IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL DIVISION
EXPEDITED LIST

Revised
Not Restricted
Suitable for Publication

Case No. CI-17-00544

Anthony Katranis — Plaintiff

v

Van Bahrou and Bruno D'Azzena — Defendants

JUDGE:	Judge Woodward
WHERE HELD:	Melbourne
DATE OF HEARING:	6-7 May 2019
DATE OF JUDGMENT:	9 May 2019
CASE MAY BE CITED AS:	Katranis v Bahrou & D'Azzena
MEDIUM NEUTRAL CITATION:	[2019] VCC 602

REASONS FOR JUDGMENT

Subject:	LANDLORD AND TENANT
Catchwords:	Refusal by landlord to allow tenant to recover chattels after termination of lease – no right to distress for rent – conversion of chattels – value of chattels converted – calculation of interest on damages for conversion
Legislation Cited:	*Supreme Court Act 1986* (Vic), s59
Cases Cited:	*Asian Pacific Building Corporation Pty Ltd v Sharon-Lee Holdings Pty Ltd* [2013] VSC 11; *ACN 116 746 859 (formerly Palermo Seafoods Pty Ltd v Lunapas Pty Ltd & Anor* [2017] NSWSC 1583; *Penfolds Wines v Elliot* (1946) 74 CLR 204; *Upton & Anor v TVW Enterprises* (1985) ATPR 40-611; *Australian Guarantee Corp Ltd v Commissioners of the State Bank of Victoria* [1989] VR 617; *Nemur Varity Pty Ltd v National Australia Bank Ltd* [1999] VSC 366

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr S Davison	Maciel Pizzorno & Co Lawyers & Consultants
For the First Defendant	No appearance	
For the Second Defendant	In person	

HIS HONOUR:

Summary and outcome

1 Between around late 2014 and September 2016, the plaintiff Anthony Katranis owned a car maintenance and repair business operating from rented premises at 31 Lawson Crescent, Thomastown ("Workshop"). The second defendant Bruno D'Azzena is the owner of the Workshop. Mr Katranis alleges that Mr D'Azzena converted items comprising tools, equipment and cars in various states of repair (the "Equipment") belonging to Mr Katranis and held at the Workshop, by refusing to allow Mr Katranis to collect them after Mr D'Azzena terminated the lease for non-payment of rent.

2 The issues in this proceeding are:

- Did Mr D'Azzena's refusal in late November 2016 to allow Mr Katranis to collect the Equipment amount to the conversion of the Equipment?
- If so, what was the value of the Equipment so converted as at the date of conversion?
- Is Mr D'Azzena entitled to set-off against any damages he is liable to pay to Mr Katranis the rent of $7420.00 unpaid by Mr Katranis at the date of termination of the lease?

3 In my judgment, Mr D'Azzena's conduct in refusing to allow Mr Katranis to recover the Equipment from the Workshop in around late November 2016 was a conversion of the Equipment. Mr D'Azzena is therefore liable to pay Mr Katranis damages for that conversion, being the value of the Equipment at the date of conversion. Determining that value is far from straightforward, but I have concluded for the reasons below that the amount of the damages payable by Mr D'Azzena is $101,460. I have also concluded that Mr D'Azzena is entitled to set-off against that sum unpaid rent in the sum of $7,420. I will therefore order that there be judgment in favour of Mr Katranis against Mr D'Azzena in the net amount of $94,040, plus interest and costs.

The Trial

4 Before setting out the factual background and my reasons, it is appropriate that I say something about the conduct of the trial. Mr Katranis secured judgment in default of defence against the first defendant Van Bahrou by order of Deputy Registrar D Johnston on 17 January 2018 in the total sum of $144,509.52, including costs and interest. Mr Bahrou took no part in the trial. Mr Katranis was represented by solicitors and counsel during the interlocutory stages and throughout the trial.

5 Turning to Mr D'Azzena, I know nothing about his financial position, except that he owns the Workshop, and remarks made by him during the trial suggest that he considered all the lawyers he spoke to about representing him at trial to be too expensive. Thus, while it appears that he may have retained solicitors in the early part of the interlocutory stages of the proceeding, he represented at trial. This created considerable difficulties for the conduct of the trial. Mr D'Azzena is elderly (his evidence was that he was 83 years old), apparently in poor physical health and has only limited grasp of English.

6 Moreover, he was prone to frequent intemperate outbursts during the trial, directed particularly to witnesses and Mr Katranis. These outbursts were often followed by periods where Mr D'Azzena was tearful and clearly suffering considerable distress. When he spoke, he tended to shout, often speaking over the interpreter and other witnesses or the questioner. This made the role of the interpreter and (I imagine), the transcription agency, particularly taxing. Mr D'Azzena apologised for his outbursts on occasions when I was forced to intervene, referencing his high blood pressure and general ill health to excuse his behaviour. However, it was not clear to me how these factors exacerbated his outbursts. Indeed, had he been in more robust health, I expect they may have been even more disruptive.

