IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

AP12/03

BETWEEN	GEOFFREY BEACH Appellant
AND	RHEOCHEM PTY LTD Respondent

Hearing: 18 June 2003

Appearances: G Bogiatto for the Appellant
S Litchfield for the Respondent

Judgment: 15 July 2003

INTERIM JUDGMENT OF PATERSON J

Solicitors:

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Introduction

[1] The respondent (Rheochem) obtained judgment in the District Court against the appellant (Mr Beach) in the sum of $69,389.32 together with interest and costs. The cause of action upon which judgment was given was conversion. Mr Beach now appeals against that judgment.

Points on Appeal

[2] Mr Beach's memorandum of points on appeal contained 15 discrete points. However, he has now abandoned six of those points. He alleges that the District Court Judge erred in the following respects:

a) In finding that s 130 of the Property Law Act 1952 had been complied with;

b) In finding that a notice complying with s 130 of the Property Law Act had been given and that Mr Beach was aware of the transfer of the business from its former owner to Rheochem;

c) In finding that Mr Beach had converted goods held in a warehouse owned by Storage and Distribution Specialists Ltd (SDS);

d) In finding that Mr Beach had converted other goods by having them removed from the warehouse to other premises;

e) In finding that Mr Beach had persuaded the manager of SDS to transfer to Mr Beach's account on 2 March 2000 certain goods owned by Rheochem;

f) In finding that it was by no means clear that Mr Beach's subsequent dealing with SDS was such as to restore effective possession of the goods to Rheochem;

g) In finding that the amount owing was $69,389.32;

h) By failing to take into account the obligation on Rheochem to mitigate its losses, and its failure to do so;

i) In not finding that Rheochem was estopped by its conduct from asserting that Mr Beach was not entitled to deal with the goods situated at the warehouse for the purposes of sale of those goods and protection from dispersal by SDS.

Background

[3] The general background which follows is taken from the District Court judgment. Some of the findings are under challenge and will need to be considered further.

[4] Mr Beach was at the relevant times an importer and distributor in New Zealand of drilling fluids. He imported fluids from Independent Drilling Fluid Services Pty Ltd (IDF), a company associated with Rheochem. In early 1999, he was in negotiations with IDF over assuming a role as supplier and distributor of IDF's products in this country.

[5] IDF agreed to store its product in a warehouse in Onehunga operated by SDS. Mr Beach was authorised within certain limits to access and sell stock from this warehouse and was required to account to IDF for the goods taken and sold.

[6] On 30 July 1999, the assets and undertaking of IDF were assigned to Rheochem. It was the evidence of Mr Gardner, the Managing Director of Rheochem, that at the time of the assignment Mr Beach was advised of it, both orally and in writing. Mr Beach did not accept that he had been so advised and the Judge's finding that he had been given notice is one of the findings from which he appeals.

[7] Negotiations between Mr Beach and Mr Gardner which had begun before 30 July 1999, when the latter was representing IDF, continued. As part of these discussions, Mr Gardner visited New Zealand in August 1999 and had discussions with Mr Beach's accountant. Subsequently, two companies were incorporated. The first, Rheochem NZ Ltd, was to be the trading operation for Rheochem in New Zealand. Independent Drilling Fluid Services NZ Ltd was also incorporated simply to protect the tradename of IDF in New Zealand. The proposal was that both these

companies would be wholly owned subsidiaries of Rheochem. Mr Beach held one share in each of them and was appointed a director of both of them.

[8] Mr Beach also incorporated a company, New Zealand Drilling Fluids Ltd (NZDFL) and in his dealings with his customers, he documented sales as being with NZDFL.

[9] The Judge determined that a new agreement was not entered into between Rheochem and NZDFL and that Rheochem NZ Ltd never commenced trading. Mr Beach has not challenged these findings. The goods which Mr Beach continued to draw from the warehouse were accordingly drawn pursuant to the original arrangement negotiated by Mr Beach with IDF and which the Judge determined had been assigned to Rheochem in July 1999.

