CJ, whilst citing *Fouldes v Willoughby* , considered that the actual use of the bottles by the defendant was for the purpose of exercising what he regarded as his right to use them for containing any liquid that he chose to put into them and to keep them for that purpose until he delivered them, with their contents, to his customers (see 218). This was a dealing with the bottles on the basis that he was entitled to hold them and to use them for the purposes of his trade (see 219). There was not mere removal (from his brother's possession, i.e. mere possession), "There was a handling of the bottles, an actual user of them, for the purposes of the defendant's trade - for containing and disposing of [his] wine and for the use of [his] customer ..." (see 219). Likewise McTiernan J, whilst citing *Fouldes v Willoughby* and *Hollins v Fowler,* considered that the use of the bottles by filling them with wine to be

delivered to his brother was inconsistent with the owner's dominion and rights of property - by using them in his business as receptacles to be given to a customer (see 234-239). Williams J, applying *Hollins v Fowler,* considered that the use made of the bottles with knowledge of the plaintiff's title was an interference with property which would not as against the true owner be excused in one who had lawfully come into possession of the goods (using the words of Lord Mansfield used by Blackburn J in *Hollins v Fowler* at 766) or using the goods with the intent to exercise an act of ownership on his behalf or of someone (his brother) other than the true owner (using the words of Brett J in *Hollins v Fowler* at 784).

142 Dixon J, on the other hand, considered that the use made of the bottles was not a conversion (see 229). The acts in question did not deprive or impair property rights or the immediate right to possession. The acts were filling bottles brought to the defendant and returning them that did not involve any dominion over them, however transitory. There was no user on the footing that the respondent was owner, and no act derogating from the plaintiff's rights.

143 The differences between the judges in *Penfolds Wines* were of the assessment of the quality and character of the acts not, as I read it, of expression of operative legal principle.

144 The capacity for differences of view to exist as to the quality of the act by way of interference with the dominion or rights of the owner can also be seen in some of the unauthorised user cases involving vehicles: compare *Jeffries v Pankow* 112 Ore 439; 223 Pac 903 (1924) a dealer entrusted with a car for sale, driving it 10 miles, not a conversion, with *Miller v UHL* 37 Ohio App 276; 174 NE 591 (1929) similar facts, but a drive of 2,000 miles, a conversion, as to which see Prosser *op cit* at 183-184; compare *Schemmell v Pomeroy* (1989) 50 SASR 450, where a joyride was held not to be a conversion, with Young J's (as his Honour then was) comments in *Flowfill Packaging Machines Pty Ltd v Fytore Pty Ltd* (1993) Aust Torts Reports 81-244 at 62,520.

145 In *Model Dairy Pty Ltd v White* (1935) 41 Ang LR 432, the defendant had made a practice of using the bottles of others in which to deliver her own milk which was considered sufficient deprivation of the owner's right to possess (see 433-434). Similarly in *Milk Bottles Recovery Ltd v Camillo* [1948] VLR 344 the plaintiff delivered bottles to dairymen who took them under a bailment permitting them to lend the bottles to customers to take the milk, and promptly return. The defendant bought the business of a dairyman and refused to enter into an agreement with the plaintiff, declaring the bottles were his, having bought them from the vendor and then used them to deliver milk to customers. It was held that he dealt with the bottles entirely inconsistently with the terms of the original bailment and consistent only with

an intention to treat them as his own.

146 If I may respectfully say so, the underlying principle as to possession and use was helpfully distilled by Young J in *Flowfill Packaging* at 62,520:

> "The cases show that the mere detention by A of B's goods will not necessarily amount to conversion nor will the mere handling of them. But once the degree of user amounts to employing the goods as if they were one's own then a conversion is established."

147 The expression treat or deal "as his own" must be understood and applied in the actual context of any given factual circumstances. The question is somewhat subtle when, as here, one has another's goods in one's possession consequent upon an arrangement in which that other (Chep) launches a vast number of fungible goods into commerce for transport, handling and storage.

148 The evidence of Mr Austin and Mr Davis to which I have earlier referred makes it plain that the whole purpose of the system, in practical business terms, is to facilitate the cost effective handling of palletised goods in the supply chains of businesses. It is entirely conformable with that purpose for recipients of goods on pallets to keep goods on those pallets without unloading and reloading them until clearance in the ordinary and reasonable course of business, and then return the pallets into circulation as fungible returns.

149 On the facts as proved here, and on the case as run, there was no basis to conclude that in receiving pallets Bunnings was committing any wrong. In any event, to use the expression of Lord Mansfield in *Cooper v Chitty* and Blackburn J in *Hollins v Fowler* "it must be an interference with the property which would not, as against the true owner, be justified, or at least excused, in one who came lawfully into the possession of the goods".

