3/84

No. 57 of 1983.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF

NEW SOUTH WALES

COURT OF APPEAL

IN PROCEEDINGS 116 OF 1981

MAYNEGRAIN PTY. LIMITED — Appellant (Defendant)

and

COMPAFINA BANK — Respondent (Plaintiff)

CASE FOR THE RESPONDENT

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A. General

1. This is an appeal as of right by Maynegrain Pty. Ltd. ("Maynegrain") from a judgment of the court of Appeal Division of the Supreme Court of New South Wales. The respondent ("Compafina") also petitions for special leave to appeal as to the manner of assessing the damages due to it. By arrangement with the appellant, Compafina's submissions upon that cross-appeal are included in this case.

2. This action was commenced in the Common Law Division (Commercial List) of the Supreme Court by Compafina against Maynegrain and against Bulk Terminals and Exporters Pty. Ltd. ("BTE"). BTE and a Panamanian company, Penmas Inc., were controlled by a Mr. Alexander Jamieson, who was engaged in the international grain trade. Maynegrain operates a bulk grain storage terminal at Brisbane, Queensland, with facilities to receive grain by road or rail and discharge it into ships moored alongside the terminal. Compafina is a Swiss bank.

3. In September 1976, it was agreed between Compafina and Mr.Jamieson, acting on behalf of BTE and Penmas Inc. that Compafina would lend up to $U.S. 3 million for the purchase by BTE in Australia of up to 30,000 tonnes of barley for sale overseas; that such finance would be for 80 per cent of the purchase price; that interest would be paid thereon at the rate being the London Interbank Offered Rate (LIBOR) from time to time plus two per cent; and that such loan was to be secured by a pledge, constituted by warehouse receipts to be issued by Maynegrain. It was agreed that warehouse receipts should be held by the ANZ Bank in Sydney on behalf of Compafina.

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4. Between December 1976 and March 1977, 28,034.46 tonnes of barley purchased by BTE were delivered to Maynegrain's terminal, in respect of which amounts totalling $US2,562,326 were lent by Compafina. At BTE's request, Maynegrain issued successive warehouse receipts addressed to the ANZ Bank and stating the current totals of quantities of barley held "on your account".

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5. Before those warehouse receipts were issued, Maynegrain were made aware, by BTE, that the origin of the moneys lent to BTE was a bank in Geneva and the warehouse receipts addressed to the ANZ were required in connection with such borrowing arrangments.

6. In June 1977, Mr.Jamieson sought Compafina's approval of the release of the barley for shipment to Kuwait. However, Compafina refused to agree to the transactions proposed, having regard to the need to ship the barley in bulk, but to supply it bagged in Kuwait in order to fulfill a contract for the supply of bagged barley, with the bagging to be done on the wharf in Kuwait, prior to delivery. Certain proposals to protect its security were discussed, but without its knowledge or consent Mr. Jamieson proceeded to arrange the shipment to Kuwait. Penmas Inc. entered into a contract to sell the barley on a bagged basis to Gulf Fisheries WLL, which in turn contracted to sell it to Kuwait Supply Co. On 10 July 1977 Kuwait Supply Co. opened a Letter of Credit with the Commercial Bank of Kuwait to the value of $U.S.4.4 million, in favour of a Sheikh Hamad, in respect of the barley to be supplied bagged at Kuwait.

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7. Early in August 1977, the barley was loaded by Maynegrain, at the request of BTE, upon the vessel "Bellnes" and the vessel sailed to Kuwait. Maynegrain did not notify Compafina or ANZ, or seek their approval to the loading.

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8. Mr. Jamieson first notifed Compafina of the shipment on 24 August 1977 whilst the vessel was on the high seas. After protesting, Compafina paid the freight in an amount of $US550,000 and executed a demurrage guarantee for the benefit of the shipowners, in order to obtain the bill of lading for the cargo.

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9. The vessel arrived at Kuwait on 4 September 1977. After negotiations between Compafina, Gulf Fisheries WLL and Sheikh Hamad, the letter of credit was transferred to the extent of $US3.3 million, to Compafina. The Sheikh refused to give a transfer to any greater extent.

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10. After delays in unloading and bagging of the barley, damage to the barley from rain, forced payments in order to have the letter of credit extended and other tribulations, Compafina received $US2,447,509 from the sale of the barley, leaving a substantial shortfall in the moneys due to it in respect of principal lent, interest, freight and demurrage.

11. The action was heard by Rogers J. who held that Compafina had a valid pledge of the barley and that Maynegrain was liable to it for damages in conversion, by reason of its loading of the grain without authority. He also found against Maynegrain in detinue, in respect of a discrepancy between the amount received by it and that loaded on the vessel. Judgments were entered against BTE and Maynegrain for $A1,664,377, representing the value of the barley as at the date of the conversion, less the amount recovered by Compafina after deduction of freight and demurrage, producing a balance of $A1,210,544, together with interest thereon at 10% to date of judgment. Vol. 1, 337-338

12. Maynegrain appealed to the Court of Appeal and Compafina cross-appealed. The Court of Appeal allowed in part both the appeal and cross-appeal on damages and reduced the damages awarded, including interest, to $A1,067,350. Vol. 1, 392

13. Maynegrain now appeals to Her Majesty in Council. Compafina obtained conditional leave to cross-appeal against the judgment of the Court of Appeal but due to an oversight in the payment of security in circumstances referred to in the Petition for Special Leave to Appeal, final leave could not be granted by the Court of Appeal.

