

CONVERSION - PRINCIPLES

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The Principles

1. Where a person deals with a good in a manner repugnant to the immediate right of possession of the person who has the property or special property in the good, or in a manner inconsistent with the general right of dominion which the owner of the good has in it, and he intends to deny the owner's right or to assert a right which is inconsistent with the owner's right, he will convert the good.
2. The High Court has, in ***Penfolds Wines Pty Ltd v Elliott*** (1946) 74 CLR 204, elucidated the nature and elements of conversion:

Latham CJ at pp218-219 [25] quoting from ***Pollock on Torts***, 14th Ed. (1939):

"The grievance (in conversion) is the unauthorized assumption of the powers of the true owner. Actually dealing with another's goods as owner, for however short a time and however limited a purpose, is therefore conversion.

Dixon J at p229, [19]:

The essence of conversion is a dealing with a chattel in a manner

repugnant to the immediate right of possession of the person who has the property or special property in the chattel. It may take the form of a disposal of the goods by way of sale, or pledge or other intended transfer of an interest followed by delivery, of the destruction or change of the nature or character of the thing, as for example, pouring water into wine or cutting the seals from a deed, or of an appropriation evidenced by refusal to deliver or other denial of title. But damage to the chattel is not conversion, nor is use, nor is a transfer of possession otherwise than for the purpose of affecting the immediate right to possession, nor is it always conversion to lose the goods beyond hope of recovery. An intent to do that which would deprive "the true owner" of his immediate right to possession or impair it may be said to form the essential ground of the tort.

McTiernan J at pp234-235, [9]:

In Fouldes v Willoughby (1841) 8 M & W, at p 548 (151 ER, at p1156) Alderson B. said:- "Any asportation of a chattel for the use of the defendant, or a third person, amounts to a conversion; for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel, either for the use of himself or of another, it is a conversion." In Burroughes v. Bayne (1860) 5 H & N 296 (157 ER 1196) , Martin B. said that he agreed with the above statement by Alderson B. Mr Justice Blackburn, as he then was, said in Hollins v. Fowler (1875) LR 7 HL 757, at p 766:- "It is generally laid down that any act which is an interference with the dominion and right of property of the plaintiff is a conversion, but this requires some qualification. From the nature of the action, as explained by Lord Mansfield, it follows that it must be an interference with the property which would not, as against the true owner, be justified, or at least excused, in one who came lawfully into the possession of the goods."

Williams J at pp242-244, [22]-[23]:

In Caxton Publishing Co. Ltd. v. Sutherland Publishing Co. (1939) AC 178, at p 202, Lord Porter said: "Conversion consists in an act intentionally done inconsistent with the owner's right though the doer may not know of or intend to challenge the property or possession of the true owner." One form of conversion referred to in Chitty on Pleading, 7th ed. (1844), vol. 1, p. 172, in a passage cited with approval by Brett J. in Hollins v.

Fowler (1875) LR 7 HL, at pp 783, 784, is "illegally using, or misusing goods; ... a user as if the defendant or someone other than the plaintiff were the owner." "The loss or deprivation of possession suffered by the plaintiff need not be permanent. The duration of the dispossession is relevant with respect to the measure of damages, but makes no difference in the nature of the wrong": Salmond on Torts, 10th ed. (1945), p. 289. "Any other wrongful disposition of goods, if it has the effect of depriving the owner of the use of them permanently or for a substantial time, is conversion; thus, if a person . . . hands them over to someone other than the true owner. . . Such person is guilty of conversion": Halsbury's Laws of England, 2nd ed., vol. 33, p. 53..... The importance of rights attached to ownership vary according to the nature of the particular property. Bottles are meant to be filled so that to fill the bottle of another person is to deprive him of the use of his property. In the present case the brother purported to place the defendant in possession of the bottles as a bailee for him. If they had been "clean bottles," although in fact the property of the plaintiff, the defendant might not have been guilty of conversion in filling and returning them to the person from whom he got them, unless the plaintiff had made a claim that they were its bottles and had demanded their return (Union Credit Bank Ltd. v. Mersey Docks and Harbour Board (1899) 2 QB 205). But the endorsements on the bottles proclaimed that they were the property of the plaintiff. In Hollins v. Fowler (1875) LR 7 HL at p 766. Blackburn J. said that "In considering whether the act is excused against the true owner it often becomes important to know whether the person, doing what is charged as a conversion, had notice of the plaintiff's title. There are some acts which from their nature are necessarily a conversion whether there was notice of the plaintiff's title or not. There are others which if done in a bona-fide ignorance of the plaintiff's title are excused, though if done in disregard of a title of which there was notice they would be a conversion." The use which the defendant made of the bottles with knowledge of the plaintiff's title was, in the words of Blackburn J. on the same page, "an interference with the property which would not as against the true owner, be justified, or at least excused, in one who came lawfully into possession of the goods." He was, in the words of Brett J. (1875) LR 7 HL 784 "using the goods with the intent to exercise an act of ownership on his own behalf: or of some one (that is his brother) other than the plaintiff."

