Yenty Lily (trading as Access International Services) *v* ACES System Development Pte Ltd [2012] SGHC 208

Case Number	: Suit No 679 of 2009 (Registrar's Appeal No 247/2011)
Decision Date	: 18 October 2012
Tribunal/Court	: High Court
Coram	: Judith Prakash J
Counsel Name(s)	: Lee Mun Hooi and Lee Shi Hui (Lee Mun Hooi & Co) for the plaintiff; N. Sreenivasan and Valerie Ang (instructed) and Mimi Oh (Mimi Oh & Associates) for defendant.
Parties	: Yenty Lily (trading as Access International Services) — ACES System Development Pte Ltd

Damages – Measure of damages – Contractual breach

Damages – Measure of damages – Tort – Wrongful detention of property belonging to another – User principle

18 October 2012 Judgment reserved.

Judith Prakash J:

1 I have before me an appeal against the assessment of the damages incurred by the plaintiff in the action as a result of the defendant's breach of contract and tortious actions. The damages were assessed in August last year and the plaintiff, being dissatisfied, has appealed against that assessment.

Background

2 The parties herein are both carrying on business in the construction industry. The defendant, ACES System Development Pte Ltd, was appointed the main contractor in respect of the project known as "Proposed Improvement works to metal roofs for a total of 39 blocks of flats at Bishan-Toa Payoh North and Toa Payoh Central Divisions" ("the project") by the Bishan-Toa Payoh Town Council in the first half of 2008.

3 The defendant needed mobile platforms in order to carry out its work in relation to the project. On 10 July 2008, the defendant entered into a contract ("the subcontract") with the plaintiff, Lily Yenty trading as Access International Services, whereunder it awarded the plaintiff certain subcontract works. The subcontract works required the plaintiff to provide mobile platforms and to erect and dismantle these platforms at various locations at the site of the project where the defendant was carrying out work.

4 The subcontract provided that the defendant would pay the plaintiff a lump sum of $850,000 in respect of the subcontract works. The plaintiff's obligation was to provide six sets of single mast climbing platforms and accessories (collectively "the platforms") for a maximum period of 16 months and to erect and dismantle and move the same as required. It was also agreed that the lump sum price of $850,000 would be based on 39 blocks and that the plaintiff would be paid $21,795 for each of the first 38 blocks and $21,790 for the last block. An important provision of the subcontract was

that the defendant would provide the plaintiff with financial assistance to enable the plaintiff to purchase the platforms and would do this by establishing a letter of credit in favour of the vendor of the platforms. The plaintiff was obligated to repay the purchase price and the charges incurred by the defendant in relation to the letter of credit by 12 equal monthly instalments. It was further provided that such instalments would be deducted from the progress payments to be made by the defendant under the subcontract.

5 Pursuant to the subcontract, the platforms were purchased and the plaintiff proceeded to carry out the subcontract works in accordance with the requirements of the defendant. The plaintiff submitted progress claims to the defendant but the defendant failed to pay these in full. By the time the plaintiff submitted her eleventh progress claim in July 2009, there was an outstanding balance of over $188,000 due to her. The plaintiff considered such non-payment to be a repudiation of the subcontract. On 3 July 2009, the plaintiff informed the defendant that as the outstanding progress payment had not been settled by the due date, she was unable to carry out further works on the site.

6 The defendant responded the next day to state that the plaintiff was not released from any risk or obligations imposed on or undertaken by the plaintiff as a subcontractor and, if the plaintiff failed to proceed with the work, the defendant would not hesitate to engage a third party to do so and would recover the cost of employing such third party from the plaintiff. On 7 July 2009, the plaintiff wrote to the defendant noting that it had continued to use the platforms on site and stating that she would hold the defendant responsible for any loss or damage to the same. The plaintiff further stated that she would be removing the platforms from the site immediately. On the same day, the defendant responded by stating that as the platforms were exclusively intended for the execution of the project, the plaintiff had no right to remove the same without the defendant's consent. The defendant further emphasised that the platforms had been fully paid for by the defendant and therefore remained the property of the defendant. On 11 July 2009, the defendant terminated the subcontract.

7 These proceedings were commenced in August 2009. The plaintiff claimed the outstanding amount of $188,404.30, loss of profits, the return of the platforms and damages for wrongful detention of the same. The plaintiff averred in her statement of claim that she was the legal and beneficial owner of the platforms. In its defence, the defendant denied liability on various grounds and stated that it had purchased and paid for the platforms for use at the site of the project. It denied that the plaintiff had purchased the platforms with the financial assistance of the defendant and further put her to proof of her allegation that she had made six monthly instalment payments towards the purchase price of the platforms. The defendant specifically denied that the plaintiff was both the legal and beneficial owner of the platforms when she had not financed or purchased the platforms or even completed and handed over the works to the defendant.