14. It is proposed to deal with the issues raised by the appeal and proposed cross-appeal under similar headings to those adopted by Maynegrain in its case.

B. Whether the argument that Compafina had no title to sue in conversion and detinue can be entertained on appeal.

15. In the Court of Appeal Maynegrain sought to argue that, since the warehouse receipts were addressed to the ANZ Bank, there was no effective pledge in favour of Compafina

and that Compafina could not sue without ANZ Bank being a party to the action. Maynegrain had put various arguments on the issue of liability before the trial judge, but not this one.

16. In the Court of Appeal, Compafina opposed the raising of this point. Hope JA rejected the point on its merits, without referring to the question of whether or not it should be allowed to be raised. However, His Honour expressed agreement with the reasons of Hutley JA, who, after shortly rejecting the point on its merits, expressed the view that, if the point had been taken at the trial it could have been cured by joining the ANZ either as a plaintiff or defendant and it should therefore not be allowed to be raised. (See Supreme Court Rules Part 8 Rules 7 and 8).

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17. It is submitted that the Judicial Committee should not permit the point to be raised before it.
(Perkowski v. Wellington Corp (1959) A.C. 53, 69;
Pillai v. Comptroller of Income Tax (1970) A.C. 1124;
Liew Sai Wah v. Public Prosecutor (1969) 1 A.C. 295).
If it is permitted and decided favourably to Maynegrain, Compafina will suffer substantial prejudice by reason of its not having been raised at the trial. In addition to the reasons of Hutley JA (above), it is apparent that the 6 year limitation period from the date of the tort of conversion has now expired, and Maynegrain would therefore have a defence to an action by the ANZ as plaintiff.

18. As stated by the High Court of Australia, it would be wrong and would destroy and value of the Commercial List procedure in the Supreme Court if a court upon appeal were to decide such a case by reference to matters which were not raised as issues at the trial.
Saffron v. Societe Miniere Cafrika (1958) 100 231, 240.

19. Further, where a point is not taken in the court below and evidence could have been given there which by any possibility could have prevented the point from succeeding, it cannot be taken afterwards.

Suttor v. Gundowda Pty. Ltd. (1950) 81 CLR 418, 438.
Had the point been taken at the trial, not only could it have been cured by the joinder of the ANZ as a party, but Compafina may have been able to adduce further evidence of the relationship between itself and the ANZ as to the agency whereby the warehouse receipts were held by ANZ on behalf of Compafina, and as to Maynegrain's knowledge of the position of the ANZ Bank as an agent.

20. In any event, by the taking of the point now, rather than at the trial, if it be successful, there will be other significant prejudice to Compafina. To now join the ANZ Bank may necessitate the return of the matter to the trial judge and consequent further delay and expense.

C. Compafina's title to sue in conversion and detinue.

21. In order to give rise to its title to sue for these torts, Compafina relies upon a pledge completed by the constructive delivery of possession of the barley to it through its agent the ANZ Bank. Such constructive delivery of possession was affected by Maynegrain's attornment to Compafina by means of the warehouse receipts, issued pursuant to the agreement for pledge between Compafina and BTE referred to in paragraph 3 above. Alternatively, Compafina says that Maynegrain is estopped from denying Compafina's entitlement to possession of the barley by reason of the representations made by the warehouse receipts and Compafina's reliance upon these representations to its detriment in making the advances of money.

22. It is well established that such a pledge may be created by constructive delivery of possession of the goods pledged, the change in possession being perfected by the third party who holds the goods attorning to the pledgee.
(Official Assignee of Madras v. Mercantile Bank of India Ltd. (1935) A.C. 53, 58;
Grigg v. National Guardian Assurance Co. (1891) 3 Ch. 306;
Crossley Vaines on Personal Property, 5th ed., 459-461.)

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365.12

23. In receiving and holding the warehouse receipts addressed to it, the ANZ Bank was acting as agent for Compafina. Rogers J. and Hope JA held that to Maynegrain Compafina was an undisclosed principal. However, it is submitted that the matters of which Mr. Johnstone, the manager of Maynegrain, was aware were sufficient for a reasonable person in his position to infer that, in connection with the warehouse receipts, ANZ Bank was acting not as a principal but as agent for a Swiss bank. These matters are referred to in paragraph 5 above. It is therefore submitted that the question of agency can be dealt with on the basis that Compafina was the principal of ANZ whose existence, but not identity, as principal was known to Maynegrain.

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24. Whether or not Compafina was disclosed as principal, it is submitted that it must be allowed the benefit of the attornment to its agent. This is not a case in which there was anything specifically important in the identity of the pledgee to Maynegrain. Knowledge of the actual owner is irrelevant in conversion. On this basis, Hutley JA held that the special property in the barley vested in Compafina as pledgee, by virtue of the attornment, and it could sue.
Marfani & Co. Ltd. v. Midland Bank Ltd. (1968) 1 W.L.R. 956, 970-971).

