5.7.89

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

BEFORE THE HON. THE CHIEF JUSTICE

ON 27th and 28th February,
1st, 2nd, 16th, 17th March,
20th, 21st, & 2nd June, 1989

CAUSE 143 OF 1988

BETWEEN		LB LEASINGGESELLSCHAFT m.b.H	PLAINTIFF
AND	(1)	CAYMAN AUSTRIAN CONCRETE CO. LTD.	
	(2)	INTERNATIONAL TECHNICAL SERVICE AND MARKETING	
	(3)	HEITH HARVEY HILL	
	(4)	EDMUND BODDEN	
	(5)	MRS. MARJORIE BODDEN	DEFENDANTS

Mr. R. Alberga Q.C. instructed by Mr. Alan Turner of W.S.Walker & Co. for Plaintiff
Mr. P. Broadhurst instructed by K.Collins & Co for 1st and 3rd defendants
No appearance by or for 2nd Defendant
No Defence by 4th Defendant - not represented.
Mr. P. LaMontagne Q.C. for 5th Defendant

COLLETT C.J. JUDGEMENT

On 17th December, 1986 the Plaintiff LB Leasinggesellschaft m.b.H, an Austrian incorporated financial institution purported to enter into six contracts of lease-hire in respect of various items of plant and equipment designed for making concrete with R. A. Hamilton Corporation of New Jersey U.S.A. ("Hamilton"), a reputable concern. Those contracts were signed upon purported behalf of Hamilton by one C. Christianson, a U.S. Citizen who had been introduced to the Plaintiff by three Austrian nationals Adolf Hartl, Werner Prevedel and Josef Aigner with whom it was acquainted. He was, as it turned out falsely, held out to the Plaintiff as the authorised agent of Hamilton.

The purpose of those contracts was to finance a venture in Grand Cayman for which the plant and equipment had been purchased by the Plaintiff from Austrian suppliers at a cost of approximately 11 million Austrian shillings. The intention was

that a local company should be incorporated in the Cayman Islands to sub-lease the plant and equipment and to operate it. This Company, the 1st Defendant Cayman Austrian Concrete Ltd. ("C.A.C.") was to be owned as to 60% of its shares by International Technical Servicing and Marketing, ("ITSM") the 2nd Defendant another Cayman Is. company in which Hamilton, as well as Mr. Hartl and the 4th Defendant, Edmund "Jack" Bodden were supposed to be interested and as to the other 40% by an Austrian company controlled by Mr. Aigner. The terms of the six contracts allowed for a grace period of nine months running from the date of take over of the plant and equipment in Grand Cayman by C.A.C. which occurred in mid December, 1986. Thereafter monthly rentals at the stipulated rate were to be paid to the Plaintiff until the conclusion of the 54 month term of hire at which time it was provided that the Lessee might, at its option, acquire the ownership on payment of a sum equivalent to one further instalment of hire.

Mr. Aigner made the stipulated down payments to the Plaintiff under the contracts as well as the stipulated payments for interest occurring over the grace period. Thereafter, since no further rental payments were yet due to the Plaintiff it remained in ignorance of the fact that Christianson so far from having been the authorised agent of Hamilton was quite unknown to them. The lease contracts were in consequence quite invalid and so it transpired was an export guarantee which the Plaintiff had secured on the faith of them from the Austrian Central Bank. The Plaintiff's state of ignorance was rudely shattered when sometime in August, 1987 Messrs. Aigner and Prevedel visited its offices and disclosed that the shareholding in CAC. had been changed from what had been envisaged and that in consequence it appeared that Hamilton was not after all concerned with ITSM. This intelligence was speedily confirmed in correspondence between the Plaintiff and Hamilton's head office in New Jersey. As a result Mr. Gottfried Klotsburg a senior official of the Plaintiff visited Grand Cayman for the first time in early October 1987 to investigate the situation.