8 The action came on for hearing before Lee Seiu Kin J (the "trial judge") in May 2010, and after hearing the evidence and submissions which were completed on 4 October 2010, it was adjudged by the trial judge that:

(a) The defendant had wrongfully repudiated the subcontract and the plaintiff had been entitled to terminate the same by her letter of 3 July 2009;

(b) Interlocutory judgment had to be entered for the plaintiff for damages to be assessed on the basis of the lump sum of $850,000 less:

(i) Cash payments received by the plaintiff from the defendant totalling $281,800;

(ii) The cost of the six platforms (inclusive of banking and workers' charges) totalling $227,600.70; and

(iii) Costs that would have been incurred by the plaintiff to complete the remaining blocks of the project, *ie*, blocks 228 and 235 (subject to proof of completion or non-completion) plus the six blocks in respect of which works had not commenced at time of termination as the same were assessed by the Registrar.

(c) It was declared that the plaintiff was the legal and lawful owner of the platforms and that there would be interlocutory judgment for her for damages to be assessed for the defendant's wrongful retention of the platforms as from 31 January 2010.

(d) The plaintiff was awarded interest at the rate of 5.33% per annum on the sums found due and payable to her by the defendant with the date from which the interest was to run to be decided by the Registrar.

(e) The plaintiff was also awarded costs of the action.

9 The defendant only returned the platforms to the plaintiff on 23 October 2010. Prior to that, the defendant had kept the platforms in storage at the warehouse of WYN2000 Transport & Container Services Pte Ltd ("WYN2000"). The platforms had been moved there in December 2009 after work on the project was completed. It should be noted that in deciding that the defendant's continued retention of the platforms was wrongful as from 31 January 2010, the trial judge had taken into account the fact that, under the subcontract, the plaintiff's obligation was to make the platforms available to the defendant for a period of 16 months and this period only ended on 31 January 2010.

The assessment

10 Following from the interlocutory judgment obtained by the plaintiff, the Assistant Registrar ("AR") who heard the assessment was faced with the task of determining the following:

(a) The costs that would have been incurred by the plaintiff to complete work on the remaining blocks of the project;

(b) The extent to which the platforms had been damaged or lost whilst in the possession of the defendant and the amount payable to the plaintiff in respect of such loss and damage; and

(c) The quantum of damages that should be awarded to the plaintiff in respect of the wrongful retention of the platforms.

11 The AR made the following findings:

(a) That the plaintiff would have incurred a further $52,124.11 in expenses had she completed the remaining blocks of the project. The AR found that a sum of $4,626.90 had already been paid by the plaintiff in relation to such costs and therefore deducted the same from the sum of $52,124.11. Thus, the sum deductible as costs of completion was $47,497.21.

(b) The AR accepted that the best evidence of the inventory left by the plaintiff on the site in July 2009 was contained in the report of the survey of the platforms and their accessories conducted by Insight Marine Services Pte Ltd ("Insight") on 23 October 2010 at the open yard in front of the warehouse of WYN2000. On the basis of this survey report, the AR found that the

defendant would have to pay the plaintiff €9,420.70 for damage and loss in respect of the inventory. She allowed a further sum of $3,648 for maintenance and servicing of the platforms after the plaintiff retrieved them from the defendant and $100 as an amount payable to WYN2000.

(c) As for the plaintiff's claim for loss of rental and profit arising from the wrongful detention of the platforms, the AR awarded nominal damages of $100 on the basis that the plaintiff had failed to adduce sufficient evidence to prove her actual loss.

(d) The defendant was to pay the plaintiff interest at 5.33% to run on the total award from the date of the writ of summons up to the time of any interim payment by the defendant and thereafter interest at 5.33% on the remaining balance until payment.

12 The plaintiff was dissatisfied with all of the above holdings and therefore filed the present appeal (Registrar's Appeal No 247 of 2011). The defendant was dissatisfied with the decision on interest and filed a cross-appeal in that respect (Registrar's Appeal No 248 of 2011) but, at the start of the hearing of the appeal, counsel informed me that the defendant was not proceeding with its cross-appeal.

The appeal

Costs of completing the project

13 One of the main disputes between the parties in regard to this issue was how long it would have taken for the plaintiff to have completed her subcontract work on the project had she not terminated the agreement. The length of the period would naturally affect the costs that would have been incurred by the plaintiff. The plaintiff's argument was that she could have completed the work in two months, which was the actual length of time taken by the replacement subcontractor, D&D Industries Pte Ltd ("D&D"), hired by the defendant.

14 The AR was, however, of the view that five months was a "fair" period over which these notional costs should be assessed. Using this period, she assessed the plaintiff's notional costs at $47,497.21 by deducting $4,626.90 (representing the sums already paid by the plaintiff) from the sum of $52,124.11 (total costs to be incurred in order to complete the works). The $52,124.11 figure was, in turn, derived from the following: ($10,000 monthly costs x 5 months) + $2,124.11 costs payable on a one-off basis. A breakdown of the AR's assessment is set out at [20] below.

