Federal Court of Australia

Roder Zelt-Und Hallenkonstruktionen Gmbh v Rosedown Park Pty Ltd and Reginald R Eustace [1995] FCA 1221; (1995) 13 ACLC 776 (Extract) (1995) 17 ACSR 153 (28 April 1995)

FEDERAL COURT OF AUSTRALIA

RODER ZELT-UND HALLENKONSTRUKTIONEN GMBH v. ROSEDOWN PARK PTY LTD and REGINALD

R EUSTACE

No. SG 3076 of 1993

FED No. 275/95

Number of pages - 25

Sale of goods

[1995] FCA 1221; (1995) 13 ACLC 776 (extract)

[1995] FCA 1221; (1995) 17 ACSR 153

COURT

IN THE FEDERAL COURT OF AUSTRALIA

SOUTH AUSTRALIAN DISTRICT REGISTRY

GENERAL DIVISION

VON DOUSSA J

CATCHWORDS

Sale of goods - United Nations Convention on Contracts for the International Sale of Goods - retention of title - appointment of administrator of the purchaser corporation under Part 5.3A of the Corporations Law - whether seller entitled to recover possession whilst the purchaser remained under administration - whether the administrator incurred liability for refusing to deliver up the goods - administration ended by purchaser executing deed of company arrangement - whether seller required leave to proceed with action for recovery of the goods - whether purchaser and the administrator of the deed liable for the tort of conversion for retaining possession of the goods after the purchaser executed the deed.

The Corporations Law, ss 263, 266, 435C, 436A, 437B, 439C, 440A, 440B, 440C, 440D, 440E, 440F, 441J, 444A, 444D, 444E, 444F, 447A

The Federal Court of Australia Act 1976 (Cth), s 51A

The Goods Act 1958 (Vic.), s 24

The Sale of Goods (Vienna Convention) Act 1987 (Vic.)

Strand Electric and Engineering Co. Ltd v Brisford Entertainments Ltd (1952) 1 All ER 796

Clough Mill Ltd v Martin (1984) 3 All ER 982

Aluminium Industrie Vaassen BV v Romalpa Aluminium Limited (1976) 1 WLR 676

Armour and Another v Thyssen Edelstahlwerke AG (1991) 2 AC 339

Compaq Computer Ltd v Abercorn Group Ltd (t/a Osiris) and Others (1993) BCLC 602

Modelboard Ltd v Outer Box Ltd (in liq.) (1993) BCLC 623

Commissioner of Taxation v B and G Plant Hire Pty Ltd and Others (1994) 14 ACSR 283

J and B Records Ltd v Brashs Pty Ltd (1995) 15 ACLC 458

Prof. Di Everett, Romalpa Clauses: The Fundamental Flaw (1994) 68 ALJ 404

HEARING

ADELAIDE, 14-16 December 1994

28:4:1995

Counsel for the applicant: Mr S H Milazzo

Solicitor for the applicant: Piper Alderman

Counsel for the respondents: Mr M Bevan-John

Solicitor for the respondents : Dunemann Sutherland Pty

ORDER

THE COURT ORDERS THAT:

The matter be relisted on a date to be fixed for further

consideration.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

DECISION

VON DOUSSA J In June and July 1992 the applicant ("Roder") agreed to sell goods to the first respondent ("Rosedown") to the value of Deutschmark 609,102.00 with payment to be made by a deposit and instalments after delivery. The goods were received by Rosedown in October 1992. Roder alleges that the contract contained a term for the retention of title in the goods by Roder until the purchase price had been paid in full. Rosedown fell into arrears with its payments before the end of 1992, and the payment schedule was rearranged. On 6 October 1993 the second respondent, Mr Eustace, was appointed the administrator of Rosedown under s.436A of the Corporations Law ("the Law"). Thereupon the company came under administration under Part 5.3A of the Law (ss.435-458): see s.435C(4). Roder immediately advised Mr Eustace that ownership of the goods remained with Roder, and Roder claimed possession. Mr Eustace disputed the existence of a retention of title term in the contract, denied both Roder's claimed interest in the goods and its right to possession, and asserted that Roder was merely an unsecured creditor for the outstanding balance of the purchase price.

2. On 8 November 1993 Roder commenced the present action against Rosedown and Mr

Eustace claiming a declaration that the property in the goods remained with Roder, an order for delivering up of the goods to Roder, an order pursuant to s.440C of the Law granting leave to Roder to take possession of the goods, and various consequential orders including damages. On 9 November 1993 by specially returnable notice of motion Roder sought interlocutory injunctions restraining the respondents from removing certain of the goods from South Australia, and from selling, charging, or otherwise dealing with the goods, and for immediate delivery of the goods into the possession of Roder. The orders were opposed by the respondents. A meeting of creditors convened under s.439A of the Law was to be held on the following day to consider a resolution directing Rosedown to enter into a Deed of Company Arrangement pursuant to Part 5.3A providing for a moratorium on payment of pre-6 October 1993 debts to all creditors until March 1994 on conditions as to minimum future trading performance specified in the Deed. Mr Eustace in an affidavit sworn on 9 November 1993 deposed that:

> "If I am unable to use the equipment which the Applicant now
>
> claims in and about my administration of the First Respondent's
>
> business then the Deed of Company Arrangement will immediately
>
> fail and cease to operate which will be to the detriment of the
>
> creditors of the First Respondent."

3. On the hearing of the notice of motion, upon an undertaking being given by Mr Eustace to secure and maintain the goods in good working order but subject to fair wear and tear and to continue current insurance, all claims for relief were stood over pending a trial; an order was made pursuant to s.440D(1)(b) of the Law giving leave to Roder to proceed with this action notwithstanding Mr Eustace's administration of Rosedown; and directions were given to prepare the matter for trial, including directions as to pleadings and the filing of affidavit evidence.

4. The statement of claim was filed on 13 December 1993. Thereafter numerous delays occurred, times limited for procedural steps were not met, and time was lost whilst applications of security for costs and for the transfer of the proceedings to another registry were dealt with. In the meantime it seems (from statements made from the bar table during the trial) that the creditors passed a resolution under s.439C(c) requiring Rosedown to enter into the proposed Deed of Company Arrangement, and that the moratorium period was at some later stage extended from 31 March 1994 to 31 March 1995. Upon the execution of the Deed the administration of Rosedown came to an end: s.435C(2). The rights and duties of the creditors thereafter were governed by Div.10 of

Part 3.5A (ss.444A to 445) and by the terms of the Deed.

5. In the preparation and presentation of their cases the parties have given little attention to the provisions of Part 5.3A, and the evidence is silent about events that have occurred in the administration after 9 November 1993, and under the Deed of Company Arrangement. It will be necessary to return to the provisions of Part 5.3A in detail later in these reasons. At this point, however, it should be noted that whilst the meeting of creditors convened under s.439A could have resolved that the administrator of the Deed be someone other than the administrator of the company: see s.444A(2), it appears from the conduct of these proceedings that this did not happen. It is implicit in affidavits read at trial that Mr Eustace is the administrator of the Deed.

6. In the statement of claim it was alleged that Rosedown in breach of contract failed to assign certain moneys to Roder, failed to pay interest due on the instalments and failed to pay DM266,000 and interest of DM9,975 due on 30 November 1993 (the latter payments falling due after the commencement of the administration and these proceedings) (para.9); that in the circumstances Rosedown had repudiated the contract and Roder had accepted the repudiation thereby determining the contract (para.10); that in the premises Roder was entitled to immediate possession of the goods (para.11); and that in October 1993 Roder requested Rosedown to deliver up the goods and further requested Mr Eustace's consent to it retaking possession which requests were refused (para.12). It was pleaded that in consequence of the breaches of contract by Rosedown, and in consequence of the respondents' refusal to give up possession of the goods, Roder suffered loss and damage. Particulars of the loss and damage were not pleaded but it was said that particulars would be given prior to trial (paras.13 and 14). The relief sought was that claimed in the application.

