Conversion

Set I

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A 271/82

BETWEEN CONTINENTAL CAR SERVICES (WELLINGTON) LIMITED an incorporated Company havi its registered office at Wellington

First Plaintiff

A N D DYATRON SYSTEMS LIMITED incorporated Company havi its registered office at Wellington

Second Plaintiff

A N D KEVIN PATRICK O'REGAN of Wainuiomata, Repossessior Agent and CITICORP AUSTRALIA LIMITED a Comp incorporated in the state Victoria, Australia, havi a registered office at 14 St Georges Terrace, Perth Western Australia

First Defendants

A N D MICHAEL ANTHONY BUNGAY Wellington, Solicitor

Second Defendant

Hearing: 26, 27 and 28 November 1984

Counsel: J.C.D. Corry for first and second plaintiffs
M.A.F. Gilkison for first defendants
W.S. Shires, Q.C., for second defendant

Judgment: 17 December 1984

JUDGMENT AND REASONS FOR JUDGMENT OF SAVAGE J.

This action relates to a BMW motor car which is at present in the hands of the second plaintiff, Dyatron Systems Limited

("Dyatron"), of Wellington. A brief history of the car, and the persons through whose hands it has passed, is necessary to understand the issues that arise in the action. In February 1980 a Mr J.D. Enright entered into a hire purchase agreement with Citicorp Australia Limited ("Citicorp"), one of the first defendants, in respect of the BMW motor car. The transaction was in Perth, Western Australia. In terms of this agreement Citicorp was the owner of the BMW and Enright the hirer on the terms set out in the agreement which included an obligation to make monthly payments. The last payment was made on 7 August 1981. Thereafter Citicorp instructed its agents, K.J. Marriott & Associates, to locate the car and the hirer. This took a considerable time, for the trail stretched across Australia from Western Australia to Queensland and New South Wales and thence to New Zealand. Mr Enright was located in Lower Hutt and the car in the possession of Dyatron. This was in the latter part of 1982. Citicorp was represented in New Zealand by Kevin Patrick O'Regan, a repossession agent, named as one of the first defendants. It appeared that Enright had taken the car from Australia to New Zealand in early 1980 and it was registered here on 27 March 1980 in the name of Mrs H.N. Enright. Shortly after that date it was purchased from the Enrights by the second defendant, Mr M.A. Bungay at Wellington. He kept it for some two years and two months and then sold it to a car dealer, Continental Car Services (Wellington) Limited ("Continental"), the first plaintiff. The actual date was 24 May 1982 and on the same day Continental

sold it to Dyatron in whose hands, as has already been noted, it now is.

After the car was located in Wellington Mr O'Regan, the repossession agent, took some steps towards repossessing it f Citicorp and there followed discussions and correspondence between Continental, Dyatron and Mr Bungay and solicitors for the parties. In September 1982 solicitors for Continental an Dyatron issued these proceedings. They sought a declaration that Citicorp had no right title or interest in the car and against Mr Bungay they contended that if Citicorp was entitle to the car then they were entitled to judgment against him fo the amount that Dyatron had paid for the car and subsequently expended on it, amounting to $16,700, and for the amount of their solicitor and client costs incurred in resisting Citicorp's claims. Citicorp filed a defence and made a counter-claim in which it said it was the owner of the BMW ar that Continental had committed the tort of conversion in relation to it and that Dyatron also had converted the car bu in addition it still had the car and refused to surrender it Citicorp and thus it had committed, and continued to commit, the tort of detinue in relation to it. Continental and Dyat filed defences to the counter-claim and also raised a plea o contributory negligence against Citicorp. Mr Bungay filed a defence to the claim against him by Continental and Dyatron. Citicorp then served a notice on Mr Bungay under R 99N of th Code claiming that he, too, had committed the tort of conversion and seeking damages from him. Mr Bungay filed a

defence to the notice and also pleaded contributory negligence against Citicorp.