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25. Hope JA also found that the doctrine whereby the undisclosed principal may sue on a contract made on his behalf should be applied to the attornment and associated estoppel here.
(See Mooney v. Williams (1905) 3 CLR 1, 8; Tehran Europe Co. Ltd. v. S.T. Belton (Tractors) Ltd. (1968) 2 Q.B. 545, 552).
With one exception, Compafina respectfully adopts the reasons of Hope JA on this point. The exception is the statement that the barley bought by BTE and pledged to Compafina was intermixed with barley not belonging to BTE, and that, thus, no identified barley had been separated from the larger amount and appropriated to BTE. The point was not raised at the trial and His Honour the trial judge made no such finding. Whilst Maynegrain had the power to mix BTE's barley with other barley of the same quality under the agreement between them, there is no evidence that any such mixing took place. The evidence of Mr. Johnstone, Maynegrain's manager, as to the reasons why a smaller quantity was

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shipped than was received into the terminal are inconsistent with there having been any such mixing. It should be inferred, therefore, that the pledged barley remained separate and distinct at all times. If this is correct, then His Honour's conclusion is strengthened.

26. Compafina further submits that the constructive possession of the barley which ANZ had by reason of the warehouse receipts was, in law, the constructive possession of Compafina. In relation to the receipts and holding of such receipts, ANZ acted as the mere agent of Compafina. Just as a servant who has custody of a chattel in the course of his employment does not have possession of the chattel, but his master does, it is submitted that the constructive possession of a mere agent is the constructive possession of his principal. The principal therefore has sufficient right to possession to ground the action for conversion.
(See White v. Morris 11. C.B. 1015; 138 E.R. 778;
Barker v. Furlong (1981) 2 Ch. 172, 179;
Wilson v. Lombank (1963) 1 W.L.R. 1294;
London Corporation v. Applegard (1963) 1 W.L.R. 982;
Byrne v. Hoare (1965) Qld. S.R. 135; and
Johnson v. Lancashire & Yorkshire Railway (1878) 3 C.P. 499, 503).
Mulliner v. Florence (1878) 3 Q.B.D. 484;
Williams v. Millington 1 H.B1 81, 126 E.R.49;
Halliday v. Holgate (1868) L.R. 3 Ex.299;
Consolidated Co. v. Curtis (1892) 1 Q.B. 495;
City Fur Manufacturing Co. v. Fureenbond Brokers (1937) 1 A.E.R. 799;
International Factors v. Rodriguez (1977) Ch. 351.

27. Whether or not Compafina may rely upon the attornment by warehouse receipts as an undisclosed principal, it submits that it is entitled to the benefit of the estoppel by representation, made by those receipts. Maynegrain is thereby precluded from denying that Compafina, by its agent ANZ, had the right to possession of the barley and also, if necessary, from denying that the necessary appropriation of specific barley had been made.
(See Knights v. Wiffen (1870) L.R. 5 Q.B. 660; and the analogy of estoppel where a

person attorns tenant of land: Partridge v. McIntosh & Sons Ltd. (1933) 49 C.L.R. 453, 462, 457).

28. A person may rely upon an estoppel by representation if he is -

(a) the principal of the person to whom the representation was directly made; or

(b) a person not being a principal, whom nevertheless the representor actually or presumptively intended the representation to reach and affect, and whom it did in fact so reach and affect.

(Spencer, Bower & Turner, Estoppel by Representation, 3rd ed. 117;
Knights v. Wiffen (above);
Burkinshaw v. Nicholls (1878) 3 App. Cas. 1004;
Martyn v. Gray (1863) 14 C.B.N.S. 824 (143 E.R. 667);
Henry Bentley ex p. Harrison (1893) 69 L.T. 204;
Clowes v. Ross (1922) V.L.R. 434 and

Curtis v. Perth & Freemantle Bottle Exchange Co. 18 C.L.R. 17, 26-7.

29. Compafina qualifies under both limbs referred to in paragraph 28 -

(a) It has been found to be the principal of the ANZ;

(b) Mr. Johnstone, manager of Maynegrain, appreciated that the warehouse receipts he was providing, addressed to the ANZ, were required in connection with the arrangements made for borrowings from a Swiss bank. In the circumstances, he must be presumed to have intended that the representations made by the receipts should reach and affect that Swiss bank.

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As Rogers J. found, Compafina did act on the faith of the receipts in making the various advances, on each occasion instructing the ANZ that the "drawdown" should not be released until the warehouse receipt was held.

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30. The required elements of estoppel are therefore present. As Hope JA held, the principles of attornment and of estoppel have been applied from time to time with considerable flexibility, and will

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accommodate both Compafina and the ANZ Bank having the benefit of the estoppel here.

D. Whether ANZ consented to the shipment

31. Maynegrain argues that the ANZ Bank impliedly consented to the release of the barley for shipment and in some way Maynegrain was thereby discharged, by Compafina, from the tort of conversion.