7 In any event, the combined effect of these factors was that it was difficult for me to explain to Mr D'Azzena what issues he needed to deal with in the trial, how

he should go about questioning the witnesses and giving evidence and explaining what matters he wanted me to consider in support of his defence of the claim against him. To the extent that I attempted explanations, it was hard to discern how much (if any) of them were understood by Mr D'Azzena. That is not to say that Mr D'Azzena was either unintelligent or suffering any apparent mental impairment. Instead, my impression was that he simply would not listen to anything that did not accord with or reinforce his single-minded view of what issues were important.

8 Nevertheless, in recognition of these difficulties, I granted Mr D'Azzena considerable leeway in getting assistance from his daughter (on the first day of the trial) and the interpreter engaged by him. I wish to record my gratitude for their efforts, particularly those of the interpreter, who was required at times both to calm Mr D'Azzena and try to articulate his case for him. Despite this assistance, I was forced to take a greater role in the conduct of the trial than I would have liked, even for a case involving a self-represented litigant. This included assisting to identify the topics Mr D'Azzena should deal with in cross-examination of witnesses, asking questions myself to extract relevant evidence (particularly during Mr D'Azzena's evidence), testing the submissions made on behalf of Mr Katranis and framing the grounds for Mr D'Azzena's defence of the claim.

9 In doing this, my aim was to do justice to Mr D'Azzena's defences and set-off claims, without being seen to unduly favour his arguments over those of Mr Katranis. But based on his demeanour during the trial, I have little confidence that Mr D'Azzena will accept that the law requires him to pay money to Mr Katranis. Mr D'Azzena clearly considered that Mr Katranis's non-payment of rent and other alleged breaches of the lease entitled Mr D'Azzena to flout the VCAT order and refuse to allow Chris Katranis or anyone else access to the Workshop to recover the Equipment until the rent was paid. Mr D'Azzena appeared to me stubbornly to hold to the conviction that if he could prove these

breaches, his actions would be vindicated.

10 The problem for him was that, apart from the issue of the amount of rent owing on termination (later conceded by Mr Katranis), the breach of the lease and the validity of its termination were not in dispute. The only issue was whether that breach entitled Mr D'Azzena to refuse demands for the return of Mr Katranis's Equipment. And, as explained below, the law on this is clear. On the facts of this case, Mr D'Azzena had no such right. He was entitled to his rent, but he was not entitled to claim distress for rent or, in other words, to hold the Equipment hostage until the outstanding rent was paid. I fear my attempts to explain this aspect of the law to Mr D'Azzena (including at the commencement of the trial) fell on deaf ears.

Background

11 Mr Katranis began leasing the Workshop in late 2014 or early 2015. His evidence was that he signed a 12 month lease agreement with Mr D'Azzena at a rental of $2000 plus $355 outgoings per month. The written lease was not in evidence. It is possible that Mr Katranis was unable to produce it because it (along with receipts and other documents) was still held at the Workshop. There was no evidence before me about why it had not been produced by either party or what was in the lease. Importantly, there was no attempt by Mr D'Azzena in his pleadings or otherwise to rely on any term of the lease to justify his refusal to facilitate collection of the Equipment. By the time of the events giving rise to the issues in this proceeding, the original 12 month term of the lease had expired and Mr Katranis was continuing to occupy the Workshop pursuant to a month to month tenancy.

12 After signing the lease agreement and moving into the Workshop, Mr Katranis began establishing his car repair and maintenance business. To that end, he agreed to purchase a hoist already installed in the Workshop from Mr D'Azzena and began the process of securing the other equipment necessary to operate the business. This involved both relocating equipment from other workshop

premises in which he was involved and purchasing some items of new equipment. Mr Katranis also purchased or otherwise secured cars that were in need of repair or as a source for spare parts. Part of his business involved repairing cars for resale.

13 Mr Katranis gave evidence that in early 2016, he got into financial difficulties as a result of some poor decisions, including losing money by gambling. He began to get behind in his rental payments to Mr D'Azzena. At about this time, Mr Katranis's brother Chris Katranis and his father Michael Kyriackou became actively involved in the business in an attempt to assist Anthony to get the business back on track. Chris Katranis gave evidence that in the second half of 2016 he was working in the business on an almost daily basis and that Mr D'Azzena saw him working at the business on numerous occasions during this period.

14 By around August or September 2016, Mr Katranis was again behind in his rent. In September 2016, Ray Mascaro Real Estate (Mr D'Azzena's managing agents) served on Mr Katranis what he described as a "lockout notice". However, on about 23 October 2016, Chris Katranis was able to negotiate with Ray Mascaro Real Estate to be permitted to remain in the Workshop, on the basis that he paid one month's rent and outgoings. He did this by paying $1,900 in cash that day and the balance of $455 a short time later. In the preceding weeks, Mr Katranis's father had made arrangements with Sam Bahrou (a panel beater employed in the business and the brother of the first defendant Van Bahrou) to sublease the Workshop and pay the rent. There is a dispute on the evidence as to whether or not Mr D'Azzena agreed to the subleasing arrangement, but nothing turns on this.