Meanwhile in Grand Cayman various pertinent events had occurred since the arrival of the equipment there in December 1986. It appears that financial problems had arisen over the clearance of the equipment from the docks involving the payment of freight and customs duty which was the responsibility of CAC and that money for this purpose was eventually supplied by Mrs. Marjorie Bodden, sister-in-law of Edmund 'Jack' Bodden and the 5th Defendant in this action. Manager's cheques and other cheques signed by her about this time have been put into evidence. Mrs. Bodden did not give oral evidence and so no direct testimony exists as to the actual source or the precise destination of these payments; but CAC subsequently gave written acknowledgement of its indebtedness to her for these and other payments made the bulk of which appear to have been for the legitimate benefit of the company. Upon a balance of probabilities I find that a legal debt was thereby created in favour of Mrs. Bodden from CAC in the amount of $92,626.80 (C.I) which thereafter remained outstanding in her favour.

Mr. Heith Hill, son-in-law of Mrs. Bodden and the 3rd Defendant herein commenced his involvement with CAC in December 1986 or early 1987 and was initially engaged in the erection of the plant. He became a 60% shareholder and was appointed a director in March 1987 when Mr. Edmund Bodden resigned and relinquished his shareholding. In June 1987 he was appointed managing director. It was suggested to Mr. Hill in cross-examination that he was thereafter in complete control of the policies of the company and in strict law that would appear have been the case. In practice, however, Mr. Hill seems to have acted under the instructions of Mr. Hartl and to a lesser extent of Messrs Aigner and Prevedel the principals of ITSM in his conduct of the affairs of CAC. In particular he signed on its behalf a purported lease of all the plant and equipment from ITSM with effect from 10th March, 1987. The Plaintiff relies upon the action of ITSM in entering into this transaction as a tortuous act of conversion in relation to all of this equipment. Mr. Hill testified that when he signed the lease he was ignorant of the Plaintiff's interest as owner of this equipment and, upon

a consideration of the evidence as a whole, I am satisfied that that was indeed the case. Nevertheless it is clear that he harboured some doubts as to the validity of the title of ITSM to lease out this equipment and he evinced little surprise when confronted in October 1987 by Mr. Klotsburg with proof of the Plaintiff's title as its true owner. Mr. Hill's naivety is all the more surprising in that he admits he was warned by Mr.Edward 'Jill' Bodden at a meeting on 10th June, 1987 that Mr. Adolf Hartl was 'a thief'. His conduct in continuing to go along with Hartl must be regarded as opportunism: he shut his eyes to the awkward aspects of the transaction in the hopes of future profit.

It further appears that about this time Mr. Edward Bodden began to press for the repayment of the $92,626.80.(C.I.). There is a letter addressed by his attorneys on 24th June, 1987 to Mr. Adolf Hartl and his brother, Franz, demanding this and threatening legal proceedings. That led to the holding of a meeting on 2nd July, 1987 at Cayman National Bank when Edward Bodden, Marjorie his wife, Adolf Hartl and Heith Hill were present. The loans manager, Mr. Iton, suggested to those present that the registration papers of four trucks with concrete mixers, part of the equipment in question, should be handed to Mrs. Bodden for use as collateral should she wish to borrow funds to the value of what she was owed and that the debt be liquidated at the rate of $5000 per month. This was apparently agreed to by all present there without any thought being given to the legal status of the equipment as a leased property which on its face precluded a pledge of any part of it, unless of course, the lessor also were to give its formal consent to a pledge.

No further steps were taken to implement this agreement until 15th September, 1987 when the four trucks with mixers which had been initially registered under the Traffic Law in the name of Cayman Austrian Concrete were re-registered into the name of Mrs. Bodden. On 25th September, 1987 Mr. Hill as managing director of CAC wrote formally to Mrs. Bodden with copy to Mr. Iton confirming "your right to hold the ownership papers, log books, etc.... as a pledge for the loan....made by you". It is

these actions which is relied upon by the Plaintiff as acts of tortuous conversion in relation to these four vehicles both by Mr. Hill in his personal capacity and by Mrs. Bodden. In regard to the former it is important to note that paragraph 96 of the Articles of Association of CAC, which deals with the powers which the directors may confer upon a managing director of that Company, expressly excludes the power to mortgage or charge the property of the Company.