[10] Rheochem alleged that Mr Beach took all of the remaining stock from the warehouse, some of which was removed at one stage to another warehouse. On 4 April 2000 it rendered an invoice for this stock. The basis of this invoice was the terms and conditions on which the stock had been supplied by IDF to Mr Beach before 30 July 1999.

[11] Rheochem, relying upon the invoice dated 3 April 2000, alleged that the goods were sold and delivered to Mr Beach. The Judge determined that this cause of action could not succeed and that finding was not subject to a cross-appeal.

[12] The second cause of action was conversion and judgment was given against Mr Beach in this cause of action for the sum of $69,389.32.

Appeal on Factual Issues

[13] The points of appeal raise both factual and legal matters. An appellant has certain difficulties in appealing on factual issues. As noted in *Rae v International Insurance Brokers (Nelson-Marlborough) Ltd* [1998] 3 NZLR 190, any tendency to engage in a general factual retrial has to be firmly resisted. A trial Judge hears and sees witnesses and can form an impression of their credibility and reliability. The

Judge can gain an impression from the evidence not necessarily evident from the cold typeface of the transcript. In many respects in this case, Mr Beach is endeavouring to overturn factual findings of a Judge who had an advantage which this Court does not have.

Section 130 Property Law Act

[14] It is convenient to consider together the first two appeal points (para 2(a) and (b) above). In summary, Mr Beach's contentions are that if the contract, which existed before 30 July 1999 between IDF and Mr Beach, were assigned by IDF to Rheochem, the provisions of s 130 of the Property Law Act 1952 were not complied with. Therefore, there was no legal assignment of the contract and, at best, there was an equitable assignment, notice of which were not given to Mr Beach. If notice of the equitable assignment were not given, it was not enforceable against Mr Beach because the assignor, IDF, was not a party to the proceedings. The alleged reasons for non-compliance with s 130 were:

a) Mr Beach did not receive written notice of the assignment of the chose in action; or alternatively

b) If he did receive written notice, it did not comply with the section because it was not sent by the assignor and was not particularised.

[15] The relevant provisions of s 130(1) read:

> Any absolute assignment by writing under the hand of the assignor … of any … other legal or equitable thing in action, of which express notice in writing has been given to the … person from which the assignor would have been entitled to receive or claim that … thing in action, shall be and be deemed to have been effectual in law (subject to all equities that would have been entitled to priority over the right of the assignee if this act had not been passed), to pass and transfer the legal or equitable right of that debt or thing in action from the date of the notice, and all legal or equitable and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor."

[16] The Judge's relevant findings were in the following terms:

> "[5] At the time of the re-arrangement of the Australian company's affairs in July 1999, Mr Gardner informed the defendant, both orally and in writing, of

> the separation of the interests of himself and Mr Skujins, and invited the defendant to continue dealing with the Plaintiff. It was Mr Gardner's evidence that he subsequently, both orally and by email, formally informed Mr Beach that the assets of IDF had been formally assigned to the Plaintiff company. The defendant in his pleadings and in his evidence denied having received any such written notice. On the basis of that denial counsel for the defendant contends that the Plaintiff cannot show title since the provisions of s 130 of the Property Law Act have not been met.
>
> [6] On the evidence, overall, I am satisfied that such notice was given, and moreover that Mr Beach was well aware that the business of IDF had been taken over by the Plaintiff. It is obvious from the overall dealings between the parties that he was content to deal with the Plaintiff, and he acknowledged in giving evidence before me that there was no confusion in his mind as to the party to whom he was required to account for goods taken and sold. The defendants' argument under s 130 of the Property Law Act is, in my view, without merit."

[17] Mr Gardner, the managing director of Rheochem, and at the relevant time a director of IDF, sent a lengthy email to Mr Beach on 29 June 1999. He advised of the proposed restructuring of the Australian business during which he said:

> "I would appreciate the opportunity to involve you under the type of proposal you mentioned. As I said, it is your choice whether you deal with me or whatever Andre sets up. In the meantime it is up to you whether you want to sign the contract. If you wish to be involved in my new group, please let me know in writing before Wednesday as it strengthens my negotiations with suppliers."