Williams J further notes at p239 [12]:

The principle of English law is that persons deal with the property in chattels or exercise acts of ownership over them at their peril: Fowler v. Hollins (1872) LR 7 QB 616, at p 639, affirmed by the House of Lords in (1875) LR 7 HL 757; William Leitch & Co. Ltd. v. Leydon (1931) AC, at p 107; Jelks v. Hayward (1905) 2 KB 460; Bowmaker Ltd. v. Wycombe Motors Ltd. (1946) 62 TLR 437.

3. Similar statements/reiteration of principle have been made in subsequent cases, for example:

Banks v Ferrari & Ors [2000] NSWSC 874 (7 August 2000) per Dowd J at [57] - [58]:

In order to maintain an action for conversion, the plaintiff must have the right to the immediate possession of the goods. The Winlifield, note 1 at 349, per Collins MR. Conversion essentially consists of a positive wrongful act of dealing with goods in a manner which is inconsistent with the rights of the owner. This must be coupled with the intention of denying the owner's rights or asserting a right that is inconsistent with them. Among such rights is the right of possession to the immediate claim to it. Coleman v Harvey [1989] 1 NZLR 723 at 730, per Somers J...

In an action for conversion, the aggrieved owner must connect the wrongful conduct with the infringement of a specific right or rights to the goods concerned.

Winifred Way Yuen Yu v Allan Ni Kwan Kwok & Ors [1999] NSWSC 992 (2 September 1999) per Simos J at [81](after quoting at [77] from Dixon J in Penfolds Wines Pty v Elliott):

The conduct of the defendants (in the present case) clearly involved a denial by the defendants of the title of the plaintiff to immediate possession

Flowfill Packaging Machines Pty Ltd v Fytore Pty Ltd (1993) Aust Torts Reports 81-244, per Young J at 62,520:

Once the degree of user amounts to employing the goods as if they were one's own then a conversion is established. The point may be reached without any subjective intention.....

Using Goods

4. Where a person merely uses goods of another without his authority it will be a conversion – Davidson J in *Craig v Marsh* (1935) 35 SR(NSW) 323 at 325. In this case, Marsh left goods on a premises which he quitted. Craig leased the premises from the owner (this lease between Craig and the owner was endorsed with a provision that the goods were Marsh's and were not leased with the premises). Craig used some of the goods in the course of manufacture of the product he produced. Marsh brought a successful cross-action against Craig for conversion of the goods. During the course of his judgment, Davidson J noted:

...even if a person merely uses goods of another without his authority, he may be liable, pro tanto, for conversion (at p325)

....when the plaintiff was left in possession of the goods in the room which he had rented, knowing that they belonged to the defendant, and thereupon used them for the purposes of manufacturing articles with the idea of making money, no other conclusion could be arrived at than that he had made himself dominus pro tempore of these goods, by his user of them for this purpose, in the temporary derogation of the rights of the true owner; being there as goods of the defendant, the latter had the right to have them left alone, and the plaintiff had no right whatever to use them. He had no agreement with the defendant, and he was not authorised by anybody to make use of them.....(p328)

He further noted at p330 that it was impossible for the converter "to raise, by way of defence, a claim that the injured person should himself have gone and asked for the recovery of his goods. Demand is not necessary to the maintenance of an action for conversion..."