Notwithstanding the transfer of registration it is clear that the trucks with mixers remained like the other equipment on site in the possession of CAC and in use in the course of its business when Mr. Klotsburg arrived for his initial visit in October, 1987. He thereupon confronted Mr. Hill with proof of the Plaintiff's ownership of the equipment and Mr. Hill readily conceded the correctness of the Plaintiff's claim. The first report which Mr. Klotsburg made to the Plaintiff upon his return to Vienna shows that he then proposed, and Mr. Hill readily agreed, that there should be a new lease of the equipment from the Plaintiff to CAC which should formally acknowledge the Plaintiff's ownership, regularise the legal position and enable the latter to continue in business. Mr. Klotsburg insisted upon a bank guarantee for the stipulated rental payments and, having obtained Mr. Hill's signature to the draft contract, he took it back with him to Vienna to submit it for the approval of the Plaintiff's management.

Counsel for the Plaintiff has submitted that Mr. Hill must be taken to have concealed from Mr. Klotsburg, firstly that CAC was in practical terms insolvent at this time and thus to his knowledge unable to meet the anticipated rental payments under the new lease and secondly, that the four trucks with mixers had been pledged to Mrs. Bodden. Having considered the oral testimony as well as Mr. Klotsburg's two reports and the terms of the new lease I am satisfied that there was in fact no such concealment. Mr. Klotsburg was well aware of the need to inject further capital into CAC if its business was to continue and he also appears to have had some knowledge of the fact that the trucks with mixers had been pledged but regarded that

circumstance as one which could be circumvented through the machinery of requiring a bank guarantee. Mr. Hill was obviously willing to go along with a plan which he must have perceived to be the only option open to the company if it was to continue in business with himself as managing director.

No cause of action has been pleaded in the Re-amended Indorsement to the Writ of Summons or in the amended Statement of Claim in respect of anything done or omitted to be done by Mr. Hill in his personal capacity in relation to the new lease which he signed on behalf of CAC in October 1987 and I declined to allow an amendment to made to these pleadings at a very late stage of the trial to raise such an issue. In view of my findings of fact just referred to, I doubt very much whether such an amendment would, in any case, have availed the Plaintiff. I am satisfied that the new lease was a perfectly legal transaction and one in relation to which Mr. Hill acted properly as the managing director of CAC even though he did not obtain, as it would have been prudent for him to have done, a resolution of the board of directors authorising him to enter into it on behalf of the company. No liability attaches him in that respect.

Because of the impecunious state of CAC during the period in question the new lease proved stillborn and it was formally terminated by the Plaintiff in December 1987 for non payment of rentals. The Plaintiff appointed Mr. Prevedel as its agent with authority to take charge of the equipment and sent him to Grand Cayman. On 28th December 1987, he presented his letter of authority to Mr. Hill. I am satisfied having considered the relevant oral and documentary evidence that this action amounted to a retaking of physical possession by and on behalf of the Plaintiff from CAC as of that date. Thereafter the Plaintiff's efforts supervised by Mr. Klotsburg were directed towards disposing of the plant and equipment to its best advantage. As Mr. Klotsburg testified he was at that time in negotiation with a number of prospective purchasers who included Mr. Hartl and Universal Engineering Inc. of New Hampshire represented by Mr. O'Brien. But the only serious offer made for the equipment at

that time came from Evrard Holdings plc of Guilford, England represented by a Mr. Abdullah its chairman.

On 21st January, 1988 Mr. Klotsburg paid a second visit to Grand Cayman. On 25th January, 1988 a letter of intent was addressed by telefax to Mr. Klotsburg at his local hotel by Mr. Abdullah specifying a firm offer price for the plant and equipment of 1.9 million U.$. dollars but containing a number of specific conditions which required further negotiation to resolve. The same evening Mr. Klotsburg was invited to attend a meeting held at Mr. Edward 'Jill' Bodden's house which was also attended by Mr. Bodden's wife, Marjorie, Mr. Hill and Mr. Prevedel. At this meeting Mr. Klotsburg was bluntly told that the Plaintiff could not sell the equipment because the four trucks had been mortgaged to Mrs. Bodden and registered in her name. Protests by Mr. Klotsburg at this meeting as to the illegality of those transactions were met by personal threats uttered to him by Mr. Hill. I am satisfied upon the whole of the evidence and I find as a fact that both Mrs. Bodden and Mr. Hill made it clear to Mr. Klotsburg that they would do anything in their power to frustrate any attempt on his part to assert the Plaintiff's claim as owner of these trucks in preference to the alleged right of Mrs. Bodden to hold them as security for her debt and to deal with them as she pleased as the registered owner in the Cayman Islands.