150 The primary judge dealt with Bunnings' use at [106]-[114] ([31] above).

151 As to use referred to at [114(4)], (swapping with suppliers) this cannot be a conversion, absent the refusal of a demand to return. The goods were being used for the precise purpose contemplated in the Chep system. The free-flow of pallets, including the transfer of possession and return of fungible equivalents, is the essence of the pallet pooling relationship. The evidence was, as I have earlier discussed, that a significant proportion of pallets were unloaded within a day or so and the pallets returned to the loading bay for collection. There was no act of dominion by Bunnings contrary to Chep's property rights in doing this.

152 The conclusion that such use is conversion only in relation to NCPs cannot be maintained either. That a Chep hirer was or was not paying hire on any particular pallet (which could not be separately identified) does not affect the character of any act of returning or swapping a pallet in exchange for delivery

of another. Either the act is one of dominion or not; absent a demand for return in these circumstances, it was not.

153 The understanding of Bunnings referred to at [195] of the reasons does not affect this conclusion. First, the finding was criticised by Bunnings. I have already referred to its deficiency based on Mr Davis' evidence. Mr Gilsenan's and Mr Wilkinson-Beards' evidence concerning the findings at [90]-[95] of the reasons have already been dealt with. The evidence of Bunnings' knowledge before 2005 is really only based on the dealing with the Tasmanian stores and Mr Doyle's recollection of what had occurred in some BBC stores in 2000. There is no suggestion in the evidence that Bunnings was aware, at least before early 2006 and the store audit, that Chep knew and did not consent to the manner in which the pallets were used by Bunnings. Secondly, and in any event, any lack of consent is but a factor in understanding the act or dealing and the intent that may assist in giving the act or dealing its character.

154 Here the use in [114(4)] is consistent with treating the pallets as part of the operating and circulating pallet system. It is not an evident act of dominion over the goods inconsistent with Chep's rights of ownership and possession; rather, it accords with them in that it is consistent with the use of pallets owned by Chep circulating in the system.

155 As to the uses in [114(2)] (storing in high rise) and [114(3)], (storing heavy goods) this is possession of the pallets. The pallets were delivered with goods placed, fixed or wrapped on them. In this form, the goods and pallets were placed into storerooms or on high rise stacks. To say this is use of a pallet can be accepted linguistically, but it is the holding of possession of the pallets and no more. It is not an act repugnant to Chep's rights of ownership or possession.

156 As to the use in [114(5)], (transporting surplus stock between stores and centres) the movement of pallets carrying stock as delivered is likewise no more than possession.

157 As to the use in [114(1)], (display of goods) once again the act is not more than possessory. There is an added element of display, to the commercial advantage of Bunnings, but I do not consider that the character of the act of leaving the goods on the pallet on which they arrive on display is an act of dominion repugnant to Chep's right to possession.

158 In all these categories, the possession was obtained in a manner not shown to be unlawful. The possession was taken of articles that were fungible, though clearly owned by the operator of the business of hiring pallets. All pallets with Chep markings would have originally been the subject of hire arrangements, although some (indeed, from the primary judge's conclusions, perhaps many) had been the subject of a compensation fee and were no longer the subject of

hire payments. It was impossible to identify separately whether any pallet was either the subject of hire or not. If, as Chep asserted in its case and as his Honour found, Bunnings' acts were not a conversion if hire was being paid on a pallet, but were conversion if hire was not, Bunnings (indeed, Chep) could never have known in respect of any pallet at any particular time whether conversion was occurring or not. This would be so even though the acts in question and Bunnings' intention in respect of those acts was the same in respect of both classes of pallets - hire and non-hire.

159 Conversion is a tort concerned with proprietary rights, including the right to possession, in and to goods. With respect, what appears in [196]-[197] of the primary judge's reasons is not an answer to the above difficulties. The aphorism used by Latham CJ and Williams J in *Penfolds Wines* was, as I have said, not directed to "deal" in the sense of use, but "deal with the property in" or "exercise acts of ownership over".

160 The evidence was that Bunnings generally did not use individual unloaded Chep pallets to palletise its own goods. The primary judge dealt with how Bunnings unloaded pallets and used any empty pallets at [106]-[113] (see [31] above). The primary judge found that on occasions Chep pallets that had been unloaded were used to store goods placed on them (see [110]), that empty pallets were sometimes used at distribution centres for sending out goods to stores, but this was against Bunnings' policy (see [111]-[113]).

161 As to [114(6)], (palletising and delivering to stores imported goods received at distribution centres) this use can be viewed differently. Here, the pallets, clearly owned by someone else (Chep) are being used, as the email referred to in [113] says, as if they did not belong to anyone else. They did; to Chep. The use in this category is one which can be seen as involving an act of dominion or right to use the goods as one's own. There is a distinction to be drawn with uses in [114(1)-(3) and (5)] where the pallet is moved or placed with the goods with which it is delivered. Thereafter, the movement and use is no more than possession to permit the unloading in the ordinary course of business. Once the pallet is unloaded, the logistics uses for which it was delivered have ceased, and use thereafter (such as by loading more goods onto it to transport between Bunnings' stores) ceases to be mere possession. The acts of appropriating the pallets to be used for carrying Bunnings' goods or for storing other goods placed on them amounts to a sufficient act of dominion, albeit temporary, to amount to conversion.