At the conclusion of the evidence it became clear that some disputed matters were resolved and some matters of fact were settled. Mr Corry for Continental and Dyatron and Mr Shires for Mr Bungay both informed the Court that it was accepted that the true owner of the car was Citicorp; both accepted that there had been conversions of the car by their clients. In the case of Continental and Dyatron the conversion occurred in May 1982, when the purchase by Continental from Mr Bungay and the sale to Dyatron occurred, but in the case of Mr Bungay Citicorp contended it occurred in March 1980, when he bought the car from the Enrights, or, alternatively, in May 1982, when he sold it to Continental. Mr Bungay, on the other hand, claimed that Citicorp did not have a right to possession of the car before August 1981, when the last payment was made by the Enrights to Citicorp under the hire purchase agreement, and accordingly there was no conversion in March 1980. Mr Gilkison for Citicorp advised the Court that what Citicorp sought was a money judgment against Continental, Dyatron and Mr Bungay and accepted that when the judgment was satisfied the car should remain with Dyatron. All counsel also accepted that the exchange rate between Australia and New Zealand at the relevant dates was agreed but I do not need to set the figures out. There was also evidence from a motor vehicle consultant, Mr F.J. Myers, which I accept as showing the value of the car at the relevant dates, namely $16,000 in March 1980, $16,500 i

May 1982, $14,500 in January 1984 and $12,500 today.

The position between the parties appears to be as follows:

1. Continental and Dyatron accept that Citicorp is entitled to judgment against each of them; both accept that they are liable in conversion, the conversion taking place in May 1982; both dispute the amount which Citicorp claims and both contend that whatever the amount properly is it should be reduced by reason of Citicorp's contributory negligence.

2. Dyatron denies that it is liable to Citicorp in detinue at all. This cause of action is only of relevance if the plea of contributory negligence against Citicorp succeeds and the amount that Citicorp is entitled to in conversion ends up by being less than the amount that would be recovered in detinue, which is the value of the car today, that is $12,500.

3. Mr Bungay accepts Citicorp is entitled to judgment against him, he being liable in conversion; he accepts that conversion occurred in May 1982 but denies conversion in March 1980. He disputes the amount Citicorp claims and contends that whatever the amount properly is it should be reduced by reason of Citicorp's contributory negligence.

4. Mr Bungay accepts that he is liable to Continental for whatever sum it is obliged to pay Citicorp as a result of this action to pay Citicorp but denies Continental's and Dyatron's further claim for their

solicitor and client costs in relation to resisting Citicorp's claim for possession of the car and damages

5. Citicorp claims its damages should be awarded in Australian rather than New Zealand currency, while Continental, Dyatron and Mr Bungay all contend the damages should be allowed in New Zealand currency.

I propose, before dealing with the above five issues, to deal with some other matters which bear upon the matter of the amount of damages generally that may be payable. All counsel appeared to accept that the amount Citicorp might recover by way of damages for conversion and detinue was limited, in the circumstances, to the value of the vehicle at the time of the conversion or in detinue at the time of the judgment. It was not claimed by Citicorp that there were additional damages which it might recover in excess of the value of the vehicle. In my view, it is also clear that, the vehicle being subject to a hire purchase agreement, the measure of the damages to which Citicorp is entitled is the lesser of either, on the one hand, the market value of the vehicle at the time of conversion or in detinue of this judgment, or, on the other hand, the amount still owing under the agreement at the date of conversion or in detinue of this judgment. See Chubb Cash Ltd v John Crilley & Son [1983] 2 AER 294 and Wickham Holdings Ltd v Brooke House Motors Ltd [1967] 1 AER 117. In the latter case Lord Denning M.R. said at p 120:

> "I base my decision on this. In a hire-purchase transaction there are two proprietary interests,

> the finance company's interest and the hirer's interest. If the hirer wrongfully sells the goods or the benefit of the agreement, in breach of the agreement; then the finance company are entitled to recover what they have lost by reason of his wrongful act. That is normally the balance outstanding on the hire-purchase price; but they are not entitled to more than they have lost."