The practical consequences of this stance on the part of the 3rd and 5th Defendants was not long in making itself felt. Mr. Klotsburg left Grand Cayman and travelled to London where the pending negotiations with Everard Holdings plc resumed in a positive atmosphere on 1st February, 1988. On 2nd February, 1988 they were however abruptly and finally broken off by Mr. Abdullah who had just received from the Cayman Islands information that there were third party claims concerning the equipment. The identity of the immediate source of that information is not clear from the evidence but there can be little doubt that it was Mrs. Bodden's claim to the four trucks with mixers which led to these promising negotiations between the Plaintiff and Everard Holdings plc going off. The loss of that

bargain can be traced as a direct and natural consequence of the pledge of these vehicles and the reregistration which had occurred in September, 1988 and I hold accordingly.

Subsequently the earlier interest shown by Mr. O'Brien in the purchase of the equipment was renewed. Mr. John Bevins, a fellow director in Mr. O'Brien's associated company, Ferryman Investments paid a visit to Grand Cayman in February 1988 and he investigated the status of the trucks with mixers. He returned here the following month with Mr. O'Brien and in the meantime had obtained an impression that the vehicles could be purchased for $120,000. This did not turn out to be the case however, because when they approached Mrs. Bodden she informed them that the actual price was $175,000. Despite heated arguments she declined to reduce it and moreover insisted upon Friday evening 11th March, 1988 that the sale must go through at that figure by the following Monday or else she would export the trucks to Florida where she alleged there was a prospective purchaser prepared to pay her $200,000. To reinforce her point she sent drivers to the site to drive the trucks away to her house, although subsequently she allowed CAC to borrow them for working purposes so that orders could be fulfilled over the weekend. These assertive tactics were successful.

The upshot was that on Monday 14th March, 1988 Ferryman paid Mrs. Bodden her price of $175,000. A few days later it then leased or purported to lease them to another local company, Cayman Allied Concrete Ltd. which had been newly formed and was 100% beneficially owned by Mr. Hill. The equipment continued to be used in Cayman under his direction. I am satisfied that it was the intention of both Mr. Hill and Mrs. Bodden throughout the negotiations with Ferryman to bring about that situation.

The evidence is that Mr.Prevedel who had been put in charge of the equipment in December, 1987 had left Grand Cayman sometime in late February, 1988 and there can be little doubt that, after his departure, CAC continued to operate it for its own business purposes under the direction of Mr. Hill until its

use and possession was transmitted to Cayman Allied Concrete under the same management. It appears to me on a balance of probabilities that after Mr. Prevedel's departure and the frustration of the Plaintiff's negotiations with Everard Holdings, the Plaintiff relinquished and CAC resumed possession. Certainly on 11th March, 1989 Mrs. Bodden asserted in no uncertain way her claim to possession by taking the trucks from the CAC site and with her sale to Ferryman that possession passed in rapid succession to them on 14th March, 1988 and shortly thereafter to Cayman Allied Concrete Ltd., their Lessee.

Finally on 8th June, 1988 these proceedings were commenced and on 10th June, 1988 an interim injunction was granted to prevent the further use or disposition of this plant and equipment by the Defendants. It was eventually delivered up to the Plaintiff's possession by Mr. Hill on 10th January, 1989. On 23rd January, 1989 a consent order of the Court was made whereby Ferryman paid $150,000 as agreed damages to the Plaintiff and the claims against that company and against Cayman Allied Concrete in respect of the events of March 1988 were dismissed. The claims for alleged conspiracy against some of the other Defendants in this action have not been pursued at the trial and need not be further considered.