32. It is clear that Maynegrain did not notify the ANZ of the loading of the cargo on the "Belnes". Further, there is no evidence that Maynegrain was aware that the ANZ had any knowledge of the shipment. The only evidence of knowledge on the part of the ANZ was in the form of diary notes tendered, stating that BTE had informed some officers of the ANZ, in its capacity as BTE's bank, of some of the proposals in relation to sale and shipment of the grain, but not as to the particular shipment which took place. However, in the absence of evidence that Maynegrain knew of this and relied upon it as consent, it is submitted that there can be no defence.

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33. The argument was rejected by Rogers J. and by Hutley JA. Consent requires some positive act by a person with authority, such person having full knowledge of all relevant circumstances so as to give consent. A positive act, not mere passivity is required - although consent may be inferred.
Booton v. Clayton 48 S.R. (NSW) 336 at 339-40).

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34. Here, the ANZ Bank took no postive act such as to indicate consent. Further, it has not been shown that any of its officers and knowledge of all relevant circumstances - and in particular the fact that Compafina had expressly declined to authorize BTE to ship the barley to Kuwait. No ANZ officer was called to establish consent. It is also clear that ANZ did not have actual authority to consent, on behalf of Compafina, to the shipment. In view of Maynegrain's ignorance of ANZ's receipt of any information, it cannot rely upon any ostensible authority that ANZ might have had.

E. Whether Compafina's losses can be regarded as "consequential" and "too remote".

35. Maynegrain argues that the particular sums disbursed by the Commercial Bank of Kuwait should be looked at as "consequential losses" by Compafina. Rogers J. and the Court of Appeal rejected this approach, holding that Maynegrain's tort of conversion was complete when the cargo was loaded, and that thereafter Compafina was engaged in mitigating its damage flowing from the tort. On this analysis, Maynegrain bore the onus of proving that, in respect of some particular amount or amounts, Compafina did not act reasonably in attempting to recover it. Compafina is therefore entitled to the full amount lost, less the amounts of money actually received from the proceeds of sale in Kuwait, together with expenses of such mitigation.

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(Solloway v. McLaughlin (1938) A.C. 247, 258.
McGregor on Damages, 14th ed.; para. 1690).

36. In his findings of fact, Rogers J. found that only one amount, of $40,000, was not satisfactorily explained by Compafina. This conclusion was reversed by the Court of Appeal (see below). In relation to the rest of the shortfall suffered by Compafina, His Honour found no reason to conclude that Compafina had not done all that was reasonable in mitigating its loss.

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37. Maynegrain's point as to 'remoteness' appears to depend upon an argument that, by obtaining the bill of lading in respect of the cargo, Compafina thereby regained possession of the pledged goods and it is in some way then limited to claiming losses which were 'consequential' or foreseeable as a result of the tort.

38. Such an argument ignores the fact that obtaining of possession of the bill of lading by Compafina was in no way the equivalent of regaining possession of the barley in store in Brisbane. The cargo was in a 'distress' situation, on board a vessel bound for Kuwait and Compafina had no right to change that destination. In practical terms, Compafina had no alternative but to pay the freight and give the demurrage guarantee in order to obtain

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the bill of lading - and then to fulfill the sale to the Kuwait Supply Company that had been arranged, negotiating as best it could with the holder of the letter of credit, Sheikh Hamad. Mr. Ferrasse's evidence as to Compafina's lack of alternative courses of action and as to the recovery of the possible amounts was accepted by Rogers J., and no evidence was led by Maynegrain to show that the steps taken were less than what was reasonable.

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39. Maynegrain directs submissions to particular sums of money disbursed by the Commercial Bank of Kuwait. However, except for the sum of $40,000, it is not suggested that Compafina could, in the circumstances, have obtained any further payments from the bank. How the money was disbursed is, therefore, presently irrelevant. Whilst one may speculate as to which amounts ought to have been paid to Compafina (and it may have an action, to which Maynegrain would be subrogated upon payment of the judgment herein, against that bank for $US600,000), other amounts shown on exhibit C2, such as those paid to Mr. Jamieson, to the Gulf Bank or to Sheikh Hamad, might also have been paid to Compafina to reduce its loss, but were not. Further, the loss of barley resulting from rain and other wastage was such that the proceeds of only 24,000 tonnes are shown on that documents. Were it not for such losses, the proceeds may have been sufficient to pay out Compafina. Thus, it is misleading for Maynegrain to say that Compafina's loss is "made up of" certain selected disbursements by the Commercial Bank of Kuwait taken from that document.

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F. $40,000 paid to Thai boatmen

40. The Court of Appeal held that the sum of $US40,000 paid to certain Thai boatmen should not be deducted from the damages received by Compafina. Their Honours found that this sum was paid to the boatment who were responsible for the lightering of the barley from the ship to the wharf, and was money laid out in payment to workmen necessarily employed to complete the sale of the barley.