162 The above distinction draws force from the character of the acts done. On the one hand the pallets are held and placed with goods as delivered in the ordinary course of business, or exchanged promptly or held available for exchange. These acts, in the commercial context of the operation of a pallet pool by Chep, releasing into commerce fungible goods to facilitate transport

and handling of goods, do not bespeak an act of dominion contrary to the true owner's immediate right of possession. On the other hand, once a pallet is unloaded, belonging as it does to Chep, then to use it for one's own purposes, unconnected with the circumstances in which its possession was (not unlawfully) transferred, is to exercise dominion over it as one's own. Further, to the extent this occurred, it would not matter (for the commission of the act, though it may do for damages) that any particular pallet was under hire or not.

163 This reasoning is not to rely upon the licence and estoppel cases rejected by the primary judge, against which there was no appeal. Rather, it involves an insistence that the character of any act of any putative tortfeasor be assessed by reference to the particular circumstances of the case.

164 Given that the only case made against Bunnings was for the use of NCPs, even though I would conclude that there had been some conversion before 8 August 2006, it is impossible to say with any precision that any such pallets as were converted in the manner that I have described were on or off-hire or were NCPs or not. This is not just a question of damages or loss, it goes to proof of conversion in the way that the matter has been pleaded and run. I will return to this issue when dealing with the form of orders.

Grounds 4-8: detinue

165 The conclusion to which I have come concerning the events of 2002 to 2007 and conversion makes it unnecessary to deal with detinue in any detail other than to say that the conditional demand made in March 2006 that became unconditional on 8 August 2006 suffices for detinue. Prior to that date there was no unconditional demand for return of pallets. Further, in address, Mr Douglas QC, who, with Mr Kidd, appeared for Chep, accepted the necessity of a demand in the circumstances here and did not seek to support the case in detinue before March 2006. (See Appeal Transcript 22 September 2011 at p 36 ll 4-14.) In these circumstances it is not necessary to consider *Baud Corp v Brook* or *Brambles Australia v Tatale.* The conclusion that I have come to about the nature of the March 2006 demand requires the rejection of the detinue claim from March 2006, but its acceptance from 8 August 2006.

Grounds 9-12: damages

166 The primary submission of Bunnings was that *Strand Electric* and *Gaba Formwork* should not be utilised to give a reasonable fee for the use of the pallets because the evidence revealed that no loss had been suffered by Chep. Central to this proposition was the abandonment by Chep of the other heads of damage and the conclusion that, in relation to all NCPs, a

compensation fee had been paid by the hirer in an amount sufficient in effect to buy a new pallet. At [221]-[223] of his reasons the primary judge set out Bunnings' submissions below, as follows:

> "[221] Mr Garratt submitted that Chep had not established any loss. That was so, he submitted, because:
>
> (1) at all material times, Chep had available to it more pallets available for hire than it had out on hire, or needed to provide to hirers, so that there was no actual loss of hire;
>
> (2) there was no evidence that the pallets might have been hired out, but at most evidence of an "opportunity cost" of not having the pallets available for hire;
>
> (3) in any event, once the pallets came back into Chep's possession in the ordinary course of circulation (as he put it), they were available for hire;
>
> (4) any claim for ongoing repair costs was misconceived because, by definition, the pallets in respect of which that cost was incurred were pallets in Chep's possession and available for hire; and
>
> (5) any capital cost incurred earlier than would otherwise have been the case was amply compensated by the compensation payable in respect of that loss.
>
> [222] Further, Mr Garratt submitted, the loss compensation fee fixed by Chep from time to time was in fact lower than the maximum that it could have charged. Thus, he submitted, if Chep chose to charge and recover a fee that was insufficient compensation for its loss, that was not something for which Bunnings should be held liable. In this context, Mr Garratt pointed to what he said was the failure of Chep to lead evidence as to how the loss compensation fee from time to time was fixed, and as to what were its integers or components.
>
> [223] In any event, Mr Garratt submitted, the facts in this case did not attract the *Strand Electric* / *Gaba Formwork* reasoning. That was because those cases depended on there being something more than mere detention; for damages to be payable on the basis of hire foregone, the defendant must have made use of the goods. In this case, Mr Garratt submitted, such use as Bunnings made of the pallets (holding stock on them, or stacking them ready for exchange) was insufficient."

167 The primary judge rejected the proposition that Chep had been compensated in full by the receipt of lost compensation fees. He did this, in part, by taking into account the annual cost of repair: [264] of the reasons. The complaint by Bunnings on appeal that this is to use one of the heads of damage abandoned by Chep has some force.