The amount owing under the agreement was contested and so I now deal with that issue. There was, as I understood counsel, no dispute as to the amount due under the agreement so far as the actual figures were concerned (and which were given to me in his submissions by Mr Corry) in relation to the total payable at the date of the conversion in May 1982 after taking into account interest, overdue interest, amounts paid by the Enrights and the rebate provided for in the West Australian statute. On that basis the figures are as follows, in Australian currency:

Amount of unpaid instalments in terms of the agreement	10,080.00
Interest up to May 1982	574.24
	10,654.24
Statutory rebate as at May 1982	1,019.46
	$ 9,634.78

Citicorp also claimed that there were two items payable under the agreement to which they were entitled and thus were a part of their loss. These two items were, first, the sum of $770

Australian, being costs they had to pay to K.J. Marriott & Associates for locating the car, and, secondly, the sum of $1,100 Australian which had been payable to them by the Enrights and which Citicorp claimed it was entitled to recover under the agreement in relation to the BMW.

In respect of the first item the agreement provided in clause 4(d) that the hirer would pay the reasonable costs incurred of and incidental to repossessing or attempting to reposses the vehicle. Mr Corry submitted that Continental and Dyatron were only liable to Citicorp for the amount due under the agreement at the time of the conversion, which in their case was 14 May 1982, and, since the account from K.J. Marriott & Associates was not rendered until 1 July 1982, no payment was due in respect of it until after the conversion. He further submitted that the account was for inquiries and not for actual repossession and therefore did not come within the clause. I do not think either of those submissions is sound. It is clear that the work done by K.J. Marriott & Associates was substantially done, if not wholly done, by the time Continental and Dyatron committed their acts of conversion in May 1982. The fact that they had not actually rendered their bill is not, I think, decisive. I think their inquiries which led to the locating of the BMW and the instructing of the repossession agent, Mr O'Regan, plainly come within the clause. Mr Shires in his submissions on this point went further. He contended that this item was irrecoverable from Mr Bungay, and no doubt if he is right from Continental and Dyatron also, on the basis

that the loss is too remote. He relied on Chubb Cash Ltd v John Crilley & Son (supra). The point of his submission was the argument that Citicorp is entitled to damages for conversion not for breach of the hire purchase agreement and he submitted this item of loss was not caused or contributed to by act of conversion or detinue. In my view, while it is correct that neither the act of conversion nor of detinue caused the expense to be incurred by Citicorp, for that was attributable to Enright's breach of the agreement, nevertheless it had been incurred before May 1982 and therefore was payable by Enright under the agreement at that date. It follows that since Citicorp is entitled to recover at least the amount due under the agreement at the date of the conversion it is entitled to recover this expense. Mr Shires further submitted that in any event there was no satisfactory proof that it is a reasonable charge. There was, he submitted, no evidence on this point other than that given by Mr Metcalfe of Citicorp, whose evidence was not sufficient because Mr Metcalfe was not clear whether it had been K.J. Marriott & Associates who had found the car or the Police. It was the Police in Australia who in the event prosecuted the Enrights for fraud, and, indeed, extradited them to Australia for trial. I think the evidence is sufficient; it is clear, whether it was the Police who found the car or Marriotts, that this account was incurred incidentally to attempting to repossess the car, which is all that clause 4(d) requires. However, while this expense had been incurred by May 1982, I think it is clear it had not been

incurred in March 1980, and if, therefore, Mr Bungay is liable for an act of conversion in March 1980 rather than May 1982 then the Marriott account cannot be claimed against him by Citicorp in respect of that conversion.

In respect of the second item Citicorp relied on clause 3(e) of the agreement, which provided that the hirer authorised it, Citicorp, to apropriate any monies that the hirer (Enright) paid to it in connection with the agreement towards any debt or liability of the hirer to Citicorp. Citicorp contended that Enright owed it $1,100 in respect of another motor vehicle referred to as the Fairlane. Mr Corry and Mr Shires submitted that this was an appropriation clause and in fact no appropriation was made and so the clause had no application. Mr Gilkison submitted that Citicorp would make an appropriation out of the proceeds of the monies eventually paid as a result of this litigation but, as Mr Corry pointed out, that would not be a payment in connection with the agreement but as the result of a judgment. It is clear no appropriation has in fact been made out of the monies paid by Enright and I therefore hold the clause has no application and Citicorp cannot recover the $1,100 Australian claimed.