15 In late October or early November 2016, Mr Katranis received a telephone call from Sam Bahrou telling him that he (Mr Bahrou) had again been locked out of the Workshop by Mr D'Azzena. Mr Katranis gave evidence that he then

telephoned Ray Mascaro Real Estate to find out why Mr Bahrou had been locked out, and was informed that Ray Mascaro Real Estate was no longer managing the premises. After failing to resolve the impasse with Mr D'Azzena, Mr Katranis sought to make arrangements to recover his Equipment. He was ultimately forced to bring proceedings in VCAT for orders that he be given access to the Workshop for that purpose.

16 Those orders were made by Senior Member E Reigler on 21 November 2016. The orders were relevantly to the effect that Mr D'Azzena must give Mr Katranis access to the Workshop for the sole purpose of allowing Mr Katranis to remove the items in a list attached to the orders, and that access was to be given by Mr D'Azzena on each of 25, 26 and 27 November 2016 between the hours of 9.00am and 6.00pm ("VCAT orders").

17 The evidence was that Mr Katranis's solicitors arranged service of the orders on Mr D'Azzena. Remarks made by Mr D'Azzena from the bar table gave me the impression that he disputed receiving the VCAT orders at any time before 25 November 2016. However, Ms Ferraro (the property manager at Ray Mascaro Real Estate) later gave evidence that she had received the VCAT orders on 21 November 2016 and that (as best she could recall) she gave a copy to Mr D'Azzena that day or the next. And in his evidence that followed, Mr D'Azzena agreed that he was aware of the VCAT orders and had a copy when he attended at the Workshop on 25 November 2016, in the circumstances described below.

18 Anthony Katranis gave evidence that he arranged with his brother Chris to secure transport (including tow-trucks) to begin moving the Equipment from the Workshop on the morning of 25 November 2016. He said that he was planning to join his brother to assist with the move later in the morning. Chris Katranis's evidence was that, when he arrived at the Workshop that morning, it was locked and there was no one present to facilitate access. He telephoned Mr Katranis's

solicitor who in turn contacted Mr D'Azzena. Mr D'Azzena arrived at the Workshop soon after.

19 Chris Katranis said that he showed a copy of the VCAT orders to Mr D'Azzena and told him that he needed to open up the Workshop "so we can collect our goods". Mr Katranis said that he offered a copy of the orders to Mr D'Azzena but he refused to take it. He told Mr D'Azzena again that "these are the orders" and he had to open the Workshop. He said that Mr D'Azzena's only response was, "I'm not opening it until I get my rent". Chris Katranis then telephoned the solicitor again to say that Mr D'Azzena was not opening the factory. The solicitor asked Chris Katranis if he had shown him a copy of the orders, to which Mr Katranis replied "yes, he won't accept it". He told the solicitor that Mr D'Azzena was being very aggressive and he did not want any confrontation. The solicitor advised him just to leave.

20 Chris Katranis later added that the arrangement with Anthony was that Anthony was going to come down as well and help remove everything, and he believed Anthony was on his way when he spoke to Mr D'Azzena at the Workshop. He said that once he decided to leave, he must have advised Anthony not to attend, but he did not have a clear recollection of this. He repeated that Mr D'Azzena gave no reason for his refusal to provide access apart from him wanting money for the rent.

21 Mr D'Azzena's evidence about this encounter conflicted with Chris Katranis's in some (but not all) respects. Mr D'Azzena said in substance that he arrived at the Workshop at about 9.30am. When he arrived, Sam Bahrou was already at the Workshop and the gate and roller-door were both open. He said that he was waiting in his car at the Workshop for a time and was still there when Chris Katranis arrived to collect the Equipment. He denied that he left the Workshop and returned later when he was told Mr Katranis had arrived. He said he had a copy of the VCAT orders with him.

22 He did not go into detail as to what was said between Mr Katranis and him. Also, it was not entirely clear to me on Mr D'Azzena's account whether the Workshop was still open when he says Chris Katranis arrived. In relation to Sam Bahrou, Mr D'Azzena seemed to say that Mr Bahrou was waiting with him outside the Workshop when Mr Katranis arrived. Mr Bahrou was not called to give evidence. Mr D'Azzena said this was because Mr Bahrou was unwilling to do so. In any event, on the one key issue, Mr D'Azzena's evidence was clear. He agreed that he said to Chris Katranis that morning that he would not permit Mr Katranis to enter the Workshop to collect the Equipment until all outstanding rent was paid. His evidence on this issue was as follows:

> "I said to him, the equipment is in there, but I want my rent. I want the money. He said, oh I've got this document, and I said, that's not good enough … I'm happy with that, but you give me the money… I didn't give him the equipment and he left and it ended there."