15 The monthly costs of $10,000 had been rounded up from $9,056.40 to take into account other items of monthly costs that the plaintiff had not disclosed and in respect of which the defendant could not offer any properly substantiated concrete figures (*eg*, maintenance costs of the company vehicle, management costs, overhead expenses, *etc*).

16 On appeal, the plaintiff stood by the position she adopted before the AR, arguing that it would have taken her two months to complete the remaining works and that the costs incurred during those two months would have been $11,179. She relied on the computation set out in the affidavit of evidence-in-chief of her manager, Mr Kay Tuck Hor ("Mr Kay"), who testified at the assessment hearing.

Period of completion

17 The AR found it appropriate to assess the plaintiff's notional costs over a five-month period

because (a) the defendant had tried to utilize its own boom lifts and cantilever platforms as much as it could to complete the works quickly and (b) based on the rate at which the other blocks of the project had previously been completed, it did not seem likely that all the remaining blocks would have been completed within two months. With respect, there are at least three objections to this.

18 First, (a) appears to be a flawed basis upon which the assessment period should be lengthened from two to five months because the defendant was already utilising its own boom lifts and cantilevers when the works were being carried out by the plaintiff, *ie*, before D&D came into the picture. This came to light during cross-examination of Mr Kay. Significantly, it was the defendant's counsel who suggested to Mr Kay that the defendant's boom lifts and cantilevers had already been put to use:

> Q: While doing work on the project, in addition to using the mast platforms for access, do you agree that the Defendant also used boom cranes and cantilevers to provide access for their workers?
>
> A: Yes, it has been agreed that they will use their method to complement our mast platform.
>
> Q: Do you agree that to complete the works on the remaining blocks, the Defendant also used boom cranes and cantilevers?
>
> A: For the remaining blocks I did not do the job so I don't know.
>
> Q: For the 32 blocks that you did the job you can confirm that they used boom cranes and cantilevers to provide access
>
> A: For their own work yes.

19 Second, even if it is accepted that the plaintiff would not have been able to complete the works in two months, it is unclear how the AR arrived at the multiplier of five months. Third, while not entirely satisfactory, there is at least some basis for the plaintiff's proposed period of two months – the plaintiff claims that since it took 9.5 months to complete 30.375 blocks (excluding the two blocks in Toa Payoh), the remaining 6.625 uncompleted blocks would only take 2.07 months to complete. D&D had also managed to complete the remaining works within two months. In the circumstances, while all of these are not precise indicators of how much time the plaintiff would have taken, they provide, at the very least, some basis for the court to use two months as a reasonable marker, from which the court should be slow to deviate in the absence of evidence justifying such deviation.

Quantum of the various expenses

20 The AR's assessment of the quantum of the various expenses and the plaintiff's position on the same are set out in table below.

Plaintiff's costs of work

s/n	Description	AR's Assessment	The plaintiff's position
Costs to be incurred on a monthly basis			
1	Supervisor Suriya Babu's salary	2000	2000

2	Worker's salary (*Ravi Packiyaraj*)	731.90 ($28.15/day for 1 worker x 26 days)	731.90 ($28.15/day for 1 worker x 26 days)
3	Workers' salaries (*4 other workers*)	2600 ($25/day for 4 workers x 26 days)	2,693.60 ($25.90/day for 4 workers x 26 days)
4	Foreign Workers' Levy ("FWL") and Skills Development Levy ("SDL") for Supervisor Suriya Babu	55	55
5	FWL ($150 x 5 workers)	750	750
6	SDL ($2 x 5 workers)	10	10
7	Workmen's compensation ($30 x 5)	150	150
8	Defendant's administrative charges	250	250
9	Transportation costs	500	0
10	Dormitory ($181.90/worker x 5 workers)	909.50	0
11	Rental allowance for Supervisor Suriya Babu	100	0
12	Medical fees, consumables and personal protection equipment ("PPE")	1000	0
Total =		Monthly multiplicand of $9,056.40, rounded up to $10,000/mth **$50,000**/5 mths	$6,640.50/mth $13,281/2 mths
Costs to be incurred on a one-off basis			
13	PE COS for 6 blocks	480	480
14	AE Certification	0	0
15	Repatriation cost	1644.11	0
Total =		**$2,124.11**	$480
***Less* sums already paid by the plaintiff**			
16	Supervisor Suriya Babu's salary for July 2009 (including rental allowance)	2,100	2000
17	Workers' salaries (4 days)	527	527
18	FWL and SDL for July 2009	55	55
19	Petrol costs	125.90	0

20	Dormitory costs (July and August 2009)	1,819	0
Total =		**$4,626.90**	$2,582
AR's assessment of costs: $50,000 + $2,124.11 - $4,626.90 = **$47,497.21**			The plaintiff's position: $13,281 + $480 - $2,582 = $11,179

21 Having considered the arguments and the evidence, I think that some adjustments need to be made to this assessment. In this exercise, I will refer to the items by their serial numbers in the table above. It should be noted that in respect of sums paid, I accept the plaintiff's figure of $2,582 rather than the AR's figure of $4,626.90.