168 There is, however, a more fundamental problem with Bunnings' arguments on damages. There is no necessary correlation between Bunnings' conversion, as found, and the payment by a hirer and receipt by Chep of a lost compensation fee. The payment of the fee does not affect Chep's ownership rights, including its right to possess and use the pallets in its own business. Whether it has to refund the fee if the pallet is found or can keep both the fee and the pallet are matters for it in the organisation and conduct of its business. It is wrong, in

my view, to say that the consequences of Bunnings wrongfully using or detaining Chep's pallets has been compensated by a third party (Chep's hirer and commercial counterparty) making a payment that it is required to make under the contract.

169 This payment by the hirer does not entitle Bunnings as a wrongdoer to detain or use someone else's property at will. It is unnecessary to descend to the mathematics of the average cost of replacement of each pallet or the discounted present value of future hire. Chep's business terms entitled it to the fee; it maintained a right to possession of the pallets; it was entitled to be compensated according to law for the wrongful use and detention of its pallets, as potentially profit earning chattels owned by it and to which it had the immediate right to possession.

170 This raises *Strand Electric* and *Gaba Formwork.*

171 In *Strand Electric* , the plaintiffs lent to the defendant, a theatre company, portable switchboards pending the installation of permanent switchboards. Initially and by agreement no hire was charged but the defendant subsequently refused to return the portable switchboards as demanded by the plaintiffs.

172 Somervell LJ (at 252) used the analogy of mesne profits for use of land. The measure of damages was the sum the user would have paid if the possession was lawful. Denning LJ at 254-255 was clear that where there has been use of the goods by the converter a reasonable hiring charge was to be paid, even if no loss was shown by the owner. This is in contrast to damages for detention by a mere detainer such as a carrier or warehouseman, where actual loss must be proved. Denning LJ said at 254-255:

> "If a wrongdoer has made use of goods for his own purposes, then he must pay a reasonable hire for them, even though the owner has in fact suffered no loss. It may be that the owner would not have used the goods himself, or that he had a substitute readily available, which he used without extra cost to himself. Nevertheless the owner is entitled to a reasonable hire. If the wrongdoer had asked the owner for permission to use the goods, the owner would be entitled to ask for a reasonable remuneration as the price of his permission. The wrongdoer cannot be better off because he did not ask permission. He cannot be better off by doing wrong than he would be by doing right. He must therefore pay a reasonable hire.
>
> ...
>
> The claim for a hiring charge is therefore not based on the loss to the plaintiff, but on the fact that the defendant has used the goods for his own purposes. It is an action against him because he has had the benefit of the goods. It resembles, therefore, an action for restitution rather than an action of tort. But it is unnecessary to place it into any formal category. The plaintiffs are entitled to a hiring charge for the period of detention, and that is all that matters."

Romer LJ (at 256) emphasised the salient factors that the goods were of a profit earning nature, that they were ordinarily hired out and that the defendant applied the goods to its own ends. Whilst his Lordship (as had Somervell LJ) rejected notions of benefit to the defendant, in the light of the salient facts the defendant was not permitted to set up other facts denying loss (at 257).

173 In *Gaba Formwork* at 184-188, Giles J, as his Honour then was, examined *Strand Electric* and its reception in England and Australia up to 1991. I respectfully agree with the analysis of Giles J in *Gaba Formwork* (referred to by the learned authors of *Clerk & Lindsell op cit* at 1060 [17-104] ftnt 81 as a "careful and instructive" judgment, a description with which I respectfully concur). As the opinion of Giles J in *Gaba Formwork* reveals, *Strand Electric* has been accepted in Australia, though not without some reservation: *Bilambil-Terranora Pty Ltd v Tweed Shire Council* [1980] 1 NSWLR 465; *Yakami Dairy Pty Ltd v Wood* [1976] WAR 57; *Egan v State Transport Authority* (1982) 31 SASR 481; *Pargiter v Alexander* [1995] TASSC 62; 5 Tas R 158; *Finesky Holdings Pty Ltd v Minister for Transport for Western Australia* [2002] WASCA 206; 26 WAR 368; cf *McKenna and Armistead Pty Ltd v Excavations Pty Ltd* [1957] SR (NSW) 515; and *Roder Zelt-Und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd (In liq)* [1995] FCA 1707. The legitimacy of assessing compensation or damages in conversion and detinue for interference with proprietary or possessory rights by use of property that earns or is capable of earning a profit, by reference to a hiring fee that is appropriate in all the circumstances, was confirmed by the Privy Council in *Inverugie Investments Ltd v Hackett* [1995] 1 WLR 713 at 717-718 and by the House of Lords in *Attorney-General v Blake* [2000] UKHL 45; [2001] 1 AC 268 at 278-279. Reference to the modern texts on damages (H McGregor, *McGregor on Damages* (18 th Ed, Sweet & Maxwell, 2010) at 1234-1236 [33-068]) and torts (*Clerk & Lindsell op cit* at 1060-1061 [17-104]; R P Balkin and J L R Davis *Law of Torts* (4 th Ed, LexisNexis Butterworths, 2009) at 90 [4.40] and 106 [4.64]; Green and Randall *op cit* at 192-194; and N Palmer and E McKendrick (eds) *Interests in Goods* (2 nd Ed, LLP, 1998) at 847-853) reinforces the legitimacy of the approach of *Strand Electric* and *Gaba Formwork* .