7. The claim for "damages" was made without further indication of the nature or legal basis for that claim or against which of the respondents it was made.

8. Defences were filed by Rosedown on 11 April 1994 and by Mr Eustace on 1 July 1994. These were amended at trial when a counter claim was also pleaded by both respondents. It was pleaded in the statement of claim and admitted by the respondents that Mr Eustace was on 6 October 1993 appointed as administrator of Rosedown. This is the only reference in the pleadings to his standing in the proceedings. He could not be a party to the counter claim in that capacity as the administration had ended before the counter claim was filed. Presumably he is a party as administrator of the Deed of Company Arrangement.

9. By the defences the allegations relating to the terms for retention of title, for payment, and for interest were either denied or not admitted.

10. Further it was pleaded that if there were a term as to retention of title then

(i) at the time when the term became part of the contract,

property in the goods had already passed to Rosedown;

(ia) prior to then, no such term had been agreed, or

alternatively the term was too vague or unclear to be

of any contractual effect;

(ii) in any event, the engrafting of such a retention of

title term into the contract constituted the creation

by Rosedown of a charge over its property, since

property had already passed to Rosedown;

(iii) such charge was never registered in compliance with

s.263(1) of the Law or s.201(1) of the Companies

(Victoria) Code; and

(iv) such charge is void against Mr Eustace under s.266(1)

of the Law.

Repudiation of the contract by Rosedown was denied, as was Roder's entitlement to possession. The allegations of loss and damage were denied. Reliance on s.440B of the Law was pleaded. That section provides that a charge is not enforceable on property of a company during the administration of a company except with the consent of the administrator or with the leave of the Court.

11. Finally it was pleaded that if it is held that the applicant is entitled to the return of the contract goods then the respondents or either of them are entitled to the return of the moneys paid to Roder in respect of the goods (pleaded to be a deposit of DM66,500, and an instalment of DM72,318.75, although the evidence, such as it is, suggests the instalment was DM66,500: see Ex.A1 p.42) upon a consideration that has totally failed, and that such moneys should be set off against the damages claimed. The counter claim was for the return of these moneys in the event that it is held that Roder is entitled to the return of the goods.

12. As will appear later in these reasons, the contract for the sale of the goods is one to

which the United Nations Convention on Contracts for the International Sale of Goods ("the Convention") applies. The provisions of the Convention govern the rights and obligations of the parties arising from the contract. The pleadings, and the claims for relief in the statement of claim and in the counter claim, are expressed in the language and concepts of the common law, not in those of the Convention. Counsel made only passing reference to the Convention at trial. Upon consideration of the case I have concluded that the issues to be addressed, in the event that it is held that the contract of sale included a valid and effective retention of title term, are somewhat different to those stated in the pleadings. I shall return to this topic after resolving the disputed questions of fact.

13. The affidavits filed by the parties before trial concentrated solely on the events and documents that evidenced or recorded the transaction for the sale of the goods, and to aspects of German law. No attention was given in the affidavits to the claim for loss and damage alleged by Roder, or to the effect of Part 3.5A of the Law on the rights and obligations of the parties in the event that Roder established the alleged retention of title term. The affidavits dealt with the issue of liability and not the issue of damages or other consequential relief. The Court was informed that Roder had assumed that the trial was to resolve the liability issue, and that damages and consequential orders would be considered at a later date - hence no attempt had been made to give particulars of loss and damage prior to trial. The Court was informed that very shortly before trial counsel for the respondents informed Roder that the respondents wished to have all aspects of the case, including that of damages, resolved at the one trial. In his opening counsel for Roder argued that consideration of damages and other relief should be stood over for further enquiry after liability had been resolved because the assessment of Roder's loss would, in part, involve a determination of the value of the goods on their eventual return. It was said that the claim for damages included a claim for damages against Mr Eustace personally in tort for the wrongful failure to give up possession of the goods when requested in October 1993. Counsel was not precise whether the claim against Mr Eustace was one in detinue (cf Strand Electric and Engineering Co. Ltd v Brisford Entertainments Ltd (1952) 1 All ER 796) or in conversion (cf Clough Mill Ltd v Martin (1984) 3 All ER 982) but gave most emphasis to a claim in conversion. The assessment of damages in either case, counsel submitted, would, in practical terms, involve assessing the difference in the value of the goods at October 1993 and when they are returned, and also a consideration of "rental value" as Rosedown, under Mr Eustace's administration, has continued to use the goods in its business. As discussion developed between counsel and the Court it became plain that neither side had worked through the implications of the provisions of Part 5.3A of the Law, and they (especially counsel for Roder) were not able at that time to present other than the case on liability.

14. In these circumstances I propose to decide the disputed questions of fact raised by the pleadings, to discuss a number of the provisions of the Convention and Part 5.3A of the Law, and then to stand the matter over for further consideration. Was there a

retention of title term in the contract?

15. It is common ground that the applicant, a German company, at all material times carried on business in Germany at Budingen. It is one of the major manufacturers and suppliers in the world of large tent halls and party marquees. Rosedown is a company incorporated in Victoria. It is the trustee of the G S Tucker Family Trust which traded as Geoff Tuckers Hire and Catering from premises in Dandenong, Victoria. The business has been in operation for many years, and is one of the largest hire companies in Australia specialising in major events such as the Australian Grand Prix and the Moomba and other large festivals. The goods, the subject of these proceedings, included aluminium tent profiles and covers for five very large tents, extra gable infills and other accessories. It is admitted in the pleadings that Rosedown agreed to buy the goods from Roder. There was no dispute at trial that the purchase price was to be paid as follows:

. on placing the order - DM66,500

. 30 November 1992 - DM133,000

. 30 March 1993 - DM66,500 and interest DM1,496.25

. 30 November 1993 - DM 133,000 and interest DM9,975

. 30 March 1994 - DM66,500 and interest DM7,481.25

. 30 November 1994 - DM143,602 and interest DM23,694.22.

16. Further there was no dispute that the goods were ultimately supplied "ex works" from Budingen on 27 and 28 August 1992 whence they were freighted overland to Rotterdam where they were loaded on board ship on 3 September 1992. They were delivered to Rosedown in Australia on about 3 October 1992. The tentage was urgently required in Australia to fulfil contractual commitments of Rosedown at the Adelaide Grand Prix in November 1992.

17. It was also common ground that the deposit of DM66,500 was paid by Rosedown to Roder on 20 August 1992. Rosedown was unable to pay the next instalment of DM133,000 due on 30 November 1992. Rosedown had hoped to do so from rental received from the Grand Prix, but money earmarked for that purpose had apparently been used to pay freight and import duty on the goods. That instalment was deferred to 30 November 1993 with the intent that following the 1993 Grand Prix Rosedown would pay two instalments totalling DM266,000. As already noted, an administrator of the company was appointed prior to that date.

18. On the contentious issue concerning retention of title the applicant read affidavits from Mr Jamie Watts, the Australian agent of Roder; from Ms Erna Charlotte Mayer, an interpreter who translated invoices and shipping documents from the German language to the English language; from Michael John Fielding who at material times was the business manager of Rosedown responsible for its day to day management and administration under the supervision of the managing director, Geoffrey Stewart Tucker ("Mr Tucker"); and from Dr Thomas Hoene, a German lawyer specialising in commercial and corporate law in Germany. The respondents read affidavits from Mr Tucker; from Mr Eustace, and from Mr Nicholas Giasoumi, a chartered accountant in the employ of Mr Eustace.