I now turn to the first of the five issues referred to earlier, which is the matter of the amount to which Citicorp is entitled to claim against Continental and Dyatron, and whether that amount should be reduced by reason of Citicorp's alleged contributory negligence. The amount due at May 1982 in terms of the agreement but excluding the Marriott and Fairlane items

was, as I have held, $9,634.78 Australian or $13,381.63 New Zealand. To that sum must now be added the sum of $770 Australian for the K.J. Marriott and Associates account, making in all, on my arithmetic (which is suspect), the sum of $10,404.78 Australian and on what I was advised was the agreed rate of exchange in May 1982, in New Zealand currency the sum of $14,428.83. Mr Gilkison submitted that Citicorp was also entitled to claim as part of its loss interest in terms of the agreement down to the date of judgment. In effect he submitted regard should be had to events after the date of the conversion and on that basis interest should be calculated down to the date of judgment in terms of the agreement and furthermore the statutory rebate would be spent and no deduction should be made for it. I do not accept that approach. In my view the damages for Citicorp's loss are to be calculated on the basis of the amount to which it was entitled under the agreement at the date of the conversion. It is entitled to damages against Continental and Dyatron for conversion of the car by them not for breach of the contract it had with Enright. The amount of its loss by reason of that conversion is to be ascertained primarily by determining the amount to which it was entitled under the agreement at the time of the conversion. I add, however, that the Court can always allow interest on any sum it awards under s 87 of the Judicature Act 1908 and I shall make reference to provision later in this judgment. It follows that the amount Citicorp is entitled to recover is $10,404.78 Australian or $14,428.83 New Zealand, unless it should be

reduced for the alleged contributory negligence. Mr Bungay also alleged contributory negligence against Citicorp, as is noted in the third main issue referred to earlier, and so I deal with all the matters of contributory negligence together. The basis of this plea, which Mr Gilkison accepted was open to Continental, Dyatron and Mr Bungay if the facts justified it, was that Citicorp was guilty of contributory negligence in failing to take reasonable care for its own property in three respects:

(i) That it failed to check the registration of the BMW. The registration in fact expired in Western Australia in March 1980.

(ii) That it failed to check the insurance on the car. The insurance in fact expired in December 1980.

(ii) That it failed to have any general system for checking where the car was, or its state, from time to time.

It was argued that had Citicorp taken these three steps, or any of them, the fact that the Enrights had absconded with the car would have become apparent much earlier. They would not have prevented the March 1980 transaction but would have prevented the May 1982 transactions.

It is, I think, correct, as Mr Shires submitted, that the test for contributory negligence in these circumstances is whether Citicorp exercised reasonable care for its own property. Contributory negligence does not depend on a breach of duty to the other party but it does depend upon foreseeability of harm to one's self and in these circumstances

foreseeability of harm to one's own property. A person is guilty of contributory negligence in respect of his own property whenever he ought reasonably to have foreseen that if he did not act as a reasonably prudent man his property would suffer. In these circumstances it is my view that the question must be looked at on the basis that Citicorp was the owner of the BMW in law but that its actual ownership was qualified in the way Lord Denning described in the Wickham Holdings Ltd v Brooke House Motors Ltd case. There are two proprietary interests in the vehicle: the finance company's or other lender's and the hirer's. The test then is would a reasonably prudent finance company or other lender take the steps relied upon as being contributory negligence in the circumstances of this case? I do not think the evidence establishes that such a reasonably prudent finance company or other lender would do so. I do not think the failure to check the registration could amount to contributory negligence. It is no concern of the lender whether the car is registered or not, except perhaps to the extent that it might affect the insurance and there was no evidence about that. So far as the insurance issue is concerned, there was no evidence as to what a reasonably prudent finance company or other lender would do, and, further, I think there is merit in Mr Gilkison's submission that the purpose of the insurance provision contained in clause 3(c) of the agreement is to protect Citicorp against loss that would arise from physical damage to the car or theft of it from the Enrights. I do not think a failure to check with the insurance