Stephen J, agreeing with Davidson J, quotes at p330-331 from Atkins J in *Lancashire & Yorkshire Railway v MacNicoll* (1918) 88 LKB 601 at 605, in which statement Atkins J notes that "...dealing with goods in a manner inconsistent with the right of the true owner amounts to a conversion, provided that it is also established that there is also an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right. That intention is conclusively proved if the defendant has taken the goods as his own or used the goods as his own...".

Compared with Detinue

5. In *Penfolds Wines Pty Ltd v Elliott*, the Plaintiff could not have sued the defendant in detinue because it is a condition precedent to this cause of action (detinue) that there has been a demand for a return of the goods and a refusal before the issue of the writ: *Clayton v. Le Roy* (1911) 2 KB 1031, at p 1050 (per Williams J at p242, [20]).

6. Dowd J in *Banks v Ferrari & Ors* describes the distinction between conversion and detinue at [59]-[60] and [62]:

[59] The gist of the action of detinue is the wrongful detention of goods. In other words, as Herring CJ states in Bellinger v Autoland Pty Ltd [1962] VR 514, at 520., an action in detinue involves the unlawful failure on the part of the alleged tortfeasor to deliver the goods up when so demanded.

[60] To establish an action in detinue, the plaintiff must prove that the following three elements exist. Firstly, the plaintiff must specifically make a demand for the return of the goods on the person who has legal possession of them. The plaintiff's immediate right to possession must simultaneously subsist at the time the demand is made. Timewell v Virgoe (1868) 5 WW&A'B L 147 at 151, per Stowell CJ. Secondly, the plaintiff's demand must have been refused by the alleged tortfeasor. Nelson and Another v Nelson [1923] St R Qd 37 at 40, per McCawley CJ. And thirdly, where the goods are in the actual possession of the alleged tortfeasor the refusal to return the goods to the plaintiff must be unreasonable. EE McCurdy Ltd (in liq) v Postmaster-General [1959] NZLR 553 at 556-557, per McGregor J (hereinafter 'McCurdy'). In the event that the goods are not in the actual possession of the tortfeasor, the tortfeasor must have wrongfully parted with possession. McCurdy, note 8 at 556-557, per McGregor J.

[62] The distinction between conversion and detinue is that in the former action, the injurious act is the original taking or interference with the dominion of the true owner, whereas the latter injurious act involves the wrongful detention of goods.

7. See also *IBL Ltd v Coussens* [1991] 2 All ER 139, per Nicholls LJ at 141.

Knowledge of the Owner's Identity

8. It does not matter that the person intending to exercise dominion over the relevant goods is mistaken in his belief as to the owner of the goods. If the defendant exercises dominion over goods he converts them in-regardless of his mistaken belief at the time that a person other than the plaintiff is the true owner (*Rendell v Associated Finance Pty Ltd* [1957] VR 604, per Lowe, O'Bryan and Barry JJ at 613)

Time to Investigate Title

9. A defendant may investigate the Plaintiffs claimed title to the goods in question and for such purpose retain the goods for a reasonable time without converting them (see *Flowfill Packaging Machines Pty Ltd v Fytore Pty Ltd* (1993) Aust Torts Reports 81-244 per Young J at 62,520 quoting from Davidson J, *Craig v Marsh* (1935) 35 SR(NSW) 323 at 326 and Bollen J in *Crowther v Australian Guarantee Corp Ltd* (1985) Aust Torts Reports 80-709 at 69,103).
10. However, The "reasonable time to investigate" rule usually has no application at all where there is no doubt of the plaintiffs title to the goods (*Flowfill Packaging Machines Pty Ltd v Fytore Pty Ltd* (1993) Aust Torts Rep01ts 81-244 per Young J at 62,520)

Illegal Contract

11. The Court will look at an illegal contract in order to see whether the property has passed to the finance company. If it finds that the property has passed and that the finance company is entitled to damages, it will look to the contract to see what sum the finance company has lost, that is, the balance of the hire-purchase price (*Belvoir Finance Co Ltd v Stapleton* [1971] 1 QB 210, per Lord Denning MR at 218; See also Sachs LJ at 220).