22 First, workers' salaries (s/n 3). The AR calculated the daily rate as $25 and came to a total of $2,600 when she should have used the rate of $25.90 per day and come to $2,693.60 as the total. She had accepted the daily rate of $25.90 in relation to s/n 17 and therefore should have used it for s/n 3 as well. Accordingly, this figure should be slightly increased to $2,693.60.

23 Next, transportation costs (s/n 9). The AR took the position that the plaintiff would have incurred $500 as transportation costs whereas the plaintiff submitted that nothing would have been incurred for this item apart from monthly petrol costs of $125.90. In arriving at her decision, the AR took into account the costs of running and maintaining vehicles. However, whilst Mr Kay agreed during cross-examination that, as far as the company vehicle was concerned, there would be running costs involved, for example, maintenance, road tax and insurance, no direct evidence was given on the appropriate sum. No figure was put to Mr Kay during the cross-examination. In any event, these running costs were costs that would have already been incurred by the plaintiff for the purpose of the subcontract and were not affected by her decision to terminate it. They would have been "sunk" costs. Therefore, I consider that the plaintiff's argument was correct and the only amount that should been allocated to this item was the monthly petrol cost of $125.90.

24 Next, dormitory costs (s/n 10). The AR included $909.50 per month as the costs of providing dormitory accommodation for five workers. This figure was supported by documentary evidence and although the plaintiff submitted that nothing should be awarded, I do not agree as these costs would have been incurred had the plaintiff continued with the project. The same goes for s/n 11 since Mr Kay conceded in evidence that the plaintiff did provide Supervisor Suriya Babu with an allowance of $100 a month for rental. These figures must remain as assessed by the AR.

25 Next medical fees, consumables and personal protection equipment ("PPE") (s/n 12). The AR assessed these items at $1,000. The plaintiff argued that PPE were supplied at the very start and were long lasting equipment and therefore these again were "sunk" costs and should not be appropriated to the last few months of the subcontract. I agree that there is no evidence that any additional PPE would have needed to be supplied during the last few months of work. As regards the medical expenses, Mr Kay's explanation, which the AR accepted, was that these costs may or may not be incurred from month to month and, in fact, during the time that the plaintiff was working on the project, she did not incur any medical expenses for her workers. However, while the plaintiff's track record was good, such a contingency cannot be ruled out altogether. As for consumables, whilst Mr Kay said there were no normal losses of "bolts and nuts", there had been consumables delivered in July 2009 (wedge anchors). One must therefore consider the likelihood of further consumables being required before the end of the subcontract. Overall, I think that this item should

be reduced from $1,000 to $200 to reflect possible expenditure, albeit minor, on consumables and medical treatment.

26 Finally, repatriation cost (s/n 15). The AR found that the plaintiff would have incurred a "one-off" repatriation cost of $1,644.11. This figure was drawn from para 8 of an affidavit filed on 18 January 2011 by Mr Wong Cheng Woh ("Mr Wong"), the defendant's managing director. The AR adopted this figure although the affidavit provided no explanation as to how the sum of $1,644.11 was derived. In the AR's view, since Mr Kay had conceded that there was such a one-time repatriation cost, and since the plaintiff did not offer any evidence as to the quantum, the figure of $1,644.11 should be adopted. In this case, however, I think the AR came to the wrong conclusion. Mr Kay's "concession" in relation to the repatriation expenses clearly referred to the air tickets that had to be purchased to send the foreign workers home:

> Q: When worker finishes contract there is one time expense for repatriation right?
>
> A: Can I elaborate?
>
> Q: Send them back to India.
>
> A: *The air ticket, yes.*
>
> [emphasis added]

27 The receipts for these air tickets (totalling $1,598.80) were attached to the plaintiff's written submissions, and the plaintiff claims to have paid for them. While it is not apparent, on the face of these receipts, who made payment, it is the plaintiff who has produced the receipts, and therefore, in the absence of contradictory evidence, the natural inference to be drawn is that the plaintiff had actually paid for the air tickets to repatriate the workers. Since this had been done, there is no question of the plaintiff saving such costs because she did not complete the works. Accordingly, the sum incurred for the air tickets cannot be added when calculating the amount saved.