The substantial issues which must now be examined relate to the Plaintiff's claims (1) against the 2nd Defendant ITSM for alleged conversion of all the equipment on 10th March, 1987 the date of its purported lease to CAC; (2) against the 3rd and 5th Defendants, Mr. Hill and Mrs. Bodden jointly and severally for alleged conversion of the 4 trucks with mixers on 15th September, 1987 and (3) an alleged claim for exemplary damages against Mrs. Bodden in respect of the sum of $175,000 received by her from Ferryman for these same trucks in respect of the further act of alleged conversion inherent in that sale on 14th March 1988. Each of these issues will need to be examined in turn. Before doing so it is necessary to consider the legal principles which govern the tort of conversion at common law.

In Clerk and Lindsell on Torts 14th Edition at para. 1077 conversion is succinctly described as an act of deliberate dealing with a chattel in a manner inconsistent with another's right whereby that other is deprived of the use and possession of it. In Salmon on Torts 16th Edition it is said to be (1) an act of complex series of acts of wilful interference without lawful justification with any chattel in a manner inconsistent with the right of the person entitled and (2) an intention in so doing to deny that person's right or to assert a right which is in fact inconsistent with it. Knowledge of identity of the true owner is not essential. I accept these statements as an accurate pronouncement of this part of the Common Law in the Cayman Islands.

If these legal principles are applied firstly to the act of ITSM in entering into the purported lease of this equipment to CAC, it seems clear that a dealing with all that equipment in a manner inconsistent with the right of the Plaintiff was involved. There is no doubt about the Plaintiff's ownership. It had in no way authorised ITSM to lease out its equipment to CAC or at all. At the material time it was the Plaintiff's belief that it had itself leased out that equipment to Hamilton. By entering into its purported lease ITSM further displayed an intention on its part to assert a right which was inconsistent with the Plaintiff's ownership. The most obvious evidence of that intention appears in an addendum to the lease document whereby at the end of the five year lease period and payment of the final instalment of hire the ownership in all the equipment was to be transferred to the lessee. It follows that liability for the tort of conversion in respect of that lease transaction has been established by the plaintiff against both the 1st and 2nd Defendants although no claim for damages has actually been asserted in this action against the former. Quantification of the damage will be addressed later.

Turning now the events of September, 1987 and the acts of the 3rd and 5th Defendants, the evidence clearly shows that the four trucks with mixers were pledged by CAC as security for debt and that this pledge was effectuated by a transfer of the

registration of these vehicles into Mrs. Bodden's name. It is true that no actual change in possession of the vehicles took place in September, 1987 and that the registration of itself had no effect in transferring title to the vehicles to Mrs. Bodden. It was however an act or series of acts of wilful interference without lawful justification, since no one has the right to pledge the property of a third party to answer for a debt of his own to his creditor. Moreover a reading of Part II of the Traffic Law (Revised) shows that so long as these vehicles remained registered in Mrs. Bodden's name she alone was empowered to determine whether or not they should continue to be licensed for use on the roads of the Cayman Islands and to control any further transfer of their registration which might be sought. Thus an intention to deny the rights of the true owner of these vehicles may readily be inferred on the part of Mr. Hill who must have known that CAC had not paid for the trucks. Equally there must be inferred on Mrs. Bodden's part, especially in the light of her subsequent conduct, an intention to deal with the trucks if need be in a way quite inconsistent with the rights of ownership of anyone who may have leased them to CAC. The fact that neither of them knew at that time that it was the Plaintiff who was the true owner is neither here nor there.

Mr. Hill has sought to shelter from liability for this act of conversion behind the corporate persona of CAC and his counsel has advanced the plea that he at all times was acting bona fide within the scope of his authority as its managing director. The blunt answer to that contention is that he was not, as the reference to paragraph 96 of the Articles of Association shows. His actions in effecting a pledge of the company's property was upon any view of it ultra vires his powers as its managing director and there is no evidence that it was ever ratified by any duly constituted meeting of the board of directors. In these circumstances both he and Mrs. Bodden must be held jointly and severally liable subject to an examination of whether or not there is any damage attributable to this act of conversion: this is necessary at Common Law to complete the right of action. That question will presently be addressed.