company concerned to ensure that the policy was kept up to date would amount to contributory negligence in these circumstances since it was not suggested that any kind of insurance was required to protect Citicorp as owner from fraud by the Enrights as hirers. Lastly, so far as the matter of a general lack of supervision or system of checking is concerned, there was no evidence to suggest a reasonably prudent finance company or other lender would use one; and I add that without such evidence I would not conclude they ought. It follows that I reject the plea of contributory negligence and hold that Citicorp is entitled to recover the full amount mentioned above against Continental and Dyatron. It follows that in those circumstances it is unnecessary for me to deal with the second of the five issues. However, I record that had it been necessary I would have rejected Mr Corry's submission that the claim against Dyatron in detinue would not lie because there had been no formal demand by Citicorp for the car. A demand and a refusal is not the only form of evidence of an unlawful keeping. See Clerk & Lindsell on Torts (15th edn) paras 21-23 to 30.

The third of the five issues concerns the question whether Mr Bungay was liable in conversion for his acquisition of the car in March 1980 from the Enrights, which he denies, or whether he is liable in conversion for purporting to sell the car to Continental in May 1982, which he accepts.

The reason why Mr Bungay denied conversion in 1980, Mr Shires submitted, was that in March 1980 Citicorp did not

have a right to immediate possession of the BMW and for a cause of action to lie in conversion there must be a right to immediate possession. Citicorp, Mr Shires submitted, had no such right because the Enrights kept the payments under the agreement up to date until August 1981. Mr Gilkison accepted the general rule as to the requirement of a right of immediate possession but submitted that Citicorp had such a right. He submitted that because Enright had been in breach of the agreement in other respects, and, in particular, taking the car out of Western Australia and parting with possession of it, Citicorp had a right to immediate possession. Mr Shires appeared to accept that those two plain breaches would give a right to immediate possession to Citicorp had it known of them but he submitted that since it was clear Citicorp did not know of them in March 1980 it did not then have a right to immediate possession. There were no authorities on the point to which Mr Shires was able to refer me. I do not accept the submission. In Clerk & Lindsell on Torts (15th edn) in paras 21-51 and 52 at p 1046 there are passages to the effect that when a person with an exclusive right to possession of goods does an act or acts altogether inconsistent with the terms on which he holds the goods the right to possession will then revert to the owner who may thereupon sue the wrongdoer or anyone claiming under him. That seems to me to be the positic here, and as a matter of principle or logic I cannot see why a act which would otherwise amount to the tort of conversion should not be so merely because the owner at the time was

unaware that his bailee was in breach of the agreement under which he held the goods. In my view, lack of knowledge on the part of the owner that his bailee is in breach of the agreement does not affect the nature of the act on the part of the person acquiring the chattel from the bailee so as to prevent it amounting to an act of conversion. Theft of a chattel amounts to conversion of the chattel at the moment it is stolen not when the owner finds out it has been stolen. It follows that in my view Mr Bungay is liable for conversion as at March 1980. The amount for which he is liable is to be calculated in accordance with the approach followed in respect of Continental and Dyatron referred to earlier, save that the K.J. Marriott & Associates item is not to be included because it had not been incurred at that stage. The figure for interest will be reduced and that for the statutory rebate increased. All this may, in the circumstances, be just of academic interest since if the figure reached on this calculation is less than that payable by Continental and Dyatron Citicorp would be entitled to recover from Continental and Dyatron and leave them to recover what they have had to pay from Mr Bunagy. The only situation in which the matter assumes importance is if Citicorp is entitled to judgment in Australian currency and the effect of the change in exchange rates would result in judgment against Mr Bungay on that basis yielding more than a judgment against Continental and Dyatron calculated in respect of a conversion of the car in 1982. I have not attempted to do the arithmetic but no doubt counsel will in view of the finding

that I make later in this judgment that Citicorp is entitled to judgment in Australian currency. Leave is reserved to the parties to be heard further on the question of the calculations if this becomes necessary.