28 Further, it appears that the figure of "1644.11" had been computed based on a table attached to an earlier affidavit filed by Mr Wong on 18 December 2009. The table contained a list of "backcharges" of expenses relating to the employment of seven foreign workers (*eg*, levies, insurance bonds, dormitory charges, *etc*) which were to be set off against the progress payments made by the defendant to the plaintiff. These do not relate to "repatriation expenses", which the plaintiff would have had to incur had parties proceeded to completion. Insofar as they relate to the payment of the foreign workers, they have been accounted for in the computation of the "monthly costs" under s/n 1 to s/n 12 of the table above. Accordingly, the sum of $1,644.11 must be deducted from the costs.

29 As a result of the adjustments that I have made, the total "monthly" costs would be $7,975.90 per month instead of the sum of $9,056.40 rounded up to $10,000 per month found by the AR. I will not round up this figure as the AR did as there is no evidence to support the quantum of the extra lump sum amount used by the AR. Secondly, the costs to be incurred on a one-off basis would be reduced by $1,644.11 to $480.

Conclusion on completion costs

30 As I have found (at [17]–[19] above) that the plaintiff would, most likely, have taken two months to complete the works, the total cost of her doing so would have come up to $16,431.80 (being $7,975.90 x 2 + $480). From this sum of $16,431.80, the sum of $2,582 which the plaintiff

agrees she has already paid has to be subtracted. The amount so derived is $13,849.80 and this is the third amount to be deducted from the lump sum of $850,000 as ordered by the trial judge (see [8(b)(iii)] above).

Claim for damage to and loss of inventory

31 The AR assessed the inventory to be *per* the inventory list compiled and acknowledged by WYN2000 on 31 December 2009 ("WYN2000 List") as this inventory was compiled nearest to the time at which the defendant took over the platforms in July 2009 and was thus, she considered, the best evidence before her as to the items that the plaintiff left at the site in July 2009. The AR compared the WYN2000 List against another list ("Insight List") attached to Insight's report of 23 October 2010 in order to derive the quantity of items which were lost or damaged during the period of wrongful detention of the platforms. On this basis, the AR awarded the plaintiff €9,420.70.

32 The plaintiff submitted on appeal that the AR should not have used the WYN2000 List as the basis for ascertaining what items were damaged and lost. Mr Kay had testified that on 28 July 2009, shortly after terminating the subcontract, the plaintiff's solicitors had forwarded to the defendant's solicitors an inventory of the platforms supported by all shipping and packing documents. Neither the defendant nor its solicitors had responded to dispute such quantities. On 31 July 2009, the plaintiff's solicitors further informed the defendant that since it had not objected to the inventory, the plaintiff would take it that the items in the inventory were correct. The defendant was also informed that a writ would shortly be filed in the High Court.

33 I accept the plaintiff's argument. The defendant refused to let the plaintiff take away the platforms from the site when the subcontract was terminated because it needed the platforms. To protect itself against a damage and loss claim, the defendant could have conducted a joint survey with the plaintiff of all the items left on site in July 2009. The defendant did not conduct any survey, let alone a joint one. This may have been because the defendant was claiming that it owned the platforms and that the plaintiff had no interest at all in the same. Therefore, the defendant may have felt there was no need to ascertain what had been damaged or lost at that time.

34 Whilst normally the onus would lie on the plaintiff to establish what items had been left in the defendant's possession and what their condition was, in the circumstances of this case, it is my judgment that such onus shifted to the defendant. The defendant refused to give the plaintiff possession of the items and also refused to acknowledge the plaintiff's interest therein, maintaining its stand that the platforms belonged to it. Accordingly, it is for the defendant to show what the condition of the platforms was in July 2009 when it took possession of the same. The platforms remained on site until the work was completed and they were removed to the WYN2000 store in December 2009. During that period, items could have been lost and damage could have been sustained by the platforms. Once the platforms were in the WYN2000 store, they remained there at the risk of the defendant until they were delivered up to the plaintiff in October 2010.

35 Therefore, I accept the plaintiff's submission that the list of damaged and lost items should be determined by comparing the original inventory sent to the defendant in July 2009 and the Insight List prepared in October 2010. Such comparison supports the plaintiff's quantification. The plaintiff substantiated the quantum of her claim for lost items with a pro forma invoice issued by the Spanish suppliers of the platforms in the sum of €15,050.52.

36 Accordingly, the AR's award of €9,420.70 in respect of this claim must be set aside and replaced by a new award of €15,050.52.

37 In the appeal, the plaintiff also claimed the costs of the Insight survey report ($695.50) because she needed to determine the damage to and number of items collected when the platforms were finally re-delivered. Additional costs incurred in this respect were $256.80 from Woodlands Transport Service Pte Ltd for shifting and inspection of the items and labour charges amounting to $1,320 for the workers who counted and moved the equipment.