23 There is some suggestion on Mr D'Azzena's pleading and from remarks made by him at various points in the trial, that his reason for denying Chris Katranis access to collect the Equipment on 25 November 2016 was that the VCAT orders gave authority to only Anthony Katranis to collect the Equipment. However, this position evaporated in the course of Mr D'Azzena's evidence. It was also inconsistent with earlier statutory declarations sworn by him and the evidence of Ms Ferraro. His evidence was that, if Chris Katranis had paid all the outstanding rent when he arrived on the morning of 25 November 2016 to collect the Equipment, he would have allowed Mr Katranis to take the Equipment that morning. He said: "Yes, and I would have given him a bottle of whiskey, and I would have helped him."

24 Indeed when I asked him at the conclusion of his evidence if it remained his position to this day that he would not allow Mr Katranis to collect the Equipment until his rent was paid, he answered "Yes and the money that I've lost, there's a list, I'm being honest here":

25 Given these matters, it is probably unnecessary for me to resolve the conflict in

the evidence of Chris Katranis and Mr D'Azzena about the events of the morning of 25 November 2016. However, while I accept that Mr D'Azzena may have been present at the Workshop earlier in the morning, I generally prefer the evidence of Mr Katranis that no-one was present and the Workshop was locked when he first arrived. His account of events was straightforward and frank. Further, his arrival to find no-one in attendance, followed by his telephone call to the solicitor, are matters that are more likely to stick in his mind. Mr D'Azzena, on the other hand, could have confused this occasion with the many other times he attended the Workshop in 2016 and 2017 to find Sam Bahrou present and working there. And given that it is not in dispute that he met and spoke to Chris Katranis at the Workshop at some point during the morning of 25 November 2016, arriving after Mr Katranis (having possibly been there briefly earlier that morning) could easily have slipped Mr D'Azzena's mind.

26 Further, Chris Katranis's account of turning up to find no-one present, is consistent with Ms Ferraro's evidence. She gave evidence that Mr D'Azzena telephoned her at 9.00am or 9.30am on 25 November 2016 and said that he had arrived at the Workshop and no-one was there to collect the Equipment. A short time later, Chris Katranis called her and said that he was at the Workshop and there was no-one there. She then called Mr D'Azzena to let him know that Chris Katranis was at the Workshop and Mr D'Azzena told her that he had already left. Ms Ferraro also gave evidence that Mr D'Azzena had made clear to her that he would not allow the collection of the Equipment until his rent was paid.

27 There was some evidence of later steps taken by Anthony Katranis to recover the Equipment to no avail, including commencing proceedings in the Supreme Court in December 2016 seeking an interlocutory injunction requiring the first defendant Mr Van Bahrou to deliver up the Equipment. That proceeding was later transferred to this court and became this proceeding. Orders were made in the proceeding on 7 July 2017, after the transfer, giving leave to join Mr

D’Azzena as second defendant and file and serve a writ and statement of claim. However, given my conclusion below that the conversion occurred on 25 November 2016, it is unnecessary for me to examine those later attempts by Mr Katranis to recover the Equipment.

28 Mr D’Azzena entered into a new lease with Van Bahrou dated 18 November 2017. There was some suggestion that it was a term of that lease that Mr Bahrou not allow Mr Katranis to enter the Workshop and collect the Equipment until the rent arrears (and possibly other losses allegedly incurred by Mr D’Azzena) were paid. However, Mr D’Azzena gave evidence that, while it was not a term of the lease, he gave instructions to Van and Sam Bahrou to this effect at the time he entered into the new lease with Van Bahrou on 18 November 2016. Further, the evidence was that Sam Bahrou continued to use the tools and other equipment throughout the relevant period, including after the signing of the new lease to Van Bahrou. Given the evidence of his regular attendance at the Workshop, I am prepared to infer that Mr D’Azzena was aware that this was occurring.

Analysis

Was there a conversion of the Equipment by Mr D’Azzena?

29 The history of the law relating to distress for rent is conveniently and comprehensively summarised in the decision of Garde J in *Asian Pacific Building Corporation Pty Ltd v Sharon-Lee Holdings Pty Ltd* [2013] VSC 11 at [16] to [39]. I adopt, with respect, His Honour’s analysis noting, in particular, his reference at [35] to the decision of Phegan DCJ in *Sokolinsky v Hanave Pty Ltd* (Unreported, NSW District Court, Phegan DCJ, 18 February 2000) involving facts similar to the present. A failure to remove chattels before termination of a lease does not bring about a change of ownership of the chattels and will not confer on a landlord a lien or other rights to refuse access to the chattels, unless the lease, in clear terms, brings that about. As noted above, there is no evidence that the lease in this case contained any such terms.