Mr Beach replied the same day stating that he was happy to go along with Mr Gardner's proposals.

[18] Mr Gardner then stated that some time after that email, but before visiting Mr Beach in Auckland in August 1999, he sent another email confirming that the heads of agreement had been signed between IDF and Rheochem and the two former partners, and that from then on, Mr Beach would be dealing with Rheochem and not IDF. He stated that his email outlined the heads of agreement which had been entered into and that he advised Mr Beach that Rheochem had bought the assets and business of IDF and that Rheochem would be responsible for all existing contracts from 30 July 1999 onwards. The email was sent from his laptop computer and he did not keep a printed copy of the message. The computer was stolen in July 2000 and he could therefore not produce a copy of the email sent to Mr Beach.

[19] Mr Beach's evidence was that he did not receive in writing, or orally, details of the proposed assignment. He stated that when he met Mr Gardner in Auckland in August 1999, he was advised that the former Australian partner Mr Skujins was no longer with IDF, but was not advised of the terms of the heads of agreement dated 30 July 1999. His evidence was that there was no discussion with Mr Gardner at that time about the corporate restructuring of IDF although Mr Gardner said that he was happy that his former business partner had gone.

[20] Against this background, His Honour made the findings referred to in paragraphs 5 and 6 of his judgment (para 16 above). He, in effect, made a credibility finding against Mr Beach and, notwithstanding Mr Beach's denial, found that he did receive the second email. As already noted, an appellate Court should not lightly overturn factual findings of a Judge who has advantages which the appellate Court does not have. There was evidence upon which the Judge was entitled to make the findings and this Court should not disturb them. Nor can the appellant raise the best evidence rule. While an original document should be produced in order to prove its contents, this is not necessary if its absence can be explained. There was an explanation for the absence here of a copy of the email, which constituted the notice of the assignment, which the Judge accepted.

[21] It therefore remains to consider the further submission that the notice given was non-complying because it was sent by the assignor and was not particularised. I do not accept that the notice must be signed by the assignor. Section 130 of the Act provides that the assignment must be signed by the assignor. There is no requirement in s 130 that the express notice be so signed. The only requirement is that it be in writing. This point cannot succeed. If I am wrong, I note that at the relevant time, Mr Gardner was a director of both the assignor and assignee, and his email would have been advice on behalf of both the assignor and the assignee.

[22] In respect of the second point, Mr Gardner's evidence was that the email sent after the heads of agreement had been signed advised that Rheochem had bought the assets and business of IDF, and that Rheochem would be responsible for all existing contracts from 30 July 1999. This, in my view, was sufficient compliance with the provisions of s 130. It follows therefore that the first two points on appeal fail. The

Judge's finding that there was express notice of the assignment from IDF to Rheochem cannot and should not be overturned by this Court.

The conversion point

[23] The points of appeal summarised in subparagraphs 2(c) to (f) will be considered together. Before rephrasing the points on appeal, it is useful to summarise the relevant evidence. The summary is modified against His Honour's finding that after 30 July 1999, Mr Beach in his own right and not in the name of a new company, continued to draw stock from STS's warehouse in accordance with the terms previously agreed to with IDF.

[24] There was no evidence of stock takes from time to time. On 28 November 1999, Mr Beach sent a facsimile to Rheochem summarising stock movements. This was the last stock reconciliation provided by Mr Beach and showed the balance of stock, which Mr Beach acknowledged was held by SDS at that date. It summarised under the headings of BLACK DIAMOND, DRILL POL, DRILL POL LV, COAGULANT 17, and DRILL DET. There was no further accounting of stock before Rheochem sent to Mr Beach an invoice dated 4 April 2000, although Rheochem attempted to obtain further information from Mr Beach. On 7 March 2000, Rheochem sent an email to Mr Beach advising that it was having trouble reconciling its stock in New Zealand and asked for a list of products being held or sold. On 13 March 2000, SDS reported that it was not holding any stock on behalf of Rheochem.