19. The parties were agreed that the contract for the sale of the goods was one to which the Convention applied. That Convention has become part of the law of Australia, and, relevantly for the purposes of this case, part of the law of Victoria by virtue of the Sale of Goods (Vienna Convention) Act 1987 (Vic.). The Convention applies to contracts for the sale of goods between parties whose places of business are in different contracting States (Art.1). Both Germany and Australia are contracting States. Dr Hoene's affidavit expresses his opinion upon the application of the Convention to the facts of this case as disclosed to him in correspondence and affidavit material most of which was introduced into evidence at trial. However insofar as the contract is governed by the Convention, which is now part of the municiple law of Australia, the meaning of that law, and its application to the facts, is to be determined by this Court. It is not a matter for expert evidence. The Convention is not to be treated as a foreign law which requires proof as a fact.

20. However the Convention governs only the formation of the contract of sale and the rights and obligations of the seller and buyer arising from such a contract; in particular, the Convention is not concerned with the effect which the contract may have on the property in the goods sold: Art.4. Article 7(2) provides that:

> "Questions concerning matters governed by this Convention which
>
> are not expressly settled in it are to be settled in conformity
>
> with the general principles on which it is based or, in the
>
> absence of such principles, in conformity with the law applicable
>
> by virtue of the rules of private international law."

21. Under Article 18 an acceptance of an offer becomes effective at the moment the indication of the assent reaches the offerer, and under Article 24 a declaration of

acceptance or other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address. Relevantly in the present case the offerer was Roder, and it is common ground between the parties that the acceptance occurred in Germany, and that the contract of sale was made in Germany. The parties accepted that it was relevant therefore to receive evidence of German law insofar as it dealt with the effect which the contract may have on the property in the goods sold.

22. According to the opinion of Dr Hoene the property law effect of a retention of title agreement is determined, as are all property related transactions and relationships, according to German private international law by the lex rei sitae, i.e. the law of the place in which the relevant property is situated. Dr Hoene continues:

> "The property law effect of agreements of the parties is, therefore, determined by German law for as long as the items sold are in Germany. According to German private international law the property law effect is to be assessed under Australian law when the goods are in Australia. It is unclear which law applies to agreements which are entered into during the transportation of goods. The overriding view in the literature is that the law of the destination applies (in this case Australia)...(numerous references to authority are cited).
>
> If an item is brought to another country following agreement on retention of title the validity of the retention of title agreement is determined initially by the law of the country in which the item purchased was located at the time the retention of title agreement was entered into. If under German law a retention of title agreement had been entered into when the item arrives in

the other country the law of the other countries (sic) determines

the continuing existence of retention of title agreement and the

content and performance of this agreement...

Under German law, the property law effect of the retention of

title is that the transfer of title...takes effect on condition

precedent that the purchase price be paid in full. This means

that the title only passes to the buyer when the purchase price

has been paid in full to the seller..."

23. Under German law, title to the goods would not pass under a retention of title clause to the purchaser until payment. However once the goods arrived in Australia the property law effect of the agreements reached between the parties is to be determined by Australian law.

24. Under Australian law, the validity of retention of title clauses - aside questions of ambiguity and uncertainty - is recognised, and, generally speaking, they operate so that title does not pass until the payment requirement of the condition relating to retention of title is fulfilled: Aluminium Industrie Vaassen BV v Romalpa Aluminium Limited (1976) 1 WLR 676, Armour and Another v Thyssen Edelstahlwerke AG (1991) 2 AC 339, and The Goods Act 1958 (Vic.) s.24, but see Prof. Di Everett, Romalpa Clauses: The Fundamental Flaw (1994) 68 ALJ 404.

25. Whether a term as to retention of title was agreed between Roder and Rosedown, and the content of that term are questions of fact, but ones to be determined having regard to certain further provisions of the Convention, and in particular:

"Article 8

(1) For the purposes of this Convention statements made by and

other conduct of a party are to be interpreted according to his

intent where the other party knew or could not have been unaware

what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) ...

Article 11

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

Article 15

(1) An offer becomes effective when it reaches the offeree.

(2) ...

Article 18

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) ...

(3) ...

Article 29

(1) A contract may be modified or terminated by the mere agreement

of the parties.

(2) ..."

26. Both Mr Fielding and Mr Tucker were cross-examined on their affidavits. Mr Fielding's affidavit explains at length the course of negotiations with Roder, and the extensive correspondence that took place over several months leading up to the dispatch of the goods from the Roder works. He says that the negotiations between Roder and Rosedown, which were mainly conducted by him on behalf of Rosedown, took place throughout on the clear understanding that property in the goods would not pass until payment in full had occurred. Rosedown was in dire financial straits and he in collaboration with Mr Tucker, at times made representations to Australian financiers which were inconsistent with a retention of title clause, and in certain of his correspondence with Roder he sought to evade the issue of the retention of title clause. Nevertheless he maintains that it was clearly understood throughout the discussions with Roder that there would be a term as to retention of title and, moreover, Mr Tucker was fully aware of this fact as negotiations progressed. Mr Tucker knew that the goods could not be obtained except on that condition as Rosedown was in no position otherwise to finance the purchase. There was difficulty raising funds even for the deposit. When the deposit was belatedly paid on 20 August 1992 Roder required, by letter dated 20 August 1992, promissory notes that had been sent sometime before for signature for the balance of the purchase price and a "signed declaration for the ownership". Mr Fielding thereupon prepared a document in the following terms:

"Mr Heinz Roder GMBH

Dear Heinz,

This is to certify that the goods you are shipping to me now will

remain as your ownership until full payment is made.

I will be bringing the stock into my books as each category of

Structure is paid for.

To help me, could you do a split up of the whole order giving me

the price of each size category and fax that back to me next week.

Yours sincerely,

Geoff Tucker's Hire and Catering

Geoff Tucker"

27. Mr Fielding says that the document was signed by Mr Tucker along with the promissory notes which had been with Rosedown since mid-July 1992. The above document was then faxed to Roder, and a copy together with the promissory notes were posted. It will be necessary to say more about the terms of the documents dated 21 August 1992, and about the terms of a subsequent retention of title clause that was signed in September 1992.

28. Mr Tucker on the other hand, in his evidence, says that he was not informed on any occasion prior to 20 August 1992 that a term for the retention of title by Roder was under discussion. Insofar as correspondence prior to that date made reference to such a term he said that the correspondence had not been brought to his attention. He says a letter written by Rosedown on 10 June 1992, early in the negotiations, which included the sentence "I am also happy for you to treat the stock as rental stock (and therefore you maintain ownership) until I complete my payments" although purportedly under his hand, was not signed by him. He also denied that he had signed the document dated 21 August 1992. The effect of his evidence is that he at no time authorised such a term. (His evidence, and the respondents' case, overlooks the fact that Mr Fielding was acting in the course of his employment and within his apparent authority as business manager when he was dealing with Roder). He says that he became aware of Roder's requirement for retention of title first on 20 August 1992 when he saw the letter from Roder requesting a certificate to that effect but denies that he authorised or gave such a certificate until he signed one in September 1992. In relation to that certificate he disputes signing it on 2 September 1992, the day on which Mr Fielding says it was signed by Mr Tucker and faxed to Roder. Mr Tucker claims that it was signed on about 14 September 1992, the day on which Rosedown posted the original of the document back to Roder - a date well after the goods had left Germany.