30 Given that Mr D'Azzena had no basis for retaining the Equipment pending payment of the outstanding rent, I turn to the question of whether his doing so amounted to a conversion of the Equipment. In *ACN 116 746 859 (formerly Palermo Seafoods Pty Ltd v Lunapas Pty Ltd & Anor* [2017] NSWSC 1583 ("*Palermo Seafoods*"), Slattery J summarised the relevant principles at [108] to [113]. Paraphrasing His Honour's summary to the extent relevant to this case, His Honour held (omitting most citations):

- in *Penfolds Wines v Elliot* (1946) 74 CLR 204, at 229, Dixon J identified the elements of the tort of conversion (Starke J agreed with His Honour's statements of principle, at 221):

  "(a) A person has actual possession, or an immediate right of possession in the chattels; and

  (b) Another person deals with the chattels inconsistently with, or "in a manner repugnant" to, the former person's immediate right of possession in the chattels."

- the authorities establish that a finding of an action in conversion involving a dealing in, or exercising ownership over goods, amounts to the required infringement of the owner's possessory or proprietary rights if it constitutes an "intended act of dominion or assertion of rights over the goods";

- the intent required to be established does not need to include the specific intent to deprive the plaintiff of its rights in respect of the property;

- but established principles must be applied in analysing how the goods are employed in the context of the particular factual circumstances, to determine whether or not a conversion is established;

- a demand is one way of establishing conversion, but it is not the only way;

- once the degree of use amounts to employing the goods as if they were

owned, then a conversion is established;

- that point can be reached without any subjective intention to convert the goods;

- a conversion could be demonstrated, for example, by locking up the plaintiff's tools or stock, so the plaintiff cannot use them, without lawful excuse (*Upton & Anor v TVW Enterprises* (1985) ATPR 40-611 ("*Upton*");

- in *Upton*, the landlord permitted some items of stock to be recovered, but the balance of the stock remained under the control of the landlord, which either declined, or failed, to re-deliver the stock to the tenant after the tenant's oral request; and

- the court in *Upton* found that notwithstanding that the landlord had not otherwise demonstrated an intention to keep and use the stock as its own, by selling some of it or by otherwise dealing with it, the keeping of the stock with the intention to keep it in defiance of the plaintiff amounted to conversion by detention.

31 In this case, applying those principles, I consider the position could hardly be clearer. Mr Katranis's immediate right to possession by no later than 25 November 2016 was unequivocally established by the VCAT orders. And, in my view, by either or both of the following actions, Mr D'Azzena dealt with the Equipment inconsistently with, or "in a manner repugnant" to, that right to possession. The actions were:

- giving the instruction to Sam and Van Bahrou on around 18 November 2016 when the new lease was signed, not to allow Mr Katranis into the Workshop to collect the Equipment until all rental arrears and other losses were paid, in the knowledge that Sam Bahrou was using some of the Equipment and would likely continue to do so while it remained at the

Workshop; and

- his express and relevantly unqualified refusal on 25 November 2016 to allow Chris Katranis to collect the Equipment, without reasonable excuse and in flagrant defiance of the VCAT orders.

32 On the issue of "reasonable excuse", as noted above, there is some suggestion (arising from paragraph 7 of his defence) that Mr D'Azzena refused access because the VCAT orders gave authority only to Anthony Katranis to attend and collect the Equipment on 25 November 2016, not his brother Chris. The defence states: "The agreement was broken; therefore the goods were not released". There are several difficulties with this. First, Mr D'Azzena knew that in the months leading up to the termination of the lease, Chris Katranis was effectively operating the business on behalf of his brother, and thus he would also have known there was nothing untoward in Chris Katranis being involved in the collection of the Equipment.

33 Second, Mr D'Azzena's evidence as set out above was to the effect that his only reason for refusing access was the non-payment of rent. In particular, he agreed that had Chris Katranis paid the outstanding rent on the morning of 25 November 2016, he would happily have allowed him into the Workshop to collect the Equipment. And, third, it is clear from the evidence as a whole that Mr D'Azzena's refusal to allow the collection of the Equipment until the rent was paid was at all relevant times, intractable. I am satisfied that even if Anthony had presented himself to Mr D'Azzena at the Workshop on the morning of 25 November 2016 instead of Chris, Mr D'Azzena's response would have been no different. Further, Chris Katranis was justified, in the face of Mr D'Azzena's aggression, to form the view that continuing attempts to secure Mr D'Azzena's compliance with the VCAT orders was pointless, and to inform Anthony accordingly.

34 In the circumstances, I am satisfied that Mr D'Azzena had converted Mr

Katranis's Equipment by no later than 25 November 2016, and Mr Katranis is therefore entitled to an order against Mr D'Azzena for damages for that conversion.

35 In the course of reviewing the court file in the proceeding, I noticed that orders made at a directions hearing before Judicial Registrar Tran on 13 November 2017 record in other matters that:

> "The Second Defendant has made an open offer to the Plaintiff in Court today to allow the Plaintiff to collect all goods still being stored at 31 Lawson Crescent, Thomastown, and to arrange for the First Defendant to allow the Plaintiff to collect all the goods still stored at 31 Lawson Crescent, Thomastown with the exception of one motor vehicle".