[25] Rheochem was not paying storage charges to SDS. Mr Roycroft threatened to throw the product into the street unless the issue of payment of storage fees was settled. On 2 March 2000, Mr Beach made an arrangement with Mr Roycroft, a director of SDS and the manager of the warehouse. Mr Beach said in evidence:

> "I persuaded him on 2 March 2000 to accept a $1500 bond and arranged for most of the stocks to be transferred over to NZ Drilling Fluids Ltd's account for security in the meantime until Mike Roycroft was satisfied that IDF – the plaintiff – had met the storage cost obligations at which time he would transfer the stock back again."

[26] Mr Beach said he took the precautionary step of paying the sum of $1500 "in order to protect the stock as well as to protect the interests of my company which was dependent on purchasing parts of that stock for onsale." Thereafter, storage fees were paid by Mr Beach. The sum of $1,500 was credited to the account of Mr Beach's company and not Rheochem. A consignment note issued by SDS noted that the $1,500 was a "credit for storage of goods" and the credit was to NZDFL, and the customer reference was Geoff Beach. The 13 March report referred to above indicated that SDS was not holding any of the stock on behalf of Rheochem.

[27] Mr Beach's evidence was that in the week between 14 and 21 March, he arranged for SDS to transfer 20% of the stock to the Mainfreight premises. The stock remained at Mainfreight's premises until it was returned at Mr Beach's direction to SDS on 16 May 2000. The evidence casts doubt on whether the stock was actually transferred to Mainfreight on the date suggested by Mr Beach, or a little earlier, as an employee of Mainfreight gave evidence that the product was received by Mainfreight on 7 March 2000. Nothing turns on this discrepancy.

[28] Mr Beach did not tell Rheochem that he had transferred stock to the Mainfreight warehouse. He sent an email on 14 March 2000 advising that because Rheochem had only made one payment of storage costs which was more than six months ago, SDS "refused to release any further stock and I was forced to put up a bond to meet my customers' requirements. To add insult to injury, Bill later faxed SDS putting a hold on further stock releases without ever bothering to notify me." This email also noted that stock he requested in November was finally delivered to SDS only a few weeks ago. From other comments in the email, Mr Beach evidently believed that Rheochem was in some financial difficulty.

[29] On 28 March 2000, Rheochem asked Mr Beach what had happened to its stock, but received no reply. Consequently, Rheochem on 4 April 2000 issued an invoice for the stock which it alleged it had supplied to SDS and which Mr Beach had taken from the warehouse and not paid for. Subject to an adjustment which will be referred to later, judgment was given in respect of this statement.

[30] On 11 May 2000, Mr Beach wrote to SDS requesting that certain stocks be transferred to Rheochem forthwith and asking SDS to notify Rheochem that it would be responsible for storage costs from 11 May. In a further letter of 15 May, he requested that further stock be transferred to Rheochem and asked SDS to pick up from Mainfreight the stock held at its premises and to transfer this to Rheochem.

[31] On 19 May 2000, SDS on its statement to Mr Beach's company, debited $157.05. Mr Roycroft assumed, in response to a question, that this was SDS shifting stock internally within SDS from NZ Drilling Fluid Services (ie Mr Beach) back to Independent Drilling Fluid (Rheochem).

[32] The storage charges rendered after the "transfers" in May 2000 to Mr Beach are approximately $65.90 per week. The stock which he contends was returned to Rheochem could have incurred storage charges of approximately$45 per week. The charges from SDS to Rheochem after that date were approximately $5 per week which was for product other than that with which Mr Beach was dealing. It is apparent that SDS still charged Mr Beach for the storage after his letters of 11 and 15 May 2000.