Before doing so, however, it is necessary to consider whether or not Mrs. Bodden committed a further act of tortuous conversion of the trucks with mixers on 14th March 1987 when she sold them to Ferryman for $175,000. In my view there can be no doubt that she did. To conclude such a sale is the clearest possible act of wilful interference with the ownership of the Plaintiff and it took place at a time when Mrs. Bodden had full knowledge of the Plaintiff's interest so that an intention on her part to deprive the Plaintiff altogether of its right to possession and the use of these vehicles must be inferred. Moreover her actions in that respect are compounded by the raising of the price to Ferryman from $120,000 to $175,000 which can only be referable to a determination on her part not only to recoup the monies she had loaned out of the disposition of another person's property but to make a handsome profit on the deal as well. Compensatory damages in respect of this particular act of conversion have already been paid by Ferryman and to that extent her liability is exonerated but the question of whether or not this is a proper case for the award of exemplary damages remains to be considered later.

Perhaps the most difficult task which faces the Court in this action is the proper assessment of damages. It is the Plaintiff's contention that this can be done by taking the stipulated rate of hire rentals denominated in Austrian Shillings in the six initial purported contracts of lease as the best evidence of the market rate for use of this equipment and to compensate the Plaintiff upon the footing of an award of money calculated at that rate for the time during which each of these defendants denied the Plaintiff the use of the equipment in question. The object of an award of damages is to give a plaintiff compensation for the damage, loss or injury he has suffered and the measure of compensatory damages has been described, by Lord Blackburn in Livingstone v Rawyards Coal Company (1880) 5 App. Cas. 25 at p. 39 as follows: "that sum of money which will put the party who has been injured .... in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation."

The Plaintiff here received no benefit from his ownership or from the use by CAC of his equipment between 10th March, 1987 and 16th October, 1987 during which time ITSM, the 2nd Defendant, had committed the tort of conversion by purporting to lease that equipment to CAC. ITSM has not filed any defence not has it been represented at the trial but even if it had done so and advanced the defence that the equipment was, during that period, under lease by the Plaintiff to Hamilton and that the grace period of nine months would have absolved the latter from making any rental payments during that period, such a plea is of no avail to ITSM. The answer to it is that the leases to Hamilton were in law a nullity. It is not necessary for the Plaintiff to show that he would have had a profitable use for the machinery throughout the period of its deprivation. Nor would it be a defence for ITSM to point to the provision for a grace period in its own purported lease to CAC. The fact is that that lease conferred no right upon CAC to use the equipment without payment during that period since ITSM had no authority from the Plaintiff to confer any such right. See generally Strand Electric and Engineering Co. Ltd. v Brisford Entertainments Ltd. (1952) 2 Q.B. 246. In the result the Plaintiff is entitled to compensation from ITSM from ITSM for the value of the use of the equipment during the whole of that period as damages for conversion and the basis of computation is in its case fair and reasonable amounting to 230 days user and to the following calculation in Austrian Shillings.

1. 4 Trucks
A.S 32,400.00 per month each or
A.S 338,800.00 per annum each x 4
A.S. 1,555,200.00 for all 4 trucks

$$\frac{230}{365} \times \frac{1,555,200}{1} = \text{A.S.}979,999.000$$

2. 1 Drill
A.S. 27,815.00 per month x 12
A.S. 333,780.00 per annum

$$\frac{230}{365} \times \frac{333,780}{1} = \text{A.S. } 210,327.12$$

3. 1 Mixing Plant
A.S. 90,820.00 per month x 12
A.S. 108,984.00 per annum

$$\frac{230}{365} \times \frac{108,984.00}{1} = \text{A.S. } 686,748.49$$

Trucks	:	979,989.00
Drills	:	210,327.12
Mixing Plant	:	686,748.49
TOTAL	:	1,877,064.61

Next for consideration are the damages alleged to be suffered as a result of the tortious act of conversion of the 3rd and 5th Defendants in September, 1987, affecting the 4 trucks with mixers. The difficulty here is that, as already noted, the acts of these Defendants did not at that time cause any alteration in the possession or use of these vehicles which remained with CAC until it was retaken by Prevedel on behalf of the Plaintiff on 28th December, 1987. So no additional injury or damage was suffered by the Plaintiff at that time as a result of these actions of those two defendants and it follows that compensatory damages are not claimable by the Plaintiff in respect thereof upon the basis which he puts forward. That situation however altered on 2nd February, 1988 the day upon which Mr. Abdullah broke off his negotiations for the purchase of the equipment from the Plaintiff. I have already held that this was a direct and natural consequence of these Defendants' earlier actions now reinforced by Mrs. Bodden's determination to prevent the Plaintiff from disposing of its vehicles by sale. As such that damage is clearly referable to the tort and is recoverable against these Defendants jointly and severally. The problem how to assess it remains.