36 No reliance was placed on this offer by Mr D'Azzena at trial but, having regard to his being unrepresented, it is appropriate that I say something about the implications of the offer. The first thing to note is that it does not sit comfortably with Mr D'Azzena's evidence before me that it remains his position to this day that he is unwilling to allow collection of the Equipment until he is paid the rent arrears, as well as other sums he now claims he has lost. This raises a question in my mind about whether the offer was conditional on payment of rent. It is possible that the one motor vehicle Mr D'Azzena was purporting to keep was to cover the rent.

37 In any event, as I have found, the conversion of all the Equipment occurred about 12 months earlier, on 25 November 2016. Accordingly, Mr Katranis had a vested cause of action for the value of the Equipment on and from that date. In my view, he was not bound to accept the return, particularly in circumstances where it is likely that the condition and value of the Equipment has deteriorated significantly in the intervening period (see, generally, Sappideen C and Vines P, *Fleming's Law of Torts*, 10th Ed 2011 Thomson Reuters, at p84 [14.260]). The offer may have been relevant to an argument of failure to mitigate loss, but none was pleaded by Mr D'Azzena or advanced at trial.

What was the value of the Equipment so converted?

38 Again, the principles relevant to assessing damages for conversion are conveniently summarised by Slattery J in *Palermo Seafoods* at [162]-[164] as follows (omitting citations):

- the measure of damages for an established conversion is ordinarily the value of the goods converted at the date of conversion, together with any consequential loss which may be proved by the plaintiff;
- if a market value for the goods can be determined, that value will likely be considered appropriate;
- but where there is no market value, an award equivalent to the replacement cost of the goods in a similar condition may be considered an appropriate remedy;
- courts have recognised in some situations the possibility of consequential loss for conversion, additional to the loss of the value of the goods;
- Australian authorities have also recognised that an award to reflect any consequential damages may be appropriate in particular circumstances, such as an increase in market value;
- when profit-earning goods are converted, the hire value to the party which has converted the goods can be a basis for an award of damages;
- the purpose of such an award of damages must be to place the plaintiff in the position it would have been in, had the tort or torts not been committed; and
- despite the actions taken by a defendant in converting goods, a plaintiff is ordinarily required to mitigate its loss if able to do so.

39 My task in this case is simplified by the fact that Mr Katranis's claim for damages

is in substance limited to the value of the Equipment at the time of the conversion. He makes no claim for consequential loss. However, as noted above, determining that value is not straightforward. Mr Katranis's statement of claim seeks damages in the sum of $135,280, broken down by item in schedule A to the statement of claim. The evidence at the trial as to the value of the Equipment comprised a report from an expert auctioneer on behalf of each party. Mr Katranis relied on a report from Martin Evans of ME Auctions dated 1 May 2019 ("Evans Report"). Mr D'Azzena sought to rely on a report dated 23 July 2018 from Tom Lockwood of Lockwood & Co Pty Ltd ("Lockwood Report").

40 Mr Evans gave evidence explaining and verifying the Evans Report and was cross-examined. Despite some indication on the first day of trial that Mr D'Azzena would be able to secure Mr Lockwood's attendance at court to verify the Lockwood Report, he was ultimately unable to do so. On the second day of trial, Mr D'Azzena seemed to be saying that Mr Lockwood was unable to give any commitment as to when he might become available, if at all. In any event, under some pressure from me, Mr Katranis agreed that the Lockwood Report could be tendered by Mr D'Azzena and relied on at trial. Mr Katranis nevertheless submitted (as was his right) that I should give less weight to the Lockwood Report, because it was apparent on the face of the Report that Mr Lockwood had failed to comply with the Expert Witness Code of Conduct. For the reasons below, while I accept that it seems Mr Lockwood was not provided with a copy of the Expert Witness Code of Conduct, it is not necessary for me to reach a concluded view on the implications of this submission.

41 There are two parts to the Evans Report. The first (dated 29 June 2018) comprises a valuation of each item of the Equipment as inspected by Mr Evans at the Workshop in late June 2018. That part of the Evans Report estimates the value of the Equipment to be $38,580. The report provides an itemised breakdown of the Equipment and attaches photographs of each item as

inspected at the Workshop. I note that in the course of his evidence, Mr D'Azzena asserted that Mr Evans never attended the Workshop. I reject that evidence.

42 The second part of the Evans Report is headed "Supplementary Report" and comprises a "Valuation of goods at 31 Lawson Crescent, Thomastown as at November 2017 on the basis that all items are in proper running order and reasonable condition". Mr Evans explained in evidence (and I accept) that his reference to November 2017 was a typographical error, and should have referred to November 2016. This second part of the Evans Report estimates the total value of the Equipment on the basis that all items are "in proper running order and reasonable condition", as $144,322. Mr Evans was an impressive witness and nothing said by him in either his examination or cross-examination caused me to doubt either his expertise and experience in conducting the valuation or the reliability of his assessment of value in both parts of the Evans Report.