174 Stability of approach, especially in a field directly related to commercial law should be maintained. It is unnecessary to discuss the extent to which a degree of re-adjustment in taxonomy is required by reference to notions of restitutionary damages (cf *McGregor op cit* Ch 12). Rules of compensatory damages, sensibly and flexibly applied, are adequate to explain the theoretical and practical positions, without any extension of principle involving the award of the wrongdoer's profit as a remedial consequence of the commission of a tort.

175 The fundamental principle of damages for tort is compensation for loss caused: *Butler v Egg & Egg Pulp Marketing Board*[1966] HCA 38; 114 CLR 185; and *Haines v Bendall* [1991] HCA 15; 172 CLR 60 at 63. The damage or loss caused to the plaintiff with rights of ownership and possession who is in the business of hiring goods of the kind converted or detained is not limited to the consequences of stock depletion or to cost of replacement, but incudes the denial and infringement of its rights. Those rights have been denied to the plaintiff by the commission of a tort involving the use of the goods by the tortfeasor. It is entirely logical and in accordance with justice and commonsense that a wrongdoer should pay a price for using the goods of another as a matter of compensation for the denial of the right concerned. I do not see this as contrary to, or undermining of, the principle of compensation. To require compensation to be the operative principle is not to deny the fundamental principles discussed in cases such as *Mediana, Owners of the Steamship v Owners, Master & Crew of the Lightship Comet (The 'Mediana')* [1900] AC 113 [1900] AC 113 at 117 by the Earl of Halsbury LC, or *Watson, Laidlaw & Co Ltd v Pott, Cassels and Williamson* (1914) 31 RPC 104 at 119 by Lord Shaw as discussed by Lord Nicholls of Birkenhead in *A-G v Blake* at 278-279. Lord Shaw in *Watson* , speaking of damages for patent infringement, said:

> " ... whenever an abstraction of property has occurred, then, unless the abstraction or invasion were to be sanctioned by the law, the law ought yield a recompense under the category or principle ... either of price or hire."

176 The law of patents has always viewed the determination of damages arising from patent infringement as compensatory in character and as wide enough to encompass the amount which the infringer would have had to pay had he taken a licence upon terms normally granted by the patentee: see generally W Aldous et al *Terrell on the Law of Patents* (13 th Ed, Sweet & Maxwell, 1982) at 427 [14-160] and the cases cited at ftnt 83; and W Cornish et al *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (7 th Ed, Sweet & Maxwell, 2010) at 81-83 [2-38]-[2-40], or on a reasonable royalty basis if the patentee does not grant licences or makes its profit as a manufacturer: Aldous *op cit* at 427 and [14-160] and the cases at ftnt 84; and Cornish *op cit* at 83 [2-40].

177 Care needs to be exercised in any comparison between the principles attending the torts of conversion and detinue, on the one hand, and infringement of patents, on the other, and the lengths to which any such comparison is taken (cf *Leman v Krentler-Arnold Hinge Last Co* 284 US 448 at 456-457 (1932)). Nevertheless, the analogy is of assistance in understanding the concepts involved in compensation and the law's proper response to the interference with property rights. Compensatory damages for conversion of goods and compensatory damages for patent infringement have some basal

features in common. The former involves the denial of the property rights of the plaintiff, including the right to possession, through an act repugnant to those rights; the latter involves the denial of the plaintiff's statutory monopoly rights by infringement being the acts that the statute identifies as the denial of, or interference with, those rights. In each, if a property right has been invaded by wrongful user, the law should and does provide a remedy for the wrong, compensatory in character in the broad sense, focusing on the interference with the right in question. Recompense is given to the wronged property owner that requires the wrong to be seen as righted, by requiring a price or hiring charge to be paid for the wrongful use. What is being compensated for is the wrongful denial of property rights, not merely the injured party's financial position analysed subjectively: see *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA (Civ) 323; [2003] 1 All ER (Comm) 830 at [26] per Mance LJ. Essential to the notion of compensation here is the use by the wrongdoer that gives reality and content to the denial of, or interference with, the plaintiff's rights. So to say is not to transform damages into restitution; rather it is to set a practical limit to the principle based on the feature of the wrong (the wrongful use) which calls for the law's response to award damages for the denial or interference with the right.