38 I think that the plaintiff is entitled to the costs of the Insight survey report. On the other hand, I do not think that the plaintiff is entitled to all its labour charges which are described in its voucher as being "labour charge for taking 6 set Mast Platform on 23 Oct 2010" since the plaintiff would in any case have had to incur labour charges to remove the platforms from the site at the end of the works. The plaintiff would also have incurred transport costs and, on this basis, I do not think that she should be entitled to recover the amount paid to Woodlands Transport Service Pte Ltd. I therefore award the plaintiff only $695.50 in respect of Insight's bill. The AR's award of $3,748 being the costs of servicing the platforms and the payment to WYN2000 shall stand.

Damages for wrongful detention

39 Before the AR, the plaintiff claimed as damages for wrongful detention the sum of $341,982 made up as follows:

(a) $152,982 being loss of rental for six platforms from February 2010 to October 2010 at $2,833 per unit per month; and

(b) $189,000 being the profit that could have been earned from the cost of erecting and dismantling each platform three times per month (being $24,300 at the rate of $1,500 per erection/dismantling less $54,000 being the cost of such activity).

40 The plaintiff relied on *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ld* [1952] QB 246 ("*Strand Electric*") and other authorities on the "user principle" to argue that the defendant ought to pay the loss of rental as such damages regardless of whether the plaintiff could prove that she had suffered actual loss from the wrongful detention of the platforms. The defendant's response was that the plaintiff had failed to prove any loss as she could have rented similar platforms to replace those that had been wrongfully detained and she had not shown that she had missed any opportunity to rent out the platforms over the period that they were in the defendant's possession. The defendant argued that the cases that the plaintiff relied on had dealt with the situation where the party who had wrongfully detained the plaintiff's property had also benefitted from it commercially and therefore had been held to be liable to pay the plaintiff substantial damages. In the defendant's view, the present case was distinguishable in that the defendant had not benefitted from the platforms since it had kept them in storage.

41 The AR accepted the defendant's submissions. She held that the plaintiff's authorities stood for the principle that where a wrongdoer had made use of another's goods for his own benefit, he must pay a reasonable hire even though the owner had in fact suffered no loss. The AR held that on the facts before her, where the platforms had been stored with WYN2000 before damages for wrongful detention started accruing (determined by the trial judge to be from 31 January 2010), there was no basis for the plaintiff to claim the loss of rental on the basis of the user principle. Rather, the plaintiff had to show she had suffered actual loss in order to recover the same. Since the plaintiff here could not show such loss, she was only entitled to nominal damages of $100.

42 On appeal, the parties repeated the arguments that they had made before the AR though some additional authorities were also cited. The issue that I have to decide therefore is whether as a

matter of law, the user principle applies to a case where the converter of property wrongfully retains *but does not use* the property converted.

The user principle

43 It is trite that, as a general rule, the measure of damages is to be, as far as possible, that amount of money which would put the injured party in the same position he would have been in had he not suffered the wrong. A plaintiff suing in tort therefore recovers the loss he has suffered, no more and no less (*Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39, *Chartered Electronics Industries Pte Ltd v Comtech IT Pte Ltd* [1998] SGCA 43 at [16]–[17]). "User damages", an exception to this general rule, are typically awarded where the defendant wrongfully detains and uses the plaintiff's property for his own purposes. The law compels such a defendant to pay reasonable hire for the period of unauthorised detention, even if the plaintiff suffered no financial loss. The defendant is therefore not allowed to argue that the plaintiff would not have been able to rent out the property during the material time. As observed by the Earl of Halsbury L.C. in *The Mediana* [1900] A.C. 113 at 117:

> *What right has a wrongdoer to consider what use you are going to make of your vessel? ... Supposing a person took away a chair out of my room and kept it for twelve months, could anybody say you had a right to diminish the damages by shewing that I did not usually sit in that chair, or that there were plenty of other chairs in the room? The proposition so nakedly stated appears to me to be absurd* ... I know very well that as a matter of common sense what an arbitrator or a jury very often do is to take a perfectly artificial hypothesis and say, "Well, if you wanted to hire a chair, what would you have to give for it for the period"; and in that way they come to a rough sort of conclusion as to what damages ought to be paid for the unjust and unlawful withdrawal of it from the owner. Here, as I say, *the broad principle seems to me to be quite independent of the particular use the plaintiffs were going to make of the thing that was taken*, except ... when you are endeavouring to establish the specific loss of profit, or of something that you otherwise would have got which the law recognises as special damage. In that case you must shew it, and by precise evidence ...
>
> [emphasis added]

This is because the user principle protects property rights in themselves and therefore triggers compensation where the owner's mere right to exclude others at his own discretion has been infringed. As observed in Andrew Grubb, *The Law of Restitution* (LexisNexis Butterworths, 2002) ("*Andrew Grubb*") at para 12.35:

> The user principle ... protects property rights in themselves. The claimant's property right is protected not because of what the claimant might or could have done with the property, but because the claimant had the right to exclude others from using the property at the claimant's own discretion. The concept of property protected by the user principle is one in which what is important is the owner's *exclusion* of others from use and the owner's *discretion* to use or not to use, rather than the owner's *enjoyment* of the use. The defendant's wrong consists of disregarding the claimant's right to exclude. The damages recognise the nature of the wrong.
>
> [emphasis in original]

44 The leading case on the "user principle" is *Strand Electric*. The defendant, which operated a theatre, wrongfully detained portable electric switchboards belonging to the plaintiff, which hired out the switchboards in the course of its business. All three judges in the English Court of Appeal agreed

that the plaintiff was entitled to reasonable hire for the switchboards over the full period of detention (43 weeks). Although the defendant did not actively operate the switchboards during this period, it had "used" them because the presence of the switchboards made its theatre more attractive and more readily disposable than it would have been without them (*Strand Electric* at 256, *per* Romer LJ). Would the outcome have differed if the defendant had had no benefit, however tenuous, from the switchboards but had merely stored them elsewhere? Although that question did not arise in *Strand Electric*, Denning LJ was of the view that non-usage by the defendant would render the user principle irrelevant (*Strand Electric* at 254):

> In such cases if the wrongdoer has in fact used the goods he must pay a reasonable hire for them. *Nor do I mean to suggest that a wrongdoer who has merely detained the goods and not used them would have to pay a hiring charge.* The damages for detention recoverable against a carrier or a warehouseman have never been measured by a hiring charge. They are measured by the loss actually sustained by the plaintiff, subject, of course, to questions of remoteness. They are like cases of injury to a ship or a car by negligence. If it is put out of action during repair the wrongdoer is only liable for the loss suffered by the plaintiff ...
>
> [emphasis added]

45 Denning LJ's conclusion on the scope of the user principle was informed by his approach, which was essentially restitutionary in nature. In his words (*Strand Electric* at 254–255):

> The claim for a hiring charge is therefore not based on the loss to the plaintiff, but on the fact that the defendant has used the goods for his own purposes. *It is an action against him because he has had the benefit of the goods. It resembles, therefore, an action for restitution rather than an action of tort.* But it is unnecessary to place it into any formal category.
>
> [emphasis added]

46 One might surmise that Denning LJ's conclusion was also influenced by the specific example of the manner in which damages had been assessed in cases where carriers and warehousemen, who in the course of their trade frequently come into physical possession of someone else's property, had been found liable for wrongful detention of such property. Unlike Denning LJ, however, the other two members of the coram, Somervell and Romer L.JJ. did not feel compelled by the example of such cases to hold that in the absence of use by the defendant, hiring charges could not be awarded. They did not reach a firm conclusion on whether "use" by the defendant would turn a case such as the present; they merely acknowledged that the element of "use" *may* be significant, but expressly declined to arrive at a conclusion on the question since it did not arise on the facts. Somervell LJ observed that (*Strand Electric* at 250):

> There may be a distinction in the measure of damage in detinue between, say, a warehouseman who merely stores and a person who during the period of detention enjoys the beneficial use of the chattels. It is the latter case with which, in my opinion, we are concerned.

47 The tentativeness of Somervell LJ's view is also seen in Romer LJ's observation that (*Strand Electric* at 257):

> I agree with my Lord that in this comparatively virgin field it is better to confine our decision to the actual facts before us; and I express no opinion as to what the plaintiffs' rights would have been in the matter of damages had the property detained been of a non-profit earning character, or if, although profit-earning, the plaintiffs had never applied it to remunerative purposes.

I note here that the two conditions that could in the view of Somervell LJ possibly adversely affect a plaintiff's right of recovery do not apply here in that the platforms were of a profit-earning character and had been applied to remunerative purposes by the plaintiff to wit under the subcontract.

48 The differing attitudes of the judges in *Strand Electric* stemmed from the split in their views on the basis of user damages (*McGregor on Damages* (Sweet & Maxwell, 18th Ed., 2009) ("*McGregor*") at para 33-067). Unlike Denning LJ, Somervell and Romer L.JJ. adopted the compensatory approach (*Strand Electric* at 252, *per* Somervell LJ, and 256–257, *per* Romer LJ). In particular, Romer LJ observed that *(Strand Electric* at 256–257):

> The fundamental aim in awarding damages is in general to compensate the party aggrieved. The inquiry is: What loss has the plaintiff suffered by reason of the defendants' wrongful act? In determining the answer to this inquiry the question of quantifying the profit or benefit which the defendant has derived from his wrongful act does not arise; for there is no necessary relation between the plaintiffs' loss and the defendants' gain. It follows that *in assessing the plaintiffs' loss in the present case one is not troubled by any need to evaluate the actual benefit which resulted to the defendants by having the plaintiffs' equipment at their disposal*.
>
> ... It does not lie in the mouth of such a defendant to suggest that the owner might not have found a hirer; *for in using the property he showed that he wanted it and he cannot complain if it is assumed against him that he himself would have preferred to become the hirer rather than not have had the use of it at all*.
>
> [emphasis added]

49 The exact scope of the user principle, *viz*, whether it applies to cases such as the present, may depend on the juridical basis of awards of such damages.