Damages

12. *The general rule is that the measure of damages is the value of the goods at the time of conversion* (*IBL Ltd v Coussens* [1991] 2 All ER 133, per Neill LJ at 139, where he also refers to the general rule's reaffirmation in *BBMB Finance (Hong Kong) Ltd v Eda Holdings Ltd* [1991] 2 All ER 129, per Lord Templeman at 131, [1990] 1 WLR 409 at 413; *Chubb Cash Ltd v John Crilley & Son* [1983] 2 All ER 294, per Fox LJ at 296)
13. Other such similar statements of principle are made in *Ley v Lewis* [1952] VLR 119, per O'Bryan and Dean JJ at 121-122; *BBMB Finance (Hong Kong) Ltd v Eda Holdings*

Ltd & Ors [1991] 2 All ER 129, per Lord Templeman at 131-132, [1990] 1 WLR 409 at 412-413; *Solloway v McLaughlin* [1938] AC 247, per Lord Atkin at 257-258.

14. *However, in considering any award of damages in an action in tort it is necessary to bear in mind the general principle..... "damages in tort are awarded by way of monetary compensation for loss or losses which a plaintiff has actually sustained." (IBL Ltd v Coussens [1991] 2 All ER 133, per Neill LJ at 139 quoting from Brandon LJ in Brandeis Goldschmidt & Co v Western Transport Ltd[1982] 1 All ER28 at 31-32, [1981] QB 864 at 870)*

See also *Furness v Adriam Industries Pty Ltd* (1993) Aust Torts Reports 81-245, per Ormiston J at 62,533,

15. The High Court, in *Butler v Egg and Egg Pulp Marketing Board* (1966) 114 CLR 185, has stated this principle in the context of conversion.

Per Taylor & Owen JJ at p 191, [5]:

.....the general principle upon which compensatory damages are assessed, whether in actions of contract or of tort..... is that the injured party should receive compensation in a sum which, so far as money can do so, will put him in the same position as he would have been in if the contract had been performed or the tort had not been committed: Livingstone v. Rawyards Coal Co. (1880) 5 App Cas 25, at p 39. And this principle is as much applicable to actions of conversion as it is to the case of other actionable wrongs. In most cases of conversion it is, of course, obvious that its application will result in the injured plaintiff recovering the full value of the property converted since that will usually represent the loss that he has sustained by the defendant's wrongful act. Hence the statement which appears so often in the books that the general rule is that the plaintiff in an action of conversion is entitled to recover the full value of the goods converted, but this statement should not be allowed to obscure the broad principle that damages are awarded by way of compensation.

And per Menzies J at 192, [3]:

Damages should, I think, be assessed not on the basis of the value of the eggs at the time of the conversion but upon the actual loss sustained by the respondent because the appellants converted the respondent's eggs instead of

delivering them in accordance with the Act.

16. In this regard, *The loss suffered by the person whose goods have been converted must be compensated by an award of money which represents the full value of those goods (Furness v Adrium Industries Pty Ltd (1993) Aust Torts Reports 81- 245, per Marks J at 62,531).*
17. *And, ...although damages for conversion normally consist in the value of the goods at the date of conversion, consequential damages are always recoverable if not too remote (Hillesden Securities Ltd v Ryjack Ltd [1983] 1 WLR 959, per Parker J at 963).*
18. Damages may also include hiring charges of a substitute chattel until the chattel lost was reasonably replaced (*Flowfill Packaging Machines Pty Ltd v Fytore Pty Ltd (1993) Aust Torts Reports 81-244 per Young J at 62,523).*
19. *Where there is a conversion of a chattel which is owned by a person who lets out on hire, the proper measure of damages is the full standard rate of hire without deduction and it is not necessary for the hiring company to prove that the chattel would have been hired out throughout the period (Flowfill Packaging Machines Pty Ltd v Fytore Pty Ltd (1993) Aust Torts Reports 81-244 per Young J at 62,523).*
20. Where the defendant uses the plaintiffs goods, the defendant should pay a fair/reasonable/recognized price for their hire (*Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd [1952] 2 QB 246, Somervell LJ at 249-250, Denning LJ at 254, Romer LJ at 257 (note, this case is dealing with detinue)).*

If the goods are retained by the wrongdoer up till judgment, the hiring charge runs up to that time, and in addition the owner will get the return of the goods or their value at the time of judgment (Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd, per Denning LJ at 255).