The fourth issue is concerned with Continental's and Dyatron's further claim for their solicitor and client costs in relation to resisting Citicorp's claim for possession of the car and for damages. I do not think this claim can be sustained. The solicitor and client costs sought, as I understood the claim and the submissions, are those arising out of this action. The costs to be allowed in this action to the parties to it are to be determined by the Court and not fixed by any of the parties. The position would, I think, have been somewhat different if Citicorp had sued Continental and Dyatron alone to recover possession of the car or damages and they had defended that action and ultimately lost it on the basis that Citicorp was the true owner. Continental could then have sued Mr Bungay seeking damages in respect of its loss which would have been the value of the car, or the sum it had been ordered to pay, together with the costs it had incurred in resisting the claim. The total of those two figures would have been its loss as a result of the failure of Mr Bungay to pass a good title to the car to Continental, and subject to satisfactory proof of the reasonableness of the costs Continental would have been entitled to recover its solicitor and client costs. See Benjamin's Sale of Goods, the first edition at paras 269 and 272. The second edition contains alterations to the law which

have no application in New Zealand. In these circumstances, however, I think Mr Shires is right that Continental and Dyatron are not entitled to recover their costs on a solicitor and client basis in respect of this action. See 12 Halsbury's Laws of England (4th edn) paras 1108 and 1120. In Cockburn v Edwards (1881) 18 Ch 449 at 459 Jessel M.R. said that the costs of the litigation, as between solicitor and client, would not be given as damages in the action in which the damages are recovered. The costs to be allowed Continental and Dyatron are those costs that the Court thinks proper. Ordinarily they would be costs on a party and party basis in accordance with the scale, but I think that in the circumstances here, where Continental and Dyatron are involved in this action because of Mr Bungay's inability, owing to the fraud perpetrated on him by the Enrights, to give a good title to the car to Continental, they are entitled to a somewhat larger amount. I refer to this aspect of the matter at the end of this judgment when dealing with the question of costs.

I turn now to the fifth and final issue of whether the damages to be awarded to Citicorp should be in Australian rather than New Zealand currency. It used to be said that English courts could give money judgments only in English currency. This view was expressed by Lord Parmoor in The Volturno [1921] 2 AC 544 at p 560. However, it is now clear that that view is no longer correct. In Miliangos v George Frank (Textiles) Ltd [1976] AC 443 the House of Lords determined that English courts were entitled to give judgment

for a sum of money expressed in a foreign currency. That now appears to be the position in New Zealand. Cooke J. in Isaac Naylor & Sons Ltd v N.Z. Co-operative Wool Marketing Association [1981] 1 NZLR 361 at p 364 referred to the Miliangos case and to another case, The Despina R [1979] AC 685, and said

> "... if the plaintiff was suing in England on a debt or breach of contract or tort for which liability had to be measured in foreign currency, the English court could only give judgment in sterling at the conversion rate ruling at the date of the breach or wrong. The achievement of the House of Lords in those cases was to abolish that doctrine in favour of more realistic solutions."

The matter is of considerable importance in this case because the rate of exchange for the conversion of New Zealand currency into Australian has changed very substantially in favour of Australia over the last few years. However, in my view it is by no means clear just what principles a court should apply in deciding whether to depart from the general and usual approach of giving judgment for a money sum in New Zealand currency and give judgment in a foreign currency. Mr Shires submitted that the Court had a general discretion as to which currency should be adopted but I do not think that can be right. Mr Gilkison submitted that on the principles laid down in the Despina R case the court is required to adopt the course which will produce the most just result. I think that is right but how

does one arrive at what is the most just result?