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41. Rogers J. had expressed the view that Compafina had not satisfactorily explained the reason for the payment, and held that

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the amount should go to the credit of Maynegrain. However, His Honour did not refer to the evidence of Mr. Ferrasse which was relied upon by the Court of Appeal. That evidence, and the evidence of Mr. Jamieson, make it clear, it is submitted, that the amount was properly paid by the Commercial Bank of Kuwait, and agreed to by Compafina, in order to discharge a liability properly incurred in completing the sale of the barley, and hence in mitigating Compafina's loss.

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42. The onus lay on Maynegrain to show that, in respect of this amount, Compafina's loss of it had in fact been avoided or that Compafina failed to take reasonable steps to avoid its loss, which steps, if taken, would have so avoided the loss (McGregor on Damages, 14th ed., paras. 209, 216). It is submitted that none of these conditions was established by the evidence and the Court of Appeal's decision was correct.

G. Cross-Appeal - damages based upon full value of the barley at the date of conversion.

43. The learned trial judge held that the proper measure of Compafina's damages was the value of the barley at the date of conversion, less the net amount recovered by Compafina from the sale of the barley in Kuwait. The Court of Appeal disagreed, holding that Compafina should receive the difference between the amount due to it as pledgee, from BTE, and the amount recovered from the sale. It is submitted that the measure of damages adopted by the learned trial judge is correct, for the following reasons.

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44. It is supported by long standing authority in many jurisdictions.
(See Swire v. Leach (1865) 18 C.B. (N.S.) 479; 144, E.R. 531;
Johnson v. Lancashire & Yorkshire Railway 1878, 3 CPD 503;
The Winkfield (1902) p. 42;
Mulliner v. Florence (1878) 3 Q.B.D. 484;
Thorne v. McGregor 35 D.L.R. (3rd) 687;
Kidman v. Farmers Centre 1959 Qld. R. 8;
McGregor on Damages, 14th ed., paras. 1045, 1077, 1080).

45. It is also consistent with principle. Firstly, it is well established that the

pledgee has the whole of the present interest in the goods pledged.
(Rue v. Payne Douthwaite 1855 53 L.T. 932, 935;
Sewell v. Burdick 10 App. Cas. 74, 83, 98;
Halliday v. Holgate (1868) L.R. 3 Ex.299, 302 and the cases cited in para. 45).
It is the tortious interference with this interest for which compensation by way of damages is awarded, and the right to damages is complete at the time of the act of conversion, subject to credit being given for any amounts or benefits received subsequently by way of mitigation.
(Solloway v. McLaughlan (1938) A.C. 247).
Secondly, actions to protect possession, such as those between bailor and bailee and landlord and tenant, cannot be defeated by pleading a jus tertii, except in certain special circumstances. To enable a defendant who has converted goods to reduce the damages for which he is liable by relying upon the interest of a third party in the goods, the plaintiff having only a limited interest, is to effectively abrogate this principle. The soundness of this principle and the difficulties inherent in permitting disputes as to title to be introduced into actions based upon possession, even under the heading of damages, are illustrated by the problems occasioned by the reasoning of Hutley JA on this point.

46. It was critical to this reasoning that any interest which Compafina had in the proceeds of a judgment against Maynegrain (beyond the amount owed in respect of the barley) would be held for BTE which, in turn, would be bound to indemnify Maynegrain - thus leading to circuity of action. It is submitted, with respect, that these assumptions were, or may well have been, erroneous, and in any event raise false issues as - Vol. 1, 384.18

(a) The question of whether Compafina would hold any balance above the value of the barley for BTE was not raised at the trial by Maynegrain or BTE and was not the subject of any finding by His Honour the trial judge. Resolution of it would clearly depend upon the complete relationship between Compafina and BTE, not just the financing of the barley shipments. This was not investigated as an issue at the trial. It would have been for

Maynegrain to raise the issue and establish that any balance would have been held by Compafina for BTE and that in turn BTE would have held any such balance for it. In the event, some evidence was tendered at the trial which incidentally throws light upon the unresolved question, and which indicates that the question (if asked) would have been answered in the negative. Pursuant to its pledge, had it not been for the conversion, Compafina would have been entitled to receive the whole of the sale price for the barley, in exchange for documents of title, and pursuant to a formal "Acte de Natissement" or pledge given by the borrower, Penmas Inc., Compafina would have been entitled to retain any balance held over the above that due in respect of purchase of the barley in order to cover Penmas' other debts to Compafina. The "Acte de Natissement" or formal pledge has been included in the record only in its original French. A translation of that document appears at the conclusion of this case, at page 20. At the time of the conversion of the barley, Penmas Inc. was indebted to Compafina for borrowings not related to the barley in amounts over $US1.2 million. Penmas Inc. remains so indebted to Compafina. One exhibit which relates to these borrowings, Exhibit M, has not been reproduced in the record, and a copy appears at page 22 hereof.

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(b) By the judgment in this action BTE was ordered to pay $1,664,377 to Compafina. Until this amount is paid, Compafina would not hold any balance for BTE.

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(c) The obligation upon BTE to indemnify Maynegrain to the full extent of the judgment was the result of judgment being entered for the defendant, Maynegrain, against BTE upon a cross-claim based upon the terms of an express agreement between the two, the defence to which was struck out at the trial following withdrawal of BTE from the proceedings. It would be a curious situation if the plaintiff's entitlement to damages would depend upon the resolution of a cross-claim based upon an express agreement between the other parties.