178 Though only Denning LJ in *Strand Electric* expressly based his judgment on restitutionary principles, Somervell LJ and Romer LJ expressing the matter in terms of compensation, each of their Lordships included as an element in his reasoning use by the converter/detainer. This element of suit for the use of the chattel was a suggestion of Lord Mansfield in *Hambly v Trott* (1776) 1 Cowp 371 at 375; 98 ER 1136 at 1138. Thus the use of a sum for the hire of the chattel to inform the monetary remedy can be seen as referable to the capacity of the chattel to be hired by the owner (and the refusal to permit the wrongdoer to assert that he would or could not): Romer LJ at 256-257, or to the actual use by the wrongdoer: Denning LJ at 254-255 or to the user of the wrongdoer based on what he would have paid if he had been lawfully in possession: Somervell LJ at 252. The element of use by the wrongdoer was central to at least two of their Lordships and it was part of the action referred to by Lord Mansfield in *Hambly v Trott* . The element of use can be seen in the analogue of mesne profits and like cases: *Whitwham v Westminster Brymbo Coal & Coke Co* [1896] 2 Ch 538 at 541-542; *Hall & Co Ltd v Pearlberg* [1956] 1 WLR 244; *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 1 WLR 798; *Bracewell v Appleby* [1975] Ch 408; *Jaggard v Sawyer* [1995] 1 WLR 269; *Swordheath Properties v Tabet* [1979] 1 WLR 285; *Inverugie* ; and in respect of a dock: *Penarth Dock Engineering Co v Pounds* [1963] 1 Lloyd's Rep 359.

179 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 goods 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. 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.

180 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.

181 If there were numbers of pallets always lying idle and extraneous to any aspect of the operating business of Bunnings, that was for Bunnings to show: cf *Armory v Delamirie* (1722) 1 Strange 505; 93 ER 664. It did not.

182 In my view, it is appropriate to apply a hiring fee on the authority of *Strand Electric* .

183 It should be noted that no case for a hiring fee was sought to be made otherwise than based on the proof of the wrongs of conversion or detinue.

184 The question then arises what the hiring fee should be. The primary judge refused to give Bunnings the advantage of the rate Chep was prepared to take from Bunnings, being Wesfarmers' rate, which was some 40 per cent of the standard hire rate, saying at [262]-[264] of the reasons:

> "[262] However, I do not think that either the compensatory principle or the secondary rule as to assessment established by *Strand Electric* and *Gaba Formwork* , requires the Court to take, as the hire rate applicable, the rate paid by Wesfarmers from time to time. There are at least two reasons why this is so. The first is that the measure of damages is the loss of a market rate of hire (see Somerville LJ in *Strand Electric* at 252). The market was wider than Wesfarmers. The second is that, to adapt the words of Romer LJ in *Strand Electric* at 257, it does not lie in the mouth of Bunnings to suggest that the damages that it should pay should be reduced by reason of some benefit that it might have obtained had it bargained for the use of the chattels instead of converting or detaining them.
>
> [263] To the extent that it may be said that Chep cannot prove what particular hirers would have paid, then, I think, one should assess damages robustly and against Bunnings, whose wrongful detention and conversion of the pallets has rendered precise quantification impossible.

> [264] Essentially for the reasons that I have indicated already, I do not think that it is correct to say that Chep has been compensated in full by receiving (if it has done so) compensation from hirers for the loss of the pallets in question. As the figures set out at [204] and [205] above show, that compensation does not cover the capital cost of replacement. It does not compensate at all for the annual cost of repair. Chep claims neither the cost of replacement nor the cost of repair in these proceedings. It has limited its case to loss of use."

185 I respectfully disagree. First, Chep abandoned other bases of compensation. The focus should be on the appropriate measure of hire. The market or standard rate is to be chosen because it best reflects what the converter or detainer would have to pay and what the owner should obtain for his property wrongfully retained. Of course, it does not lie in the wrongdoer's mouth to posit a speculative advantage that it might have got had it not committed the wrong. That, however, is not the position in relation to the conversion or detinue after 8 August 2006. The very act of conversion and detinue was the refusal to enter a transaction, effectively on offer at the Wesfarmers' rate: see for example the Hire Equipment Proposal of March 2006 at section 3.4 (Blue Book Vol 1 p 425). In those circumstances, the very act of conversion or detinue was failing to accept the offer effectively based on the Wesfarmers' rate. This is the appropriate rate from 8 August 2006 for the quantity of pallets withheld and used by Bunnings. To give a higher rate after 8 August 2006 would be to risk over-compensation of the kind in *Butler* where to give damages by reference to the value of the eggs sold by the grower would have given the Board a sum greater than it would have received had the grower complied with the law, breach of which law amounted to the acts of conversion. If this is the rate, I would still maintain the primary judge's usage of 90 per cent of the pallets upon which he calculated damage, as it reflected the evidence of Chep as to usage rates and also gave a margin to accommodate the possibility that some pallets were lying idle in Bunnings without either being used by way of possession or circulating in the carrying on of Bunnings' business.