29. Mr Tucker concludes his affidavit by saying that he considers Mr Fielding was conducting his own negotiations for his own purposes with Roder and without keeping Mr Tucker informed. Precisely what those purposes might have been is not identified. The inference from his affidavit and his cross-examination is that Mr Fielding had forged Mr Tucker's signatures to the letter of 10 June 1992 and to the document of 21 August 1992. When cross-examined as to his reason for asserting that the signatures to those documents were not his, he observed that they were signed "Geoff Tucker" whereas he signed documents "G S Tucker". When it was pointed out to him that there were several other letters written to Roder whose authenticity he had not questioned in his affidavit that were signed "Geoff Tucker" he then disputed their authenticity and said that he did not think the signatures were his. The nature of the letters and his evidence about them

makes it highly improbable that the documents were not signed by him, and it appeared to me that he was making up explanations as he went along which he perceived to be supportive of his case. The high water mark of the improbability of these denials came when he denied that a signature, "Geoff Tucker", was his on a letter to Rosedown's bank manager, and on another to Mr Heinz Roder written after Mr Fielding had ceased his employment with Rosedown.

30. Having seen and heard Mr Fielding and Mr Tucker cross-examined on their affidavits I have no hesitation in rejecting the evidence of Mr Tucker where it conflicts with that of Mr Fielding, and accepting the account of events given by Mr Fielding in his affidavit. As I have already indicated, Mr Fielding acknowledged that at times misrepresentations of a serious nature had been made to Australian financiers and that he participated in the making of those representations. In substance it was represented to financiers that the goods to be supplied by Roder would become the property of Rosedown on delivery so that they could immediately be charged to secure other loans. I have therefore scrutinised with care the evidence of Mr Fielding before accepting it. The frank explanations he gave for his conduct, and the support which his story broadly receives from the written documents persuade me that I should accept his evidence notwithstanding his participation in the making of false representations.

31. Caution has also been necessary as Mr Fielding discloses in his affidavit that in about September 1993 he was engaged by Roder to find an agent to assist Roder in its business matters, in recovering moneys that were still owed to it by another company in Australia, and "to assist in cleaning up the Rosedown matter if any such opportunity arose". What this expression means was not explored in cross-examination, nor was it seriously suggested that Mr Fielding's evidence was coloured by this agreement in respect of which he had received a lump sum payment of $4,000 sometime before his affidavit was prepared.

32. In deference to the submissions of counsel for the respondents that the Court should find that Mr Fielding's evidence should not be accepted it is necessary to consider the evidence in further detail.

33. Mr Fielding by profession is an accountant but in recent years he has worked predominantly in the entertainment industry. From 1988 to 1992 he was employed by a company, Trade Structures Pty Ltd ("Trade Structures"), as business manager. That company had a business similar to that of Rosedown, and was involved in leasing tent structures to the Adelaide Grand Prix prior to 1992. The company fell on hard times and was unable to pay extensive debts due to creditors, including Roder who had supplied Trade Structures with tentage. When Trade Structures ran into difficulties an agreement was reached between that company and Rosedown that structures owned by Trade Structures would be transferred to Rosedown for a monthly fee, and at about the same time, March 1992, Mr Fielding commenced employment with Rosedown.

34. The proposed arrangement with Trade Structures fell through, and it was necessary

for Rosedown to obtain tent structures from other sources to fulfil its Grand Prix commitments. It was decided that Mr Tucker would visit the three major tent manufacturers each of whom is in Europe, and Mr Fielding was involved in making arrangements, particularly with Roder, for Mr Tucker's visit. Mr Tucker was overseas from 16 to 27 May 1992. Before Mr Tucker left Mr Fielding said to him words to the effect:

> "...Given my dealings with Roder at Trade Structures I can
>
> probably arrange for Roder to sell you the structures on the basis
>
> of payments being made over time whereas I think the others will
>
> want their money upfront.
>
> Mr Tucker - OK.
>
> Mr Fielding - I will speak to Roder before you go and get some
>
> prices from him to see what's possible. I can probably get a
>
> terms deal but Roder will want to retain ownership until the terms
>
> deal was settled given what happened with Trade Structures."

35. Mr Tucker denies that this conversation occurred. I find that it did.

36. Shortly after the conversation Mr Fielding spoke with Mr Heinz Roder by telephone seeking prices, and a series of communications followed by fax between them commencing on about 20 April 1992.

37. When Mr Tucker went overseas he took with him two other employees of Rosedown and a financial adviser to the company. Whilst Mr Tucker was overseas he telephoned Mr Fielding and asked him to telephone Mr Roder and negotiate a deal with him. At this time Roder had given a quote for specified items. Mr Tucker denies that he had this conversation or that there would have been any reason for it as he had a financial adviser with him. However he acknowledged in his cross-examination that he left the negotiations with Roder generally to Mr Fielding and authorised him after his return to Australia to conduct the negotiations with Mr Roder. I find that the conversation occurred as Mr Fielding says, and that in the following conversation Mr Fielding was acting within the scope of his authority. As requested Mr Fielding telephoned Mr Roder and a conversation to the following effect occurred:

"Mr Fielding - You know the type of structure that we want and we would like to deal with you.

Mr Roder - I don't want the Trade Structures experience to be repeated. If Rosedown fails I have to be protected and I have to get the structures back.

Mr Fielding - That's fine Heinz, you can retain ownership of the structures until you have been paid in full.

Mr Roder - Good, you give to me the proposed payment terms and we will take it from there."

38. Mr Fielding reported that conversation to Mr Tucker in Europe including that Mr Roder would extend time for payment only if he retained ownership of the structures until paid in full. Mr Tucker said "That's OK".

39. Upon Mr Tucker's return to Australia correspondence occurred between the two companies wherein Rosedown negotiated the purchase of particular structures at a favourable price and according to a schedule of deferred payments. The opening letter on 10 June 1992 contained the statement already referred to that Roder could maintain ownership until Rosedown completed its payments. By 23 June 1992 the point had been reached where Roder wrote a lengthy "confirmation of order letter" detailing product, and stating price, delivery dates, and a schedule for payments and interest charges. Then followed further correspondence in which the product to be acquired was varied, as was the overall price and payment schedule. On 13 July 1992 Roder wrote confirming the variations, enclosing five promissory notes for the five deferred payments, and asking for the initial payment of DM66,500 due on placement of the order. In none of the correspondence following the letter of 10 June 1992 is any reference made to a term that Roder would retain title until payment in full. It is argued on the respondents' behalf that this indicates that no such term was contemplated. I accept Mr Fielding's evidence that the term was assumed throughout his dealings with Mr Roder, and that he purposely omitted to refer again to it in his correspondence as he hoped that the failure to mention it might later prove to Rosedown's advantage.

40. Rosedown was at first unable to raise the deposit payment. By fax dated 21 July 1992 Roder made it plain that the goods would not be delivered until the deposit was paid. Beneficial Finance Corporation Limited and Rosedown's bankers were approached, and

in both instances the representations already referred to were made to the effect that Rosedown would obtain property in the goods on delivery which could then be used as security for a further advance. I accept Mr Fielding's evidence that these misrepresentations were made with Mr Tucker's knowledge as part of an attempt to keep Rosedown afloat, and that the making of them does not evidence a belief by Mr Fielding that the representations were true.

41. In the course of endeavouring to obtain finance from Beneficial Finance Corporation Limited Mr Fielding asked Roder if it would send a separate invoice for one of the tent structures (it being Rosedown's intention that the invoice would then be used as the basis for a lease transaction to raise the invoice price to fund the deposit). At first Roder refused but under considerable pressure from Mr Fielding in communications to an employee of Roder (who, it appears, may have been a clerical or secretarial assistant to Mr Roder.) Roder then agreed to split the purchase between two invoices, one for one structure to the value of DM42,300 and the other for the balance of the goods. It is contended that the fact that Roder was prepared to do this indicates that it did not intend there to be a retention of title clause. I do not accept this submission. The interpretation I place on the evidence is that Roder did not understand the purpose of the request.