The Despina R case arose out of an action in tort based upon negligence. Two ships collided off Shanghai. A settlement was reached under which it was agreed that one party would pay to the other 85% of the loss and damage caused by the collision. Expenses incurred in repairing the loss were incurred in Japanese yen, U.S. dollars and as to a small amount in sterling. The alternatives in relation to which currency the judgment should be given in were:

(i) the currency in which the actual expenditure was incurred, "the expenditure currency";

(ii) the currency in which the loss was effectively felt or borne by the plaintiff, having regard to the currency in which he generally operated or with which he had the closest connection , "the plaintiff's currency";

(iii) sterling, taken at the date when the loss occurred or at some other date.

Lord Wilberforce said, and Lords Diplock, Salmon and Keith of Kinkel concurred in his judgment, that it was open to the court to give judgment on any one of the three alternatives. He went on to say that the question of which alternative should be adopted could be solved by applying the normal principles which govern the assessment of damages in cases of tort. Those are the principles of restitutio in integrum and that of reasonable foreseeability of the damage sustained.

In the circumstances here it is clear that the first alternative has no application. There does not appear to have been any expenditure on the part of Citicorp outside Australia. The choice then is between Australian and New Zealand currency, alternatives (ii) and (iii).

Mr Corry in his submissions had accepted that it was where the damage or loss was sustained that was important and not where the tort was committed. He argued that what Citicorp had suffered was a loss being the market value of the car - or at least the value of its interest in the car - in New Zealand because the action was based in conversion and detinue and the car was in New Zealand. He accepted that the Court should apply the restitutio in integrum and the reasonable foreseeability principles but submitted that in the circumstances here an innocent converter of the car would not have foreseen, even though aware that the car had come from Australia, that he might have to find foreign currency to meet the claim of a person from abroad. I do not accept that submission. In my view, the loss Citicorp has to bear is effectively felt or borne by it in Australia, which is where it carries on business. To make good its loss requires that it be compensated in Australian currency or at least by a sum in New Zealand currency which, when converted into Australian currency, would make good its loss in Australia.

However, restitutio in integrum is not the only principle to be applied; there is also the matter of reasonable foreseeability. The evidence shows that when Mr Bungay bought

the BMW car from the Enrights in March 1980 at Wellington he obtained a good deal of information about it. He knew that the Enrights were New Zealanders returning home after a lengthy period in Australia. He was told by them that they had purchased the car in Perth, driven it to Sydney and then shipped it to Wellington. He enquired about its history and was assured by the Enrights that it was completely unencumbered. He accepted that assurance. He was asked if he would mind if the ownership was not transferred into his name for two years as the Enrights might otherwise be liable for some New Zealand customs duty. He received the certificate of registration and a signed transfer of ownership form with the name of the transferee left blank. In my view, in those circumstances it was reasonable for Mr Bungay to foresee, had he addressed his mind to it, that if the car was not the unencumbered property of the Enrights then the true owner was likely to be in Australia, and if that person suffered a loss as a result of his, Mr Bungay's, receiving it then that person as true owner would effectively feel or bear the loss in Australian currency. It follows then that in my view, so far as Mr Bungay's conversion of the car in March 1980 is concerned, it is appropriate to award Citicorp damages against him in Australian currency. In my view, the position is also much the same so far as Continental is concerned. According to Mr Bungay he informed Mr Booth of Continental exactly what he had been told about the car by the Enrights. He said that naturally Mr Booth was interested to learn the history of the

car, and certainly I would have expected that a car dealer purchasing such a vehicle would seek as much information as he could get. Mr Bungay also said that he informed Mr Booth why the car was not in his, Mr Bungay's name, which it will be recalled related to the matter of possible customs duty. Mr Booth's recollection of what was said seems to limit Mr Bungay's account somewhat but he accepted that he did ask about the car's history and was aware of its Australian origins and how it came to New Zealand. It follows that it is appropriate, so far as Continental is concerned, that the damages awarded to Citicorp should be in Australian currency also. The position, however, appears to be rather different so far as Dyatron is concerned. Mr Taylor of Dyatron, who conducted the negotiations relating to the purchase of the car, gave evidence. There appears to have been very little said to him. I note that the written Vehicle Offer and Sale Agreement completed by Continental and Dyatron includes the words "ex overseas" in relation to the car and the Certificate of Registration also records that the car had previously been registered in Australia but otherwise there appears to be no material about its history. I do not think that information would be sufficient to make it reasonably foreseeable to such a purchaser that the car might in fact be the property of an Australian owner. I think, therefore, that the judgment against Dyatron should be in New Zealand currency in respect of the claim based on conversion; and since the claim based on detinue is in respect of the vehicle itself, which is of course