186 As to any conversion prior to 2006 of the ad hoc kind to which I have referred, there is no reason why the Wesfarmers' rate should apply. There was no overarching offer for a commercial arrangement at that time and Bunnings has, on an ad hoc basis, converted the property of Chep. The standard hire rate should apply in those circumstances, if there are to be any orders about this conversion before 8 August 2006.

Ground 13: interest

187 The complaint concerning interest was that pre-judgment interest should not have been awarded on damages which were not truly compensatory. It was submitted that the damages that were awarded by the application of the *Strand Electric* principle meant that Chep had not been required to establish

that it would have hired out the pallets and so in effect it was not required to establish actual loss.

188 The primary judge dealt with the matter at [269]-[273] of the reasons. In doing so his Honour distinguished the decision of *Screenco Pty Ltd v R L Dew Pty Ltd* [2003] NSWCA 319; 58 NSWLR 720. In that case pre-judgment interest was not awarded upon the cost of a profit earning chattel which had not as yet been paid. Handley JA said at 724 [14] that in those circumstances although the plaintiff had lost the chattel and its use, "in a real and practical sense [it] had not lost its money because it had not paid for the screen" see also Tobias JA at 748 [21]. Ultimately, the central matter for both Handley JA and Tobias JA (with whom Sheller JA agreed) was whether or not the award of interest would over compensate the plaintiff.

189 The legal principle underlying the proper award of pre-judgment interest was dealt with in *Haines v Bendall* [1991] HCA 15; 172 CLR 60 at 66. Interest is an integral element in the attainment of the object of damages, namely, to compensate a plaintiff for injury sustained. Thus the award of interest is compensatory in character, being an essential element in the achievement of true compensation.

190 The nature of the award of damages based on *Strand Electric* does not deny the compensatory character of interest that is awarded upon it. The owner, here Chep, has been held out of moneys that it was entitled to as a proper reflection of the use of its property. Notwithstanding or subject to the views earlier expressed on the compensatory nature of the award of damages under *Strand Electric* , even if there may be seen to be a restitutionary element in that calculation, it is one that is taken as the proper assessment of the loss of the proprietary character which I have discussed.

191 In my view, interest is properly to be awarded on the damages calculated by reference to *Strand Electric* and *Gaba Formwork* .

Orders

192 I would grant the parties leave to file within 14 days the draft orders that each submits should flow from these reasons and submissions of no more than ten pages each in support thereof. It will be necessary to list the matter promptly for the resolution of orders given the announced retirement of one of the members of the Court on 23 December.

193 **GILES JA** : I agree with Allsop P, save for abstaining in part from [173] and otherwise saying a little more on the application of *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* (1952) 2 QB 246 (" *Strand Electric* ").

194 The jurisprudential basis for the award of damages in *Strand Electric* is open to debate, and has been debated. A conspectus can be found in Palmer & McKendrick *, Interests in Goods* , 2nd ed, at 849-853 (Emeritus Professor Hudson); 908-916 (Professor McKendrick). Some regard to it is appropriate in an endeavour to elucidate what is necessary or sufficient for use of the converted chattel by the defendant and whether *Strand Electric* applies to Bunnings' conversion or detention of Chep's pallets.

195 Sometimes the award of damages has been treated as within mainstream compensatory principles. I would so understand, for example, *McKenna v Armistead Pty Ltd v Excavations Pty Ltd* (1957) 57 SR (NSW) 515 at 519; *Egan v State Transport Authority* (1982) 31 SASR 481 at 529; *Hillesden Securities Ltd v Ryjack Ltd* (1983) 1 WLR 959 at 963; and *Mrs Eaton's Car Sales Ltd v Thomasen* (1973) 2 NZLR 686 at 691-2. On that approach the plaintiff is regarded as having lost the market value of the use of the chattel by hiring it out. There is support for the approach in the reasons of Somervell LJ and Romer LJ in *Strand Electric* , but there was nonetheless infringement of compensatory principles because the plaintiffs had not proved a loss: as was said by Nourse LJ in *Stoke-on-Trent City Council v W & J Wass Ltd* [1988] 1 WLR 1406 at 1412, their Lordships "assume that the plaintiffs had suffered loss through being unable to hire out the switchboards to other users".

196 In other cases a restitutionary element has been indicated, whereby the defendant pays damages representing the benefit received by the defendant through having the use of the chattel without paying for it. On this approach the benefit is measured by what the defendant would have had to pay for the use of the chattel. It is what Lord Nicholls in *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34; (2008) 1 AC 651 at [116] called restitution for wrongdoing and Tipping J in *Stevens v Premium Real Estate Ltd* [2009] NZSC 15 at [102] called restorative damages; see also Professor Edelman (now Edelman J), "The measure of restitution and the future of restitutionary damages", 18 Restitution L Rev 1-13. It was the approach of Denning LJ in *Strand Electric* , which may have been approved in the Privy Council in *BBMB Finance (Hong Kong) Ltd v EDA Holdings Ltd*(1990) 1 WLR 409 at 412. In compensatory terms, it is the plaintiff's loss of the value of the use of the chattel by hiring it to the defendant.