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(d) If the issue of the obligation upon BTE to indemnify Maynegrain had been raised at the trial for the purpose of reducing Compafina's damages, then it would have been relevant for Compafina to investigate whether Maynegrain had been party to the dishonesty of BTE which was involved in shipping the barley. If that were established, it is submitted that this would defeat any actual or notional indemnity.

47. Further, the injustice, in the view of Hutley JA, depended upon any such balance passing to BTE and being shared amongst its creditors, including Maynegrain, since BTE is now in liquidation. It is submitted, with respect, that this view also discloses an error, in that - Vol. 1.1, 384.28

(a) the proper measure of damages to be awarded to Compafina for Maynegrain's tort surely cannot depend upon whether BTE is or is not in liquidation;

(b) even if BTE was entitled to be paid the balance of a judgment paid by Maynegrain, there is nothing unjust about Maynegrain, as a creditor of BTE and a joint and several tort-feasor, in having to share what assets BTE has with other creditors.

48. It is respectfully submitted that the complications occasioned by entering into investigation if the issues discussed in paragraphs 46 and 47 of this case are inconsistent with the nature of an award of damages for intentional interference with chattels and with the conduct of such a case. It is significant that no authority can be cited to illustrate this type of question being investigated in this type of case.

49. It is further submitted that this point not having been taken at the trial should not have been considered by the Court of Appeal for the reasons referred to in paragraphs 17 to 20 of this case.

50. The cases of Wickham Holdings Ltd. v. Brooke House Motors Ltd. (1967) 1 W.L.R. 295; Belvoir Finance Co. v. Stapleton (1971) 1 Q.B. 210 and Pacific Acceptance Corporation v. Mirror Motors Pty. Ltd. 77 Vol. 1, 383

W.N. (N.S.W.) 666 were relied upon by Hutley JA. It is submitted that -

(a) such cases are distinguishable from the present. They are limited in their application to the relationship of hire-purchase or, alternatively, to situations where the defendant converter is the holder of an interest in the goods converted, and the plaintiff and the defendant together hold all of the interests in the goods. Here, Maynegrain holds no such interest, is a stranger to the property in the goods, and cannot be distinguished from a stranger who converts goods and is sued by a person who had possession of them.

(b) in the event that such cases are not to be distinguished, then it is submitted that they should not be followed.

51. It was also held by Hutley JA that The Winkfield's rule for assessment of damages in conversion cannot stand because of the decision of the High Court in Butler v. Egg & Egg Pulp Marketing Board 114 CLR, 185. It is submitted that -

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(a) The decision in The Winkfield was cited in Butler but was not disapproved of by the Court. It is hardly conceivable that the High Court would overrule such a long standing decision without comment. Therefore the two decisions must stand together.

(b) Butler's case essentially concerned the question of whether the Board should give credit for the amount which it would, but for the conversion, have been obliged to pay for Butler's eggs, rather than the question here, of whether the starting point should be the value of the thing converted. Furthermore, the defendant was not a "stranger" to the goods in the normal sense. It was a special case of compulsory acquisition leading to true unjust enrichment.

(c) If the principle for which Butler is authority is that a plaintiff is entitled to be put in the position it would have been if the tort had not been committed (see majority judgment 114 CLR at 191), then in the present case this would lead to the plaintiff receiving the money equivalent of the barley in store in Brisbane, subject of course to giving credit for recoveries.

This is precisely the basis of the decision of Rogers J.

(d) The comment by Menzies J. (at 114 CLR 192), relied upon by Hutley JA, in relation to the recovery of the converted goods, reflects the obligation to account for value of amounts recovered as Compafina has done. As Rogers J. found, obtaining the bill of lading in respect of the cargo, when it was upon a vessel bound for Kuwait, was in no practical sense the equivalent of recovery of possession thereof in Brisbane. Vol. 1, 385.15 Vol. 1, 340.1

(e) If it becomes necessary it will be submitted that, if there is a conflict, the line of authority referred to in paragraph 44 should be preferred to Butler.

Alternative basis for recovery - in negligence

52. If Compafina's title to sue in conversion and detinue is rejected, it relies in the alternative on a count in negligence. This count has been relied upon at the trial and in the Court of Appeal. It was rejected by Rogers J. Vol. 1, 341.28

53. It is submitted that the learned trial judge ought to have found that, in the circumstances referred to in paragraphs 4 and 5 hereof, Maynegrain owed a duty of care to the Swiss bank which it knew was concerned in the lending of money for purchase of the barley and in the arrangements for directing the warehouse receipts to the ANZ Bank. It was a duty, at least, to notify the ANZ Bank, in its capacity of holder of those warehouse receipts, before Maynegrain delivered up the barley.