43 As noted above, Mr Lockwood did not give evidence. However, it is clear from the Lockwood Report that the valuation undertaken by Mr Lockwood was of the Equipment as inspected on site on about 23 July 2018. There is no attempt in the Lockwood Report to assess what the valuation may have been as at November 2016. Subject to that limitation, the Lockwood Report is broadly consistent with the first part of the Evans Report. The Lockwood Report states that: "the total, present-day value of the assets currently installed and located at [the Workshop] based on a Market Value for Existing Use is $33,190 … and on an Auction Realisation Basis is…$22,450". Thus the difference between Mr Evans' value as at mid-2018 and Mr Lockwood's "market value for existing use" valuation as at that time, is around $5,000.

44 There are only two other items of evidence relevant to the value of the Equipment. The first is the reference in certain documents relied on by Mr

Katranis in earlier proceedings suggesting that the value of the Equipment "not including the cars" was $70,000. By my calculation, this is reasonably close to the value arrived at by Mr Evans in the second part of the Evans Report (his valuation less the itemised value of the cars is approximately $90,000). Further, I accept the evidence of Chris Katranis to the effect that this estimate was a rough estimate arrived at under time pressures and at an early stage in the dispute. In my view, it does not assist me in assessing damages.

45 The second and final item of relevant evidence is a list and invoice prepared in connection with a proposed sale of some of the Equipment by Mr Katranis to Mr Bahrou. This suggests that Mr Katranis was in late 2016 prepared to sell for $12,500 the items of the Equipment that Mr Evans has valued as at November 2016 at around $30,000. The evidence was that Mr Bahrou paid only $5,000 of the $12,500 owing under this arrangement and that this $5,000 was ultimately offset by Mr Katranis against rent and other amounts owing to him by Mr Bahrou. There was also evidence from Chris Katranis that the $12,500 was a discounted price on the understanding that he (Chris Katranis) was to continue to work in the business at the Workshop and thus have the ongoing benefit of the use of the items of Equipment sold to Mr Bahrou.

46 I accept that this price was discounted for the reasons indicated by Chris Katranis, but probably not as heavily as Mr Katranis sought to suggest. Further, I have doubts about the assertion that the $5,000 paid by Mr Bahrou was applied against rent and other amounts owing by Mr Bahrou to Mr Katranis. Thus, in my view, some allowance should be made for the payment by Mr Bahrou of this $5,000 to avoid Mr Katranis being paid twice for some of the Equipment. Subject to these qualifications and one further matter which I will mention shortly, I am satisfied that the starting point for the assessment of damages in this case is the figure of $144,322 stated in the second part of the Evans Report.

47 The further matter was raised by me with counsel for Mr Katranis in the course of closing submissions. I indicated to counsel that it might be expected if Mr D'Azzena had been represented at trial, that it would be submitted on his behalf that the second part of the Evans Report represented a "best case" assessment of the value of the Equipment. Such a submission would be to the effect that there should be some further discounting of the values ascribed, given that it was unlikely that all items of the Equipment were in fact "in proper running order and reasonable condition" in November 2016. Counsel for Mr Katranis conceded that there would be some force in such a submission.

48 Taking all of these factors into account and doing the best I can on the evidence adduced, I propose to assess damages on the basis of the second part of the Evans Report (his supplementary report), subject to two matters. First, as no application was made on behalf of Mr Katranis to amend his statement of claim to reflect the amount shown in the second part of the Evans Report, the damages should be capped at the sum claimed in the statement of claim of $135,280. Second, I propose to apply a somewhat arbitrary but, in my judgment, appropriate discount of 25%, representing a reasonable allowance for the likely true condition of the Equipment on 25 November 2016. Thus the amount of the damages for conversion that I assess as payable by Mr D'Azzena to Mr Katranis is $101,460.

49 Turning finally to Mr D'Azzena's claim to set-off against the damages payable by him for the amount of rental arrears owing by Mr Katranis, there was ultimately no real dispute as to Mr D'Azzena's entitlement to claim a set off for rental arrears. And in closing submissions, counsel for Mr Katranis confirmed that his client accepted that the rental arrears owing as at the termination of the lease was $7,420. Accordingly, I will give judgment in the proceeding in favour of Mr Katranis against Mr D'Azzena in the net amount of $94,040.

Interest and costs

50 Neither party was in a position to make submissions at the conclusion of the

evidence on the correct approach to the calculation of interest on damages for conversion. I therefore indicated that, if the need arose, I would endeavour to determine the question of interest without the benefit of submissions. However, if I discovered that the question was not straightforward, I would invite further submissions from the parties on the question of interest at the time of delivering my reasons for judgment. In the event, I propose to take a middle course. I will make a preliminary finding as to the basis for assessing interest, but invite the parties, should they disagree with my approach, to make submissions in writing in support of a different finding.