The price which Everard Holdings plc was prepared to pay for the equipment was not broken down and it is impossible on the evidence to determine what was the value of the bargain lost in respect of these four vehicles. Add to this that the vehicles themselves were subsequently recovered and are now at the disposal of the Plaintiffs apart from which the Plaintiffs have recovered against other parties damage in respect of their unauthorised use after 14th March, 1988. The only measure of damage which can be deduced upon the evidence to be referable to the actions of the 3rd and 5th Defendants in September 1987 and January 1988 is the loss of their rental during the period 2nd

February, 1988 - 14th March, 1988 a period of 41 days. the following calculation in Austrian Shillings upon the same base rates is appropriate.

Rent for 4 trucks 2/2/88 - 14/3/88 - 41 days
A.S. 32,400 per month per truck
A.S. 388,800 per annum per truck x 4
A.S. 1,555,200 per annum

$$\frac{41}{365} \times \frac{1,555,200}{1} = 174,693.69 \quad \text{TOTAL}$$

Finally, it is necessary to revert to the claim against Mrs. Bodden for exemplary damages. That by any reckoning is an unusual claim and the only justification for it which can be properly advanced is the second common law category mentioned in Chapter 11 of McGregor on Damages 15th Edition and based upon the speech of Lord Devlin in Rookes v Barnard (1964) A.C. 1129 at p.1226. It is confined to the situation where a defendant's conduct has been calculated by him to make a profit for himself which may exceed the compensation payable to the plaintiff. "Where a defendant....with a cynical disregard for the plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity". These words are in my judgement apt to describe the conduct of the 5th Defendant in January to March of 1988 in regard to these four vehicles. Whether the award of exemplary damages based on this category is better regarded as a means of punishment open to the Courts or as analogous to the equitable remedy of restitution for unjust enrichment does not, in the final analysis, matter very much: this Court is empowered in every civil cause to administer law and equity concurrently: see S.18 of the Grand Court Law. Having reviewed the evidence as a whole, I cannot the escape the conviction that this is indeed a case for the award of exemplary damages founded upon this principle.

Ought the award of exemplary damages to extend to the whole of the $175,000 (U.S.) paid to Mrs. Bodden for these trucks? I think not. It is the gratuitous pursuit of profit that is offensive to the law in a way that the mere misguided

pursuit of the Plaintiff's property in order to recoup herself for the monies lent to CAC is not. The quantum of exemplary damages is a matter for the Court's discretion where the case for such an award has been made out: see generaly Rookes v Barnard (1964) A.C. 1129. In this case I would give credit for $92,623.80 (C.I.). That leaves $62,044.15 (U.S.) from which must be deducted the U.S. dollar equivalent of A.S.174,693.69, lest the award against the 5th Defendant be duplicated. At the rate of A.S.13.47 = U.S.$1.00 that gives a deductible of $12,969.09 and deducting that from (U.S.) $62.044.15 leaves a nett of $49,075.06 (U.S.)

There will accordingly be judgement for the Plaintiff

(1) for a declaration in terms of paragraph 1(1) of the Re-amended Writ of Summons;

(2) against the Second Defendant (IISM) for damages for conversion in the sum of 1,877,064.61 Austrian Shillings;

(3) against the Third Defendant (Heath Hill) and Fifth Defendant (Marjorie Bodden) for damages for conversion in the sum of $174,693.69 Austrian Shillings, jointly and severally;

(4) against the Fifth Defendant alone for exemplary damages for conversion in the sum of $49,075.06 (U.S.currency).

The Plaintiffs are also entitled to an order for payment of their costs to be taxed if not agreed and to be paid to them by the 1st to 5th Defendants jointly and severally.

Dated the 5th July, 1989.

CHIEF JUSTICE.