42. As events turned out Beneficial Finance Corporation Limited refused to enter into a lease agreement until the invoiced goods had arrived in Australia.

43. So dismal did the prospect of obtaining the deposit appear that on 3 August 1992 it was suggested to Roder by Messrs Fielding and Tucker that Roder might consider purchasing a majority share in Rosedown, a suggestion which Roder promptly rejected. I find nothing in the communications which occurred on that day which throw any doubt on Mr Fielding's evidence that it was clearly understood that there would be a term as to retention of title if the goods were supplied pursuant to the order then awaiting the deposit payment.

44. On 6 August 1992, as the deposit had still not been paid, Roder sent a fax to Rosedown in the following terms:

> "Dear Geoff, dear Michael,
>
> you know we have produced the structures for your company in day -
>
> and nightshifts, because the delivery was very urgent and we
>
> wanted to fulfill (sic) this first order from you in time.
>
> 1. We have made a refinancial deal with our bank which includs
>
> (sic) the fact that we have to show the agreed prepayment

from your side.

2. To have the prepayment and the promisery (sic) note as well

as a declaration from your side that the goods stay in our

owner ship untill (sic) the whole purchase price is paid, is

condition for the refinancing deal.

3. We regret that we cannot ship the goods as long as we do not

have the prepayment and the papers from you.

4. Once again we are not very happy to make this experience. I

do not hope that the various warnings we got from Australia

do now become reality.

5. In case you could not fulfill our agreement we would have to

inform the context you have asked us to go in touch with

Kind regards,

Roder Zelt-Und

Hallenkonstruktionen GmbH

Heinz Roder."

A fair interpretation of Mr Tucker's affidavit (para.16 and 17) is that he was unaware of this letter at the time. However in his cross-examination he conceded reading the letter on about 6 August 1992, and said:

"You do not mean by that in your affidavit that you had not

received and read the letter of 6 August that we have just been

talking of?---What I was saying is that there was no papers to -

there has always been talk, no papers have been signed on

declaration of ownership, because I was still of the belief that

as the goods were leased, they would be released.

Well, having received that communication, were you then clear in

your mind that Roder required a declaration of ownership?---I

believe so."

Mr Tucker had earlier said that Mr Fielding had led him to believe that once the goods were in Australia they could be leased to finance companies to raise money to pay the later instalments. I accept Mr Fielding's evidence that Mr Tucker was fully aware of the nature of that scheme and was not, as he would have it, an innocent victim of someone else's dishonest proposal. But even accepting that Mr Tucker genuinely held the belief he asserts, it nevertheless involves the proposition that on delivery Roder retained title to the goods, and would do so unless and until goods were "released" for the purposes of being leased to a financier. Moreover the answer to the last of the above questions indicates that by 6 August 1992 Mr Tucker was aware of the requirement of Roder.

45. Counsel for the respondents argued that the reference to a "refinancial deal" in this letter indicates that the question of retention of title had arisen for the first time at that stage in consequence of the requirements of Roder's financier. I do not accept this submission. The letter does not state when the "refinancial deal" was made. It is reasonable to assume that for an order of this size some financial accommodation had to be arranged by Roder before manufacture commenced. I interpret the letter as an explanation for Roder's position, including the rejection of the offer to purchase a majority interest in Rosedown. Of the three conditions for the refinancing deal stated in paragraph 2 of the letter, the two other than the retention of title term were clearly specified in the letter of 13 July 1992, i.e. the requirement for promissory notes and the deposit payment. The proper inference is that the refinancing deal referred to was one already arranged at that time, and not something of very recent origin.

46. Between 6 and 20 August 1992 Mr Tucker persuaded Rosedown's banker to extend further credit to the company to enable the deposit to be paid, and that occurred by bank draft on 20 August 1992. Then followed the request for the promissory notes and declaration of ownership which led to Mr Tucker signing the document dated 21 August 1992 set out earlier in these reasons. The opening sentence of that letter is crystal clear "This is to certify that the goods you are shipping to me now will remain as your

ownership until full payment is made." In the context of the events that had happened there can be no doubt as to the goods to which this certificate refers. However it is argued by counsel for the respondents that the next two sentences of the letter indicate that what was intended was not a condition retaining ownership until payment in full, but a "staged retention clause" whereby property would pass in one structure after another as amounts equal to the purchase price thereof were paid. Mr Fielding gave evidence that he was endeavouring to manoeuvre a situation where Roder could be persuaded later that the condition had that meaning. However given the earlier communications between the parties, on a fair reading of the letter Roder could not have been aware that it was the intent of Rosedown to agree only to a staged retention clause. Indeed that was not the real intention of Rosedown at the time. Rather, it was Rosedown's intention to convey the appearance that it had agreed to the condition required by Roder. The understanding of a reasonable person in the position of Roder on reading the letter would be that the condition demanded by it had been fulfilled: see Convention, Article 8(1) and 8(2). In further support of this conclusion, no steps were ever taken by Roder to comply with the request that the whole order be split up with separate pricings for each size category, and no further request was made for such a division by Rosedown.

47. It was also suggested by counsel for the respondents that the fact that when the goods were shipped a few days later three invoices were issued indicates that Roder was complying with the "staged retention clause" proposal. However a consideration of the invoices in conjunction with the shipping documents makes it clear that there were three invoices because there were three separate containers each of which required a separate bill of lading and shipping documents. The invoices then issued for each shipment do not contain a split up of the order or parts thereof to give a price for each size category as requested in the letter of 21 August 1992.

48. On 25 August 1992, four days after the certificate of 21 August 1992 had been faxed to Roder, Roder forwarded a document described in Roder's covering letter as a "declaration of the property of the tents you have purchased" to Rosedown and asked that Mr Tucker sign it. The document read as follows:

> "P R O P E R T Y
>
> = = = = = = = =
>
> Notwithstanding delivery and the passing of risk in the goods, or
>
> any other provision of these Conditions, property in the contract
>
> goods shall not pass to the Buyer until the Seller has received in
>
> cash or cleared funds payment in full for the price of the

contract goods and all other goods agreed to be sold by the Seller to the Buyer for which payment is then due.

Until such time as property in the contract goods passes to the Buyer, the Buyer shall hold the goods as the Seller's fiduciary agent and bailee, and shall keep the goods separate from those of the Buyer and third parties and shall properly store, protect, insure and identify the same as the Seller's property and as against the Seller's invoices. Until that time the Buyer shall be entitled to resell or use the contract goods in the ordinary course of its business but shall account to the Seller for the proceeds of sale or otherwise thereof and shall keep such proceeds separate from any monies or property of the Buyer and third parties.

Until such time as the property in the contract goods passes to the Buyer, the Seller shall be entitled at any time to require the Buyer to redeliver up the goods to the Seller and, if the Buyer fails to do so forthwith, to enter upon any premises of the Buyer or any third party where the goods are stored and to repossess the same.

Budingen, 25. August 1992"

On 27 August 1992 Mr Fielding sent the following fax to Roder:

"We have looked at the document you sent regarding the ownership of the goods and we have no basic problems with the wording. However, the last paragraph seems to be a bit onerous in that you could claim all the goods back even though we had kept to all the terms of the agreement. I know that is not your intention and you certainly wouldn't do that to us, but could you redraft the last paragraph so that we are not potentially placed in that situation."

On 1 September 1992 Roder replied as follows:

"Thank you very much for your fax of 27th August 1992.
The property agreement is based on a proposal of our lawyer in England. He had worded this agreement.
We have asked him about your inquiry but he told us that this right to take the goods back is only given in case that you fail to pay the partial amounts which we have agreed, so he does not see any problem on your side to sign that.
In case we would take this right without you have given us a reason in not paying the due amounts, we would be responsable (sic) for all damages and losses on your side.
So we ask you kindly to sign this agreement and send it back."