The probability that the owner would not have used the chattel in question or the chance that the owner would not have found a hirer does not mean that the damages awarded in this regard will be reduced (see Somervell LJ at 251, Denning LJ at 254, Romer LJ at 256-257).

Further,in the case of conversion of a profit earning chattel which a defendant has used for his own benefit, the owner can recover by way of damages a hire charge plus either the return of the chattel or, if there has been a subsequent conversion by disposal, the value of the chattel at the date of such conversion (*Hillesden Securities Ltd v Ryjack Ltd* [1983] 1 WLR 959, per Parker J at 963) (note, Parker J applies *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* to a conversion case).

21. When assessing the value of goods converted for the purpose of assessing the plaintiff's damages and there is no market for the goods in question, the measure of damages is the cost of replacing the goods by obtaining goods *from the only people from whom* (the plaintiff) *can get goods to put him into the same position* as he would have been in if his goods had never been taken away from him, ie, for whatever price *the manufacturers will supply him with similar goods* (*J & E Hall Ltd v Barclay* [1937] 3 All ER 620, per Greer LJ at 624).

Hire-purchase cases

22. The normal measure of damages is what the hire-purchase company has lost by reason of the conversion, which is usually the balance of hire-purchase price outstanding (*Western Credits Ply Ltd v Dragan Motors Pty Ltd* (1973) WAR 184, per Jackson CJ at 187, Wickham J at 191).

See also *Wickham Holdings Ltd v Brooke House Motors Ltd* [1967] 1 WLR 295, per Lord Denning MR at 299-301 - The Plaintiff is entitled to be compensated for the loss of its limited interest in the goods and no more, there being two proprietary interests in a hire-purchase situation: the finance company's interest and the hirer's interest. If the hirer wrongfully sells the goods (and presumably if he otherwise converts the goods) the finance company can recover what it has lost as a result of such wrongful act. This will normally be the balance outstanding on the hire-purchase price.

23. This, however, does not mean that the hiring company can recover the value of the chattel at the date of conversion or the outstanding instalments, whichever is greater (*Chubb Cash Ltd v John Crilley & Son* [1983] 2 All ER 294, per Fox LJ at 297).

Further, where the amount outstanding is greater than the value of the goods, such damage does *not*. *Flow from the conversion, but flows from the failure of the debtor to perform his obligations under the agreement* (*Chubb Cash Ltd v John Crilley & Son* [1983] 2 All ER 294, per Bush J at 299).

The Plaintiff does not lose its right to recover moneys payable by the hirer under the hire-purchase agreement by reason of the conversion by a third party of the relevant goods. Where the defendant is a third party, the plaintiff cannot, in effect, compel the third party to perform the hirer's obligations under the hire-purchase agreement (*Pacific Acceptance Corporation Ltd v Mirror Motors Pty Ltd* (1961) 61 SR (NSW) 548, per Owen J at 550).

24. Instalments paid by the hirer after the conversion should be deducted from the balance due to the finance company under the hire purchase agreement in arriving at the damages payable by the defendant (*Western Credits Pty Ltd v Dragan Motors Pty Ltd* (1973) WAR 184, per Jackson CJ at 187). See also *Wickham Holdings Ltd v Brooke House Motors Ltd* [1967] 1 WLR 295 per Lord Denning at 301.
25. Where the defendant has an interest in the goods and chattels converted the measure of damages is the value of the plaintiff's interest as between himself and the defendant (*Be/size Motor Supply Company v Cox* [1914] 1 KB 244, per Channell J at 252).

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