197 Apart from *Gaba Formwork Contractors Pty Ltd v Turner Corporation Ltd* (1991) 32 NSWLR 175, the restitutionary element can be seen in the "user principle" identified by Nicholls LJ in *Stoke-on-Trent City Council v W & J Wass Ltd* at 1416, founded in particular in cases on the use of land. Allsop P has referred to a number of those cases. Nicholls LJ's user principle was adopted in the Privy Council in *Inverugie Investments Ltd v Hackett* [1995] 1 WLR 713. More widely, the use of a defendant's gain or saving of expense as the

measure of the plaintiff's loss, as an exception to the compensatory basis of damages, has been recognised in *Attorney General v Blake* [1998] Ch 439: Lord Woolf MR at 445 referred in particular to *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798, which itself relied on Denning LJ's judgment in *Strand Electric* , with the observation that "the classification of such cases as compensatory or restitutionary has been controversial".

198 The analogy with mesne profits upon which both Somervell LJ and Denning LJ drew in *Strand Electric* is of some significance. A trespasser upon land is generally liable to pay the market rent for the land whether or not the landowner would have been willing or able to let the land to someone else: see for example *Lamru Pty Ltd v Kation Pty Ltd* (1998) 44 NSWLR 432 at 439 and cases there cited and *Inverugie Investments Ltd v Hackett* at 717. Once there is departure from strict compensatory principles in some circumstances, as the law undoubtedly permits, a restitutionary element for conversion or detinue in damages representing what the defendant would have had to pay for the use of the chattel can readily enough be accepted.

199 I respectfully prefer that view of *Strand Electric* . On strict compensatory principles, the tortfeasor's use of the chattel once conversion or detinue has been found would not matter for damages.

200 Although their Lordships' reasoning differed, in *Strand Electric* use of the converted chattel by the defendant was required by each member of the Court. The portable switchboards were not operated by the defendants, but were kept in the theatre to assist in its sale or lease. Somervell LJ concluded that the defendants used the switchboards, and distinguished between a warehouseman who merely stores goods and a person who enjoys their beneficial use (at 250). His Lordship referred to the switchboards as profit-earning in the hands of the defendants (at 249-250). Denning LJ regarded the defendants as having made use of the switchboards for their own purposes (at 252). Romer LJ considered that the defendants applied the switchboards to the furtherance of their own ends, and said specifically that it was immaterial that they did not actively operate them (at 256).

201 The limited nature of the defendants' use of the switchboards in *Strand Electric* is consistent with both approaches abovementioned. There is no occasion to require active use of the converted chattel; the focus is on the defendant's use as an assumed hiring of the chattel from the plaintiff or a hiring which the defendant bypassed through the conversion or detention of the chattel. It is sufficient that the use be the kind of use that would be made of a hired chattel. In this respect the warehouseman may illustrate insufficiency of use, although in the absence of demand the warehouseman would ordinarily have no liability. The analogy with the mesne profits cases would not necessarily exclude the warehouseman's continued possession after demand - the

trespasser is liable for the reasonable rent no matter what the trespasser does with or on the land.

202 After 8 August 2006 Bunnings clearly used Chep's pallets in storing and displaying goods, in transporting goods on the original pallets to other places, and in occasionally transporting its own goods palletised on Chep pallets. The only question is whether it relevantly used Chep's pallets when they were lying at Bunnings' premises as a pool of pallets not in active use.

203 In my view, for the purposes of application of *Strand Electric* it used those pallets. The pool was one into which Bunnings put the pallets it had used to store, display and transport goods and from which it took pallets on which it transported the goods it palletised. It also put into and took from the pool the pallets received from and returned to suppliers on ordinary turn-around of pallets, but the undifferentiated pool was more than a collection of pallets committed to return to suppliers. Even though at any one time not all the pallets were in active use, the pool was part of Bunnings' business operations and all the pallets in the pool were available for active use for the purposes abovementioned. The value of this to Bunnings' business operations is shown by its resistance to returning pallets to Chep. This was the kind of use Bunnings would make of the pallets if hired from Chep.

204 For the period prior to 8 August 2006 the uses other than for transporting the goods it palletised, albeit as part of Bunnings' business operations, were not conversion because not repugnant to Chep's rights of ownership or possession. However, for that period the conversion by appropriating pallets to be used for carrying Bunnings' goods was again plainly use of the pallets for the purposes of the application of *Strand Electric* .

205 My preferred approach to the award of damages then informs whether the damages are to be calculated at Chep's ordinary rate or at the Wesfarmers rate. The damages represent the expense saved *by Bunnings* through having the use of the pallets without paying for their hire. The damages are the amount *Bunnings* would have to pay for the use of the pallets, not the amount a third party would have had to pay for their use. Thus the Wesfarmers rate should be used.

206 **MACFARLAN JA:** I agree with Allsop P.

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Decision last updated: 11 November 2011