49. The receipt of this reply caused Mr Fielding to have Mr Tucker sign the certificate which, as I have found, was completed and returned by fax to Roder on 2 September 1992 with the following covering note from Mr Fielding on behalf of Rosedown:

> "Thank you for your fax dated 1st September, 1992 and with your
>
> assurance that the property will never be claimed back providing
>
> we stick to the terms of the agreement the original agreement has
>
> now been signed and posted back to you."

Legal effect of the term/s as to retention of title

50. In my opinion, if the new clause signed on 2 September 1992 had not been proposed by Roder there would be no room for doubt that the contract for the sale of the goods was subject to a valid and effective term for the retention of title. In my opinion there was no lack of clarity in the circumstances as to the meaning and intent of the term first anticipated in discussions in May 1993 between Mr Fielding and Mr Roder; then stated in writing on 10 June 1992; stated again in the fax of 6 August 1992; and finally formally confirmed in writing in the document signed on 21 August 1992 that the goods "will remain as your ownership until full payment is made." As the term simply conveyed, ownership, that is property in the goods (see Clough Mill Ltd v Martin at 986 e-f), remained with Roder until the purchase price of DM609,102 was paid in full. I reject the allegation that the term was too vague or unclear in its form or application to be of any contractual effect: Armour and Anor v Thyssen Edelstahlwerke AG at 352-353. As property in the goods did not pass to Rosedown before the term was agreed no question of the retention of title clause being a charge arises: Armour and Anor v Thyssen Edelstahlwerke AG, and Clough Mill Ltd v Martin.

51. The new clause signed on 2 September 1992, drafted by the English solicitor, was probably extracted from a reputable precedent for trading terms between a manufacturer and dealer in goods (cf the retention clauses considered in Compaq Computer Ltd v Abercorn Group Ltd (t/a Osiris) and Others (1993) BCLC 602 at 609-610 and Modelboard Ltd v Outer Box Ltd (in liq.) (1993) BCLC 623 at 626-627), but the terms in the second sentence of the second paragraph were inappropriate to the present situation where the goods were not supplied for the purpose of resale, and moreover the condition in the first paragraph went beyond that which had been agreed by providing for the retention of ownership until payment in full for "...all other goods agreed to be sold by the Seller to the Buyer for which payment is then due."

52. Does the signing of this new clause alter the position which would otherwise have existed? I think not. If property had not passed before 2 September 1992 because of the term confirmed in writing in the document dated 21 August 1992, a modification of the contract (see Art.29(1)) in the terms stated in the first paragraph of the new clause would not alter the situation that property remained with Roder and would do so until the condition as to payment was fulfilled.

53. The modification contained in the second sentence of the second paragraph of the new clause, although inappropriate insofar as it deals with resale, nonetheless is there and cannot be ignored. Counsel for the respondents argues that the second sentence as it purports to operate on the proceeds of sale (and possibly also on rental proceeds) constitutes a charge that required registration, and seeks support for that submission from Compaq Computers Ltd v Abercorn Group Ltd. It is argued that as one part of the new clause constitutes a charge the failure to register that charge means that the clause in its entirety is void as against Mr Eustace under s.266(1) of the Law. In my opinion it is not necessary to decide whether the second sentence of the second paragraph constitutes a charge over proceeds of sale or use as Roder is not seeking to enforce that term. In Compaq Computers Ltd v Abercorn Group the plaintiff supplier was claiming the proceeds of sale of the goods, not the goods themselves. Even though Mummery J held that the provision in the dealer agreement under which the plaintiff made its claim to the proceeds of sale was to be construed as a charge, at 614 he held that on the true construction of the dealer agreement, whilst the goods remained unsold in the hands of the dealer, the plaintiff retained full legal and beneficial ownership of them, and that the relevant provisions of the retention of title clause, which were similar to the first paragraph of the present new clause, did not confer a charge on the goods in favour of the plaintiff. Similarly in Clough Mill v Martin each member of the Court of Appeal held that the first sentence of the clause under consideration, which dealt with the goods whilst they remained in the identifiable form in which they were originally supplied, was a valid and enforceable retention of title clause, and not a charge, even if a later sentence of the clause constituted a charge over manufactured items which incorporated the goods supplied: see p.990d-e, 991a-b, 993d and 994e. Even if the second sentence of the second paragraph of the new clause constitutes a charge, the failure to register that charge is of no relevance in the circumstances of this case.

54. The term for the retention of title in the goods which Roder now seeks to enforce was not a charge and is not void as against Mr Eustace under s.266(1) of the Law. It remains necessary however to consider how the provisions of the Convention and of Part 5.3A of the Law effects the enforcement of the rights and remedies following from the ownership retained by Roder after the appointment of the administrator on 6 October 1993.

Avoidance and remedies under the Convention and Part 5.3A

55. Whilst Roder alleges, and the respondents deny, that the contract of sale was "repudiated" by Rosedown, and that Roder has "accepted the said repudiation", these

common law concepts and the common law remedies which could follow upon the acceptance of a repudiation of the contract by Rosedown are replaced by the provisions of the Convention. Relevantly the Convention provides:

"Article 25

A breach of contract committed by one of the parties is

fundamental if it results in such detriment to the other party as

substantially to deprive him of what he is entitled to expect

under the contract...

Article 26

A declaration of avoidance of the contract is effective only if

made by notice to the other party.

...

Article 53

The buyer must pay the price for the goods and take delivery of

them as required by the contract and this Convention.

...

Article 61

(1) If the buyer fails to perform any of his obligations under the

contract or this Convention, the seller may:

(a) exercise the rights provided in articles 62 to 65;

(b) claim damages as provided in articles 74 to 77.

(2) The seller is not deprived of any right he may have to claim

damages by exercising his right to other remedies.

(3) ...

...

Article 63

(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.

(2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance.

Article 64

(1) The seller may declare the contract avoided:

(a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or..."

Immediately prior to 6 October 1993 Rosedown was in continuing breach of the contract of sale in that interest payments were overdue. An amount of DM1,496.25 had become payable on 30 March 1993. The other overdue interest payments related to interest payable under a further variation of the contract made on about 10 May 1993 when Roder agreed to extend until 30 November 1993 the time for payment of DM133,000 originally payable on 30 November 1992. It was agreed that interest calculated at the rate of 13% p.a. would be paid on that sum, the first payment for a six month period becoming due in late May 1993, and thereafter interest was to be paid quarterly, i.e. in August 1993 and the final payment with the instalment of DM133,000 on 30 November 1993. No demand had been made for these payments, and a letter from Roder to Rosedown dated 27

September 1993 made no reference to these overdue payments. Further, Rosedown had not at 6 October 1993 assigned income expected to be received from the November 1993 Grand Prix to Roder, but that was something that could be done effectively after 6 October 1993. I am not satisfied that these breaches of contract, in the absence of notice to perform under Art.63, constituted fundamental breaches that would justify avoidance of the contract of sale immediately prior to 6 October 1993. In any event no declaration of avoidance had been notified to Rosedown before 6 October 1993.

56. The contract of sale remained on foot when the administrator was appointed.

57. The object of Part 5.3A of the Law is stated in s.435A:

> "435A The object of this Part is to provide for the business,
>
> property and affairs of an insolvent company to be administered in
>
> a way that:
>
> (a) maximises the chances of the company, or as much as possible
>
> of its business, continuing in existence; or
>
> (b) if it is not possible for the company or its business to
>
> continue in existence - results in a better return for the
>
> company's creditors and members than would result from an
>
> immediate winding up of the company."