54. In such circumstances, it was reasonably foreseeable by Maynegrain that such Swiss Bank would suffer financial loss as a consequence of Maynegrain's failure to take proper care in relation to the barley the subject of the receipts. This is sufficient to give rise to an actionable duty of care, owed to Compafina.
(See Caltex Oil (Australia) Pty. Ltd. v. The "Willemstad", 136 C.L.R. 529;
Dorset Yacht Co. v. Home Office (1970) A.C. 1004 ;
Anns v. Merton London Borough Council (1978) A.C. 728, 751-2).

55. Had Maynegrain notified ANZ Bank, in its capacity of holder of the warehouse receipts of the proposal to ship the barley on board the "Bellnes", it is reasonable to assume that Compafina would have been notified, and steps would have been taken to inform Maynegrain of the pledgee's lack of consent, hence preventing the shipment and avoiding the losses flowing therefrom. Thus, it should be found that Maynegrain's negligence in failing to notify the ANZ gave rise to Compafina's losses.

Conclusion

56. It is submitted that Maynegrain's appeal should be dismissed with costs for the following among other
REASONS
(1) that the Court of Appeal was correct in holding that the point as to Compafina's title to sue in conversion and detinue should not be allowed to be raised on appeal;
(2) that Compafina had sufficient title to sue in conversion and detinue;
(3) that there is no defence to the claim in conversion by reason of the alleged consent of ANZ Bank to the shipment;
(4) that there should be no reduction in the damages awarded by the Court of Appeal by reason of any alleged consequential losses being too remote or by reference to the sum of $US40,000 paid to Thai boatmen;
(5) that, if reasons (1) and (2) are rejected, Maynegrain is liable to Compafina for damages in negligence.

57. It is submitted that Compafina's appeal should be allowed with costs and that, in substitution for declaration 5 in the Court of Appeal's order of 17 June 1982, the following orders should be made:-
(i) that Maynegrain pay to Compafina damages in the sum of $A1,210,544;
(ii) that it be declared that Maynegrain should pay to Compafina interest upon the value of the barley ($A2,915,583) less the amounts received by Compafina from the proceeds of sale of the barley from time to time, at the rate of interest charged to BTE under its pledge agreement, namely the London

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Interbank Offered Rate plus 2 per cent, during the period from 12 August 1977 to the date of this order;

(iii) that it be referred to the Supreme Court Common Law Division (Commercial List) to determine the amount of the said interest for the following, among other

REASONS

(1) Even if the reasoning of the Court of Appeal, contrary to Compafina's submission, is correct on this point, its application in the present case depends upon facts which were not raised by Maynegrain or investigated at the trial and on which there were no findings by the trial judge;

(2) the proper measure of damages payable to Compafina for the tort of conversion is the value of the barley at the date of its conversion less the net amounts recovered by Compafina from the proceeds of its sale;

(3) upon the measure of damages the rule in The Winkfield should be applied.

R.V. GYLES W.W. CALDWELL

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Compagnie Financière et d'Investissements

COMPAFINA S.A.

SOCIÉTÉ ANONYME AU CAPITAL DE FR. 10.000.000

11, rue Général Dufour

TÉL. (022) 28 02 22
TELEX: 289374
C. C. P. 12-10128
Cable COMPAFINA

ADRESSE POUR LA CORRESPONDANCE
1211 GENÈVE 11
CASE POSTALE 32

LETTER OF PLEDGE

1. I/we the undersigned Penmas Inc. Panama

residing in .....

declare that I/we pledge in favour of the Compagnie Financiere et D'Investissements/ Compafina S.A. Geneva (hereinafter called "the bank") all bearer and registered securities, assets, deposits, credits in account, including those in foreign currencies, all claims, which are now lodged or which might be lodged later with the bank or in the bank's name with third parties, as well as all goods handed direct to the bank or at its disposal in the hands of third parties named or approved by the bank, in my/our name by me/us or by third parties. The pledge thus conferred upon the bank expressly covers all and any outstanding, current or future interest, dividends and any other advantages whatsoever to which these assets may be entitled. Securities which are not bearer are pledged by this letter of hypothecation in accordance with Article 901, Para. 2 of the Swiss Civil Code.

2. The pledge warrants in favour of the bank the reimbursement of all present or future claims, including interest, commissions, expenses and any other charges, which the bank might have against : me/us in respect of any event which may occur.

For such purpose, I/we declare that the books of the bank will alone indicate the amount and the currency of the claim and will, therefore, constitute a title in its favour.

3. If the bank considers that the value of the pledge, after deducting a margin which it will have the right to fix, is not sufficient to cover its claim, it may demand from me/us an additional guaranty or the reimbursement of a corresponding amount. If I/we do not meet such demand within the time given to me/us by the bank in a registered letter sent to my/our address as indicated to the bank in the last instance, the claim will immediately become payable, and the bank will have the right—but without incurring any liability if it does not exercise such right—to sell, upon the expiration of the time fixed, without further notice and without any preliminary proceedings, in the manner, in the order and within the time it will deem convenient, on the stock exchange or by private treaty, all or part of the assets pledged by this letter of hypothecation and to set off the proceeds against its claim up to the amount due. In the event that the bank sees danger in the delay, it may advise me/us by telegram and shorten the time to 48 hours.