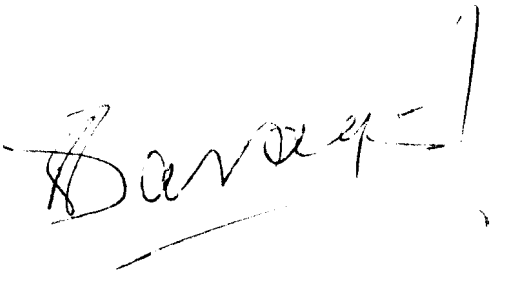
in New Zealand. I think damages in lieu of the vehicle would have to be in New Zealand currency. The matter of judgment against Dyatron is, however, I expect, largely academic, as Dyatron is entitled to look to Continental for an indemnity and no doubt Citicorp will prefer to pursue the recovery of the judgment against Continental and Mr Bungay in respect of whom the final figures will no doubt be greater than against Dyatron.

I referred earlier in this judgment to the matter of interest that might be allowed under s 87 of the Judicature Act 1908. No claim was made for this and since I have accepted that judgment against Continental and Mr Bungay should be in Australian currency so that Citicorp will get the benefit of the change in the rate of exchange between Australia and New Zealand over the last few years I do not propose to consider the matter further. I record, however, that had the position been otherwise I think it would have been appropriate to allow Citicorp interest on the amount to which it would have been entitled in New Zealand currency from the time the car was first located in Wellington by Mr O'Regan, the repossession aent, which was, I think, about August 1982. Citicorp could have diminished its loss at that point by seizing the car but it stayed its hand.

Counsel suggested that I might find it convenient to make my findings in my judgment and leave them to submit a draft form of judgment to implement my findings. I am very content to adopt that course, which in these complicated circumstances will be a very considerable assistance to me. Leave is

reserved to the parties to be heard further on any matter arising as to the form of the judgment.

I deal finally with the matter of costs. Citicorp is, of course, entitled to costs according to scale against Continental, Dyatron and Mr Bungay, including two extra days of hearing. Continental and Dyatron are entitled to costs against Mr Bungay according to scale but I propose to make Continental an extra allowance against Mr Bungay for the reasons already given. I suggest that when counsel submit the draft form of judgment they submit also a schedule of costs according to scale and I will at that point fix the extra allowance to be made to Continental. Counsel may, of course, be able to reach agreement on all outstanding matters without further reference to me.



Solicitors for first and second plaintiffs:	Foot McLaren (Wellington)
Solicitors for first defendants:	Bell, Gully, Buddle & Weir (Wellington)
Solicitors for second defendant:	Rainey, Collins, Armour & Boock (Wellington)

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A 271/82

BETWEEN CONTINENTAL CAR SERVICES (WELLINGTON) LIMITED an incorporated Company having its registered office at Wellington

First Plaintiff

A N D DYATRON SYSTEMS LIMITED an incorporated Company having its registered office at Wellington

Second Plaintiff

A N D KEVIN PATRICK O'REGAN of Wainuiomata, Repossession Agent and CITICORP AUSTRALIA LIMITED a Company incorporated in the state of Victoria, Australia, having a registered office at 140 St Georges Terrace, Perth, Western Australia

First Defendants

A N D MICHAEL ANTHONY BUNGAY of Wellington, Solicitor

Second Defendant

JUDGMENT AND REASONS FOR JUDGMENT OF SAVAGE J.

Reserved judgment delivered this 17th day of Dec 1982

Deputy Registrar

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Registrar .....