In furtherance of that object upon the appointment of an administrator under s.436A, and in the relatively short interim period whilst the company remains under administration (which in this case came to an end when the Deed of Company Arrangement was executed) the Law in Div.6 of Part 5.3A seeks to prevent creditors, secured and unsecured, from resorting to legal proceedings or self-help measures to enforce their rights against the company. Thus the company cannot be wound up during that period: s.440A. Generally, charges are unenforceable: s.440B; and owners and lessors cannot recover property used by the company: s.440C (but see Div.7). Proceedings in court against the company or in relation to any of its property cannot be begun or proceeded with except with the administrator's written consent or with the leave of the court: s.440D(1), and the administrator is not liable for damages if he refuses consent: s.440E. Enforcement processes in relation to the company are generally suspended: s.440F.

58. Whilst the provisions of Part 5.3A control the circumstances in which the property of the company may be recovered or taken by other parties, they do not freeze or suspend the exercise of every right held by a creditor. The provisions operate only according to their terms, and rights which are not modified or suspended may be exercised as if the administration had not occurred. Whilst s.440C curtailed Roder's right to recover the goods from Rosedown during the administration, in my opinion none of the provisions of the Law prevented Roder from notifying a declaration of avoidance of the contract. See also s.441J. In my opinion the appointment of an administrator by Rosedown constituted a fundamental breach of the contract within the meaning of Article 25 which would justify Roder notifying a declaration of avoidance. The resolution of the directors making that appointment amounted to an acknowledgment by them that the company was insolvent or was likely to become so. That fact, and the placement of the company under administration, in the circumstances of this case, resulted in such detriment to Roder as substantially to deprive it of what it was entitled to expect under the contract. The denial by Mr Eustace as agent for Rosedown (see s.437B) of the term as to retention of title also amounted to a fundamental breach of the contract.

59. The pleadings give no indication of the act which is said to constitute the "acceptance of the...repudiation". Whatever that act was, assuming there was one, it would probably constitute notification of a declaration of avoidance. I do not think the correspondence between Roder and Rosedown, and their solicitors, in October and early November 1993 can be construed as a declaration of avoidance. The correspondence concerns Roder's claim to possession of the goods - a claim which could have been made pursuant to the contract and not only as a consequence of avoidance: see Clough Mill Ltd v Martin at 988. As I have earlier observed, the evidence led by the parties hardly touches on the administration, and does not deal at all with events after 9 November 1993. If there were no earlier notification of a declaration of avoidance I consider the filing of the statement of claim should be so construed as it makes it plain that Roder at that time treated the contract as at an end. The statement of claim was filed on 13 December 1993. The evidence does not disclose whether this was during or after the period when Rosedown was under administration. Whilst Rosedown was under administration Roder's rights to possession of the goods whether pursuant to the contract or on avoidance were suspended by s.440C. No action can lie against either Mr Eustace (see s.440E) or Rosedown in respect of the refusal to deliver up the goods during this period. That refusal was not unlawful. It was a refusal sanctioned by the Law. The only redress open to Roder was to apply to court for leave to take possession (which it did), and if it were thought necessary to apply for leave to bring proceedings for declaratory relief (which it also did).

60. Upon the administration coming to an end when the Deed of Company Arrangement was executed, the protections afforded to the property of Rosedown under Div.6 of Part 5.3A came to an end. A new legal regime then came into force, being that governed by Div.10 of Part 5.3A (ss.444A to 445). The rights and obligations of creditors and the

company under a deed of company arrangement are likely to be quite different: cf Commissioner of Taxation v B and G Plant Hire Pty Ltd and Others [1994] FCA 1257; (1994) 14 ACSR 283 at 290.

61. I have already noted the power of the creditors to resolve that the administrator of a deed may be someone other than the administrator of the company. Other provisions of Div.10 of direct relevance are:

> "444D(1) A deed of company arrangement binds all creditors of the
>
> company, so far as concerns claims arising on or before the day
>
> specified in the deed under paragraph 444A(4)(i).
>
> (The day specified in the Deed is 6 October 1993)
>
> (2) Subsection (1) does not prevent a secured creditor from
>
> realising or otherwise dealing with the security, except so far
>
> as:
>
> (a) the deed so provides in relation to a secured creditor who
>
> voted in favour of the resolution of creditors because of
>
> which the company executed the deed; or
>
> (b) the Court orders under subsection 444F(2).
>
> (3) Subsection (1) does not affect a right that an owner or lessor
>
> of property has in relation to that property, except so far as:
>
> (a) the deed so provides in relation to an owner or lessor of
>
> property who voted in favour of the resolution of creditors
>
> because of which the company executed the deed; or
>
> (b) the Court orders under subsection 444F(4).

444E(1) Until a deed of company arrangement terminates, this section applies to a person bound by the deed.

(2) ...

(3) The person cannot:

(a) begin or proceed with a proceeding against the company or in relation to any of its property; or

(b) begin or proceed with enforcement process in relation to property of the company;

except:

(c) with the leave of the Court; and

(d) in accordance with such terms (if any) as the Court imposes.

(4) In subsection (3):

'property' in relation to the company, includes property used or occupied by, or in the possession of, the company.

444F(1) This section applies where:

(a) it is proposed that a company execute a deed of company arrangement; or

(b) a company has executed such a deed.

(2) ...

(3) ...

(4) The Court may order the owner or lessor of property that is

used or occupied by, or is in the possession of, the company not

to take possession of the property or otherwise recover it.

(5) The Court may only make an order under subsection (4) if

satisfied that:

(a) for the owner or lessor to take possession of the property

or otherwise recover it would have a material adverse effect

on achieving the purposes of the deed; and

(b) having regard to:

(i) the terms of the deed; and

(ii) the terms of the order; and

(iii) any other relevant mater;

the interests of the owner or lessor will be adequately

protected.

(6) An order under this section may be made subject to conditions.

(7) An order under this section may only be made on the

application of:

(a) if paragraph (1)(a) applies - the administrator of the

company; or

(b) if paragraph (1)(b) applies - the deed's administrator."

62. In J and B Records Ltd v Brashs Pty Ltd (1995) 15 ACLC 458 Hodgson J in the Supreme Court of New South Wales considered whether a supplier of goods under a retention of title clause to a company that was later placed under administration, and then executed a deed of company arrangement, required leave to begin or proceed with

an action under s.444E(3). The supplier argued that leave was unnecessary as it was the owner of the goods within s.444D(3), that such an owner was not bound by the deed in respect of its claim as owner under s.444D(1), and s.444E only applied to persons so bound. His Honour said at 466:

> "...I have come to the view that s.444D(2) and (3) do not have the effect of removing the requirement for secured creditors and owners or lessors to obtain the leave of the court under s.444E(3) in respect of court proceedings to enforce their rights as secured creditors or owners or lessors, where those persons are creditors with claims arising on or before the day specified in the deed, and where these claims are associated with the security or property.
>
> There is some force in the submission...that this would have the result of setting up a scheme which, to some extent, would encourage self-help and resort to extra-curial enforcement or recovery procedures, which is somewhat contrary to the trend of legislation and judicial decisions in recent times. However, I think the preferable view is that those three sections were intended to set up something of a code relating to court proceedings in relation to matters concerning claims arising on or before the day specified in the deed; so that the court which is overseeing the administration of the deed will have general control of such proceedings, either by way of applications for

leave under s.444E, or applications for orders limiting actions by owners or secured creditors under s.444F. In deciding whether to give leave under s.444E to a secured creditor or owner, and if so on what conditions, a court will have regard to the circumstance that under s.444F a secured creditor or owner will be restrained from extra-curial action only if the court is satisfied their interests will be adequately protected."