51 In my view, the assessment of interest on a claim for damages for the tort of conversion falls to be determined pursuant to s59 of the *Supreme Court Act* 1986 (Vic) (made applicable to this court by s50 of the *County Court Act* 1958 (Vic)). The issue was considered at length by Ormiston J in *Australian Guarantee Corp Ltd v Commissioners of the State Bank of Victoria* [1989] VR 617, a case concerning conversion of a cheque. His Honour held (at p639-640, citations omitted) as follows:

> "Finally I turn to the question of interest. The relevant section, it was agreed, was s59 of the Supreme Court Act 1986 which derives from s29 of the English Civil Procedure Act 1833. In its present terms it now provides in all proceedings for trover concerning goods that the court must, unless good cause is shown to the contrary, give damages in the nature of interest over and above the value of the goods at the time of the conversion. That being the only relevant section for claims in conversion, it should first be noted that it is the only one of the relevant sections in the Supreme Court Act which does not prescribe that the rate of interest should be calculated pursuant to rates fixed under the Penalty Interest Rates Act 1983.
>
> Little authority was cited to me as to the operation of s59 and its predecessors…I have made some further research into the matter but the few cases found by me were not relied upon in argument and did not answer the questions:
>
> 1. What rate of interest is appropriate in an action for conversion, and
>
> 2. From what date should that interest be calculated.
>
> It is conceivable that there may be cases of conversion, especially of cheques, in which the defendant will be ignorant of its wrongdoing until a claim is made against it, so that it would not be appropriate to award damages by way of interest from any date before the making of a demand.

> However, in the present case the defendant clearly chose to ignore the marked crossing and it did, in my opinion, act at its peril, bearing in mind that it chose not to persist with its defence under s88D. Counsel for the plaintiff sought to make a month to month calculation based on the payments received by AGC and the interest charged under the lease agreements, but I think that interest should not be awarded other than on the net value of each group of converted cheques.
>
> As to the rate of interest there was some suggestion that AGC, as a financier, could earn substantial rates of interest on the money applied to satisfy its apparent liability on these cheques. There is, of course, nothing in the Act which would preclude the court from awarding a commercial rate of interest based on the actual loss of the plaintiff. However, as no evidence was given as to these actual losses, it is not necessary for me to decide if that is authorised by the section and I therefore propose to fix a rate of interest close to, but not identical with, the rates fixed pursuant to the Penalty Interest Rates Act 1983, which have varied from quarter to quarter. For this purpose I have chosen, in my discretion, to fix 12 per cent per annum."

52 In *Nemur Varity Pty Ltd v National Australia Bank Ltd* [1999] VSC 366, another case involving conversion of a cheque (overturned on appeal, but not on this issue), Ashley J held at [12] that:

> "The effect of evidence-in-chief given by Mr Mace was, in my opinion, substantially weakened by cross-examination. Whilst it may be agreed that the penalty interest rate does include an element of punishment *vis-a-vis* a defendant, I consider that in the absence of other cogent evidence it provides an appropriate guide to the rate of interest which ought be allowed under s59. In Australian Guarantee, Ormiston, J in his discretion fixed upon a rate "close to but not identical with" the varying rates fixed in accordance with the Penalty Interest Rates Act. The evidence of Mr Mace, viewed overall, has not persuaded me that the rates fixed by the Penalty Interest Rates Act are not appropriate for use in this case."

53 In my view, taking all of these matters into account, I should exercise my discretion to order interest from the date of the conversion at the rate prescribed by the *Penalty Interest Rates Act* 1983 (Vic). In particular, in the context of Ashley J's reference to the interest rate under that Act including an element of punishment, I have regard to Mr D'Azzena's flagrant disobedience of the VCAT orders. Knowing in advance of the terms of those orders, he clearly acted at his peril in refusing access to the Workshop in the face of those orders. The Penalty Interest Rate has varied over the period from 25 November 2016 to today from 9.5% to 10%. I calculate the interest payable from 25 November 2016 to 9 May 2019 (inclusive) at the rate fixed from time to time by the *Penalty*

Interest Rates Act 1983 (Vic), to be $22,994.81.

54 On costs, unless either party is able to rely on an offer of compromise or *Calderbank* letter, I consider that I should order that Mr D'Azzena pay Mr Katranis's costs of the proceeding from the date of Mr D'Azzena's joinder on 7 July 2017 on the standard basis in default of agreement. Again, if either party seeks to make further submissions on costs based on either an offer of compromise or *Calderbank* letter, I will permit them to make submissions in writing before I make final orders, that I should make a different order on costs.

55 I propose that these reasons be sent to the parties by email. The email will state that judgment, together with orders as proposed above on interest and costs will be authenticated at 4.00pm on Wednesday 15 May 2019, unless a party files with the court and serves on the other party submissions in writing on either or both of the issues of interest and costs, before that time and date.

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Certificate

I certify that these 22 pages are a true copy of the judgment of His Honour Judge Woodward delivered on 9 May 2019.

Dated: 9 May 2019

Simone Karmis