[33] Against the above background, the Judge made various findings against Mr Beach. They may be summarised as follows:

a) Mr Beach's only right to access Rheochem's goods was to take limited quantities for sale in terms of contractual arrangement which existed at 30 July 1999. The transfer of Rheochem's goods to the account of his company and the physical removal of some of those goods to another warehouse, were acts carried out without Rheochem's authority, and made Mr Beach a bailee of the goods, viz a viz Rheochem;

b) Mr Beach converted the goods which he arranged "to be transferred over to NZDFL's account" although there was no physical movement of the goods in question. The notional transfer and Mr Beach's intent were inconsistent with Rheochem's rights as owner;

c) Mr Beach converted the goods he removed to Mainfreight's premises;

d) What ultimately became of the goods which were transferred back from the Mainfreight depot and the other goods which Mr Beach had

had transferred to his account remains unknown. However, Rheochem was able to establish that at the date of the last undisputed sale to Mr Beach, there was an itemised quantity of goods held in the SDS warehouse, none of which remained at the date of hearing.

e) Mr Beach's subsequent dealings did not restore effective possession of the goods to Rheochem.

[34] A summary of Mr Beach's points on appeal is:

a) Mr Beach did not convert the goods which were transferred to Mainfreight as the purpose of the transfer was to preserve the property for the benefit of Rheochem, and there was no intention to keep the stock adversely to the rights of the true owner. Further, if the temporary removal of the stock was wrongful, there was no intention to convert the goods for the use of Mr Beach or otherwise to deal with the goods in a manner inconsistent with the rights of the owner;

b) If the transfer of the stock to Mainfreight's depot was an act of conversion, possession of that stock was subsequently restored to Rheochem;

c) The remainder of the goods was not converted by Mr Beach's action of paying a bond and having the goods transferred to his account. There was no physical detention of the goods and Mr Beach's account was merely charged with the continuing storage costs. Mr Beach believed that he was acting under the general authority to protect the interests of Rheochem;

d) The directions given by Mr Beach in his letters of 11 and 15 May 2000 to SDS restored possession and property in the goods to Rheochem.

[35] An unsatisfactory feature of this case was an acknowledgement by Mr Beach's counsel, given after he sought specific confirmation from Mr Beach in Court, that Mr Beach acknowledges that goods to the value of just over $40,000 were taken from the SDS warehouse and not paid for His view was that NZDFL was liable for this amount. It has since been struck off. Counsel for Rheochem stated that this concession in Court was the first time that Mr Beach had acknowledged that goods to the value of $40,000 or more had been taken and not paid for. As I see the position, if Mr Beach had faced up to his responsibilities, the matter may well have been settled without the need for either District Court or High

Court proceedings. The discrepancy in the invoice issued by Rheochem and the goods which Mr Beach now acknowledges were taken is in the region of $22,000.

[36] Although counsel for Mr Beach dealt with the Mainfreight submission before dealing with the rest of the product, it is logical, in my view, to commence an analysis with the events of 2 March 2000 when Mr Beach paid the bond of $1,500 to SDS. A chronological view is necessary to clarify the legal consequences of what occurred.

[37] I am of the view that although Mr Beach's intentions may not have been dishonourable, he did convert the stock when he put it under NZDFL's control at the SDS warehouse on or about 2 March 2000. It is understandable that he wished to protect his right to access the stock in accordance with the contract with Rheochem and that company's default in paying storage fees put in jeopardy that right. The payment of the bond and the ongoing payment of storage fees was understandable in the circumstances. However, Mr Beach went further than protecting his right to access the stock. He effectively put it under his control and gave himself the right to access it at any time he wished, contrary to his agreement with Rheochem (which was initially made with IDF on or about 5 July 1999). In this respect, the actions of SDS may also be suspect and I can understand why the Judge expressed surprise that SDS was not a party to the proceeding. Nevertheless, it was Mr Beach who effectively converted that stock. Despite counsel's submission, Mr Beach did not advise Rheochem of all the steps he took on 2 March 2000. All he told Rheochem was that he had been forced to put up a bond to meet his customers' requirements. He did not tell Rheochem that he had taken control of the stock.