With those conclusions I respectfully agree. In the particular circumstances of that case leave was held to be unnecessary as the cause of action was based on an undertaking given by the administrators after the day specified in the deed. In the present case however, the essential rights which Roder seeks to enforce are its rights as owner of the goods, rights that existed before 6 October 1993. For the purposes of s.444E(3), insofar as remedies are now sought against Rosedown (e.g. for declaratory relief, delivery up and damages for wrongful detention) this action is obviously a "proceeding against the company". Insofar as additional or other relief is sought against Mr Eustace this action is one "in relation to any of its property": see s.444E(4). So a precondition to the pursuit of this action is leave under s.444E(3). The action has throughout been prosecuted on the footing that the leave to proceed given under s.440D(1)(b) on 9 November 1993 fulfils this condition. No point to the contrary has been taken by the respondents in their pleadings or otherwise. In my opinion the leave given under s.440D(1)(b) only authorised the prosecution of the action against the company whilst under administration, and against Mr Eustace as administrator of the company. When the administration came to an end, s.444E(3) then came into operation so as to require a further grant of leave. That further leave was required is readily explained by at least two considerations. First, the administrator of the deed may not be the administrator of the company: s.444A(2). Secondly, different considerations will apply in many cases when considering the merits of the enforcement of the proposed claims. For example in the present case one claim made in the proceedings at the time of the order on 9 November 1993 was a claim under s.440C. At 9 November 1993 there appeared an urgent need to address the entitlement of the owner (if Roder could establish ownership) to recover its depreciating goods as no adequate recompense was offered by the administrator for the continued use of the goods, and no other provision of the Law appeared to offer an avenue for ordering recompense to Roder during the continuance of the administration (s.443B(2) was of doubtful application, the contract of sale not providing for any rent or other periodic

payment to recompense for actual use of the goods). However once the administration ended, so did the restrictions imposed by s.440C. Then s.444F came into operation. Under s.444F the owner of goods in the possession of the company is not prevented from recovering them unless the court so orders under s.444F(4) on application of the appropriate administrator (s.444F(7)), and such an order may only be made if the court is satisfied as required by s.444F(5). As Hodgson J observed in J and B Records Ltd v Brashs Pty Ltd (supra) the provisions of s.444F will be a consideration in deciding whether to give leave under s.444E(3).

63. The absence of an order giving leave to proceed is a matter which Roder must now address. As the case has been conducted throughout on the footing that the requisite leave had been obtained, and as there has been no application under s.444F(4) or offer of recompense for the continuing use of the goods, it may be appropriate to grant leave nunc pro tunc from the day after the administration of Rosedown came to an end (see s.447A). I will hear the parties on this question.

64. Subject to the question of leave, Roder is entitled to enforce the rights and obligations which arose on the avoidance of the contract under the Convention. So too is Rosedown. Relevantly the Convention provides, first as damages:

> "Article 74
>
> Damages for breach of contract by one party consist of a sum equal
>
> to the loss, including loss of profit, suffered by the other party
>
> as a consequence of the breach. Such damages may not exceed the
>
> loss which the party in breach foresaw or ought to have foreseen
>
> at the time of the conclusion of the contract, in the light of the
>
> facts and matters of which he then knew or ought to have known, as
>
> a possible consequence of the breach of contract.
>
> Article 75
>
> If the contract is avoided and if, in a reasonable manner and
>
> within a reasonable time after avoidance, the buyer has bought
>
> goods in replacement or the seller has resold the goods, the party

claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

Article 76

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.

(2) ..."

and secondly as to restitution:

"Article 81

(1) Avoidance of the contract releases both parties from their obligations under it subject to any damages which may be due...

(2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the

first party has supplied or paid under the contract. If both

parties are bound to make restitution, they must do so

concurrently.

Article 84

(1) If the seller is bound to refund the price, he must also pay

interest on it, from the date on which the price was paid.

(2) The buyer must account to the seller for all benefits which he

has derived from the goods or part of them:

(a) if he must make restitution of the goods or part of

them;..."

There is no evidence before the Court which enables the application of these provisions to be further discussed. I note that immediately upon his appointment as administrator Mr Eustace obtained an "auction realisation" valuation of the plant and equipment of Rosedown, and that may be of some assistance to the parties in the application of Article 76 should that be appropriate.

65. Roder complains that its loss and damages are ongoing, and will continue until the goods are returned. As Roder cannot resell the goods for the purpose of Article 75, nor make restitution as required by Article 81, until the goods are returned, the appropriate date at which to assess the net result of applying the above Articles could be the date of return of the goods. In the unlikely event that the net result were in favour of Rosedown, there would be no practical point in Roder pursuing a claim against Mr Eustace.

66. On the other hand if the net result is in favour of Roder, Roder will obviously wish to obtain judgment against Rosedown and Mr Eustace in respect of their respective liabilities - unless the fortunes of Rosedown have now so improved that Roder is content to await payment by the company of its entitlement assessed under the Convention.

67. It is necessary therefore to consider the liability of Rosedown and of Mr Eustace for the refusal to return the goods to Roder. I have already indicated that Mr Eustace incurred no liability for the refusal to return the goods whilst Rosedown was under administration. However, when he became the administrator of the Deed he lost the protection of ss.440C and 440E.

68. By s.444A(5) the Deed is taken to include the prescribed provisions, except so far as it provides otherwise. By Regulation 5.3A.06 the prescribed provisions are those set out in Schedule 8A. Paragraph 1 of Schedule 8A provides that in exercising the powers conferred by the Deed and in carrying out the duties arising under it, the administrator (of the deed) is taken to act as agent for and on behalf of the company; and under paragraph 2(a) the administrator has the power to enter upon and take possession of the property of the company. A draft of the Deed (the only evidence of its terms before the Court) did not otherwise provide. The affidavit evidence of Mr Eustace read at trial indicates that in his capacity as administrator of the Deed, and agent of Rosedown, he has denied Roder's claim for possession and delivery up, and has defended these proceedings. In the result Roder has established that the contract of sale included a valid term for the retention of title until payment in full; that it is the owner of the goods; and that, absent an order under s.444F(4), it has been entitled to immediate possession of the goods from the time when the Deed of Company Arrangement was executed. Both Mr Eustace personally and Rosedown are liable to Roder for the tort of conversion for interfering with the possessory rights of Roder. The tort is committed by an agent even where the agent acts in good faith without any intention to commit a wrong: J G Fleming, The Law of Torts 8th Ed. at 56, and even though he does not act on his own account or for his personal benefit: Salmond and Heuston on the Law of Torts, 20th Ed. 111. See generally Bowstead on Agency 15th Ed. at 386 and 495 ff. The conventional measure of damages for conversion is the value of the goods at the date of the wrong: McGregor on Damages 15th Ed. paras. 1298 ff - in this case the value of the goods at the date when the Deed was executed. In addition Roder would be entitled to interest under the Federal Court of Australia Act 1976 (Cth), s.51A from that date. If the value of the goods at that date and interest thereafter is allowed, it is difficult to follow how Roder would have any additional right to compensation for "rental value" from that date. If the goods are now returned, credit will have to be allowed for their present value. The judgment for damages for conversion, when assessed, will be entered jointly and severally against both Rosedown and Mr Eustace. If the loss and damage of Roder against Rosedown under the Convention provisions is assessed at the date of return of the goods there is likely to be some overlap between the judgment entered against Rosedown on that cause of action, and the judgments entered for conversion. Roder cannot recover more than its full loss. It cannot recover its loss in full under a judgment entered against one respondent, and then recover further moneys under a judgment against the other respondent. So if Rosedown is able to discharge the judgment against it that will also satisfy the judgment against Mr Eustace. If not, Mr Eustace will remain liable to discharge the judgment against him.

69. I publish these reasons and my associate will communicate with the parties to arrange a convenient time to relist the matter.