4. The bank is also entitled to sell at any time, without other advice and without any further formality, in the manner and in the order it deems convenient, all or part of the valuables or goods pledged, in the event that
would be in arrears as regards the payment of all or part of their debt or would not have met any of their obligations.

5. The bank has the right, but not the obligation, to represent in general meetings the shares, certificates, etc. covered by the pledge and to exercise the right to vote deriving therefrom, provided, however, that no instruction to the contrary will have reached the bank eight days before the general meeting.

6. The bank undertakes to supervise the drawings, notices of redemption, conversions, redemptions, amortizations, subscription rights of the securities hypothecated, in accordance with the press announcements and the drawing lists at its disposal, but does not assume any liability in this connection nor as regards any possible reduction of the value of the pledges given.

7. I/we undertake to make all the necessary arrangements for safeguarding the rights relating to the securities and goods pledged. The bank does not incur any liability in this respect, but it is authorized to take any appropriate action for such purpose.
As regards the preservation of the goods and the damages or deteriorations which might affect their value, the bank declines all responsibility, any risks whatsoever being borne by me/us.

8. I/we authorize the bank to take, without any further formality, any action which it deems necessary for the validity, transfer and possible sale of the assets pledged ; I/we undertake, if need be, to assist the bank with this end in view.

9. For any difficulties or disputes arising from the execution of this letter of hypothecation, and of all the claims warranted by the said letter, I/we declare that I/we accept the application of the Swiss laws, as well as the jurisdiction of the courts of the Canton of Geneva, subject to appeal before the Swiss Federal Court, unless the bank prefers to file the action at my/our domicile. For this purpose, I/we elect domicile at the head office of the bank. The place of execution is, at the same time, the place of jurisdiction for me/us if I/we reside abroad or transfer my/our domicile abroad after concluding this agreement.

Made and signed in Geneva the 13th July 1976.

Signature(s)

A. Jamieson.

PV fait

EXHIBIT 'M'

DEMANDE D'AUGMENTATION

DEBITEUR : PENMAS INC., Panama

MONTANT : 1) US$ 1'200'000,-- (inchangé) voir PV du 7/11/76
2) US$ 1'000'000,-- (inchangé)
3) US$ 1'000'000,-- nouveau crédit

NATURE DU CREDIT : 1) Financement à 60% du rachat à concurrence de 40% des actions de INLAND SATELLITE TERMINALS PTY LTD.

2) Financement à 80% achat céréales entreposées à Brisbane (Australie) sous tierce détention MAYNE NICKLESS (notre participation dans crédit consortial de US$ 2,5 mios avec BPCI qui prend 60%)

3) Financement de stock de SORGO pré-vendu à TRADAX selon engagement d'achat à notre égard (notre participation dans crédit consortial en pool avec BPCI Bâle et GRINDLAY OTTOMANE, Genève)

GARANTIES : 1) Nantissement des actions acquises, détenues par l'ANZ Bk à Sydney pour notre compte.
Letter of pledge d'Amerapco faveur PENMAS. Caution pers. Mr A.JAMIESON

2) Warehouse receipts établis à notre nom et détenus pour notre compte par l'ANZ à Sydney.

3) Nantissement marchandise et lettre d'engagement d'achat de TRADAX

CONDITIONS : 1) + 2) + 3) = Commission 1/2% flat (dont 1/4% à Mr. BARKI)
1) + 2) + 3) = Intérêt : Libor à 3 mois + 2 1/2% (dont 1/4% à Mr.BARKI)

VALIDITE : 1) 31.12.1977
2) 31.10.1977
3) 31.05.1977

* *

AVIS DE LA DIRECTION

EF – favorable – le crédit complémentaire a pour but assuré dans la vente à Tradax. ✓

WS – favorable ✓

HH – favorable

OC – Favorable. ✓

DECISION DU COMITE DE CREDITS

PB – Je suis favorable à ce crédit complémentaire, notamment pour ce type d'opération. ✓

JP – Accord ✓

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REQUEST FOR INCREASE

Borrower : Penmas Inc., Panama

Amount : 1) U.S. $ 1,200,000 (unchanged)

2) U.S. $ 1,000,000 (unchanged)

3) U.S. $ 1,000,000 - new borrowing.

Nature of Loan:

1) 60% financing of the purchase of 40% of the shares of Inland Satellite Terminals PTY Limited.

2) 80% financing of the purchase of cereals stored in Brisbane (Australia) in the possession of the third party Mayne Nickless (our participation being in a consortium credit of U.S. $2.5 millions with B.P.C.I. who is taking 60%).

3) Financing a stock of Indian millet pre-sold to Tradax in accordance with an undertaking to purchase made to us (our participation being in a consortium credit with B.P.C.I. Basle and Grindlay Ottoman of Geneva).

Security : 1) Pledge of shares purchased, held by ANZ Bank in Sydney for our account.
Letter of pledge from Amerapco in favour of Penmas. Personal guarantee of Mr. A. Jamieso

2) Warehouse receipts made out in our name and held for our account by ANZ in Sydney.

3) Pledge of goods and letter of undertaking to purchase from Tradax.