[38] In the circumstances, I am of the view that the Judge's finding of conversion was correct. There was a sufficient factual basis for it. Where I differ from the Judge in emphasis is that in my view, Mr Beach had converted all the stock before he effected the transfer to the Mainfreight warehouse, either on 7 March or 14 March 2000.

[39] If the stock had not been converted on or about 2 March, there would have clearly been a conversion of the stock moved to the Mainfreight warehouse. Mr

Beach had no right to move that stock under his arrangement, and the only inference that can be drawn from the facts is that he wished to put the stock under his control so he could use it whenever he wanted to do so. This was clearly inconsistent with his agreement with Rheochem. The transfer did effectively deprive Rheochem of its possessionary interest in the goods. The chronological analysis suggests that the transfer to Mainfreight was merely a further act in completing and effecting a conversion which had already occurred.

Causation

[40] The remaining issue under these points of appeal is whether the conversion was causative of loss. Neither Mr Beach's counsel nor the Judge referred directly to causation, although it was dealt with inferentially. Although not expressed as a causation point, Mr Beach's counsel effectively addressed causation in this Court when he submitted that Mr Beach restored possession and property in the goods to Rheochem. A related point is the Judge's finding that no issue was taken over the quantity and value of the goods lost as the figure claimed had been discussed and agreed with counsel. It was submitted before me that this was not an accurate statement of the position. What had been agreed was the amount of unaccounted stock. It had not been agreed that Mr Beach caused this loss although I note that his concession on the appeal was that he was responsible for at least $40,000 of it.

[41] The submission on Mr Beach's behalf was that the letters of 11 and 15 May 2000 to SDS, directing it to uplift the goods from Mainfreight and transfer back into Rheochem's account the goods held to the account of NZDFL effectively returned those goods into the possession of Rheochem. The Judge addressed this submission when he said:

> "While it may have been the defendant's intention to rid himself of possession of the stock once he received the plaintiff's invoice, it is by no means clear that his subsequent dealings with SBS were such as to restore effective possession of the goods to the plaintiff. In any event a repatriation of the goods concerned would be an effective answer only to the claim for conversion based upon wrongful detention, the second category identified in *Halsbury.*"

[42] The conversion falls into the first category of the *Halsbury* definition referred to by the Judge (contained in 45(2) *Halsbury's Laws of England* 4th ed (re-issue) para 548). This is the type of conversion where there must be a positive wrongful act of dealing with the goods in a manner inconsistent with the owner's rights. With respect, I differ from His Honour's statement that repatriation of the goods concerned would be an effective answer only to a claim of conversion based on the second category. A person who converts $1,000 and returns it the next day has not caused the loss of that $1,000. There would normally be liability for nominal damages only in such circumstances. It is well settled that the normal measure of damages for conversion is the market value of the goods converted. I accept that if goods were returned to the possession of Rheochem and not subsequently taken by Mr Beach or NZDFL, Mr Beach could not be held liable for causing the loss of those goods. With respect, I differ from the District Court Judge in his statement of the law. The issue is whether His Honour determined that Mr Beach, either did not effectively return the goods to the possession of Rheochem, or if he did, that he subsequently took possession of those goods again.

[43] The finding that "it is by no means clear that his subsequent dealings with SDS were such as to restore effective possession of the goods" cannot be said to be a clear finding that Mr Beach did not return the goods. It may be that the Judge did not finally determine whether effective possession of the goods was returned to Rheochem. At one stage in the judgment he noted that what happened to the goods remains unknown, but it is not clear whether this statement applies to whether the goods were restored to the possession of Rheochem, or to what happened after they were restored to its possession. The question is whether I can make a factual finding on what happened to the goods.

[44] A difficulty in determining what happened to the goods was the absence of relevant warehouse records. Because the SDS's computer equipment was stolen and the company lost most of its accounting records, Mr Roycroft was unable to say what goods were in store as at 30 May 2000 and what had become of such goods. The Judge correctly did not accept that a loss of computer equipment in February 2000 was sufficient to explain Mr Roycroft's inability to product records of the position as at 30 May 2000. However, no documentary evidence was produced to

establish the quantity and nature of goods held in the warehouse as at 30 May, or the movement of those goods out of the warehouse or any subsequent dealings with them by either party. Mr Roycroft could not give an account of what had become of the goods. The fact that Rheochem was not charged storage for those goods suggests that they were not returned to the possession of Rheochem. There are various possibilities available from the evidence. One is that Mr Beach did not, in effect, return the goods to Rheochem's possession. Another is that he did so return the goods but then retook possession of them. Other possibilities are that SDS lost them, they were taken by a third party, or even that SDS took them to defray outstanding storage charges due by Rheochem. In the circumstances, I cannot determine whether Mr Beach is liable for the full loss found by the Judge. In view of his concession in this Court, there must be liability in respect of at least $40,000.

The other grounds of appeal

[45] Two grounds of appeal remain for consideration. The first can be quickly disposed of, namely, that there was an error in finding the amount owing to be $69,389.32. It is accepted by counsel for Rheochem that there was a mistake in this figure. A credit note of $6,836.46 had been issued reducing the balance to $62,451.88. This is the amount for which judgment should have been given on His Honour's findings.

[46] The final point of appeal was that the Judge failed to take into account the obligation of the respondent to mitigate its losses. This point has been covered. In considering the final amount of damages, it will be necessary to assess the damages caused by Mr Beach's conversion. In simple terms, the issue will be whether $22,451.88 worth of stock was not effectively returned to Rheochem, or if it were effectively returned, whether Mr Beach subsequently took it again.

General

[47] In my view, Mr Beach was correctly found liable for conversion unless he did effectively return possession of the goods to Rheochem and took goods under the

arrangement with them. In these circumstances, he would be liable in contract rather than conversion. The outstanding issue is whether judgment should be for the amount of a little over $40,000 which Mr Beach acknowledges as owing, or for a higher amount with a limit of $62,451.88. The Judge determined that Rheochem was entitled to a reasonable award for interest and reasonable costs, and these orders will obviously remain.

[48] As it is not clear that the Judge resolved this point, the normal course would be to remit this matter back to the District Court for determination of the amount of damages. If I had decided take this course, there would have been a direction that those damages be not less than the amount of a little over $40,000 which Mr Beach has now conceded. The other alternative, which I propose to adopt, is for me to issue an interim judgment and invite further submissions from counsel on the manner in which final liability is to be resolved. Final liability will include interest and costs in the District Court and costs in this Court to which Rheochem is entitled on the basis of Category 2B.

[49] If Mr Beach had made his concession in a timely manner, it is likely that this matter would have been resolved long ago at considerably less expense. The issue of damages may still be capable of settlement between the parties. A side issue is that a conversion finding may in the circumstances be a little harsh against Mr Beach as his liability for some, at least, of the amount may well have been on a contractual basis. Since the hearing, Rheochem, as a result of comments I made at the hearing, has applied for leave to cross-appeal on the basis that if the goods were not converted, there is a contractual obligation to pay for them. That may well be a matter which can be dealt with by agreement between the parties, or otherwise can be resolved at a further hearing if necessary.

Result

[50] On the above findings, judgment for liability was correctly given against Mr Beach but I am not satisfied that the damages were adequately determined. This judgment is therefore an interim judgment and a conference of counsel will be convened before me at 9 am on Tuesday 5 August 2003 when they will be asked to

make submissions on whether this Court should determine the final amount of damages or whether I should remit that matter back to the District Court for determination.

[51] Rheochem is entitled to costs on this appeal, calculated on a 2B basis.

Dated on 15 July 2003 at 9.00 am

B J Paterson J