50 Restitutionary analysis focuses on the benefit obtained by the defendant by virtue of his wrong and is unlikely to be engaged where the defendant fails to put the detained property to use since there would have been no real benefit to the defendant. On the other hand, compensatory analysis seeks to reverse the causative effects of the defendant's wrong by focusing on the plaintiff's loss. This "loss" may be construed in non-financial terms, *viz*, the "abstraction or invasion of property" (*Watson Laidlaw & Co Ltd v Pott Cassels & Williamson* (1914) 31 RPC 104, *per* Lord Shaw).

51 Adopting a purely compensatory approach thus allows one to argue that as long as the defendant's "abstraction or invasion" is a loss which yields proper recompense under the law, it should not matter whether or not the defendant actually uses the property. The plaintiff's loss remains the same and the defendant must in any event compensate the plaintiff under the user principle.

52 The rationale of this approach is very clearly enunciated by Mitchell McInnes, "Gain, Loss and the User Principle" (2006) 14 R.L.R. 76 ("*McInnes*") at p 88:

> [A]ll three judges in *Strand Electric* questioned, albeit to different degrees, whether substantial relief would be available if, instead of *using* the claimant's property, the defendant had simply *detained* it. Given his gain-based perspective, Denning LJ unsurprisingly said that relief in such circumstances would be limited to compensatory damages for *financial loss* or nominal damages. The better view, however, is that the user principle ought to apply regardless of what the defendant did with the detained property. The loss of *dominium* in *Strand Electric* would have been the same, from the claimant's perspective, whether the defendant had used the switchboards to make its theatre marketable or simply hid them in a closet. Moreover, just as the

law respects the owner's right of *dominium* regardless of the choices that she exercises, so too it should hold the tortfeasor responsible regardless of the choices that he exercised. Having appropriated property to its control, the defendant should not escape loss-based liability simply by showing that he chose not to put the item to commercial use.

[italics in original; underlining added]

53 The analysis in *McInnes* is attractive and applies to the situation here. The defendant in this case is seeking to escape liability on the basis that it *chose* to store the platforms rather than use them. Accepting that argument would, in my judgment, not be equitable to the plaintiff nor show sufficient respect for her property rights. It would, at the same time, allow the defendant to avoid the consequences of its deliberate actions.

54 The only Singapore decision citing *Strand Electric* is *Siew Kong Engineering Works (sued as a firm) v Lian Yit Engineering Sdn Bhd and anor* [1993] 2 SLR 505 ("*Siew Kong*"), which involved the appellant's wrongful detention *and* use of certain welding equipment belonging to the respondents. The appellant argued that since the respondents had not adduced evidence of actual loss suffered as a result of the wrongful detention, they were entitled to, at best, nominal damages. The Court of Appeal rejected this argument, relying on Denning LJ's declaration in *Strand Electric* (*Siew Kong* at [17]) that:

> If a wrongdoer has made use of goods for his own purposes, then he must pay a reasonable hire for them, even though the owner has in fact suffered no loss. It may be that the owner would not have used the goods himself, or that he had a substitute readily available, which he used without extra cost to himself. Nevertheless the owner is entitled to a reasonable hire. If the wrongdoer had asked the owner for permission to use the goods, the owner would be entitled to ask for a reasonable remuneration as the price of his permission. *The wrongdoer cannot be better off because he did not ask permission. He cannot be better off by doing wrong than he would be by doing right.* He must therefore pay a reasonable hire.
>
> [emphasis added]

55 Ignoring the tentativeness of Somervell LJ's position on this issue, the Court of Appeal observed that Somervell LJ had in *Strand Electric* drawn a "clear distinction" between a wrongdoer who merely detains the goods and a wrongdoer who detains the goods with a view to deriving a benefit (*Siew Kong* at [18]), before holding that (*Siew Kong* at [19]):

> In the present case, the equipment was detained by Siew Kong in order to make commercial use of it. By such detention Siew Kong had denied to the respondents the use of their equipment. Adopting the decision [in *Strand Electric*], we do not think that a person who has wrongfully detained for his own use property belonging to another should be allowed to profit from this detention on the grounds that the wronged party had not incurred any expenses or had any occasion to use the equipment during the period of the detention.

56 In suggesting that the award of user damages was justified on the ground that the defendant had profited or derived a benefit from the use of the asset, the Court of Appeal seemed to have regarded such award as restitutionary in nature (Gary Chan, *The Law of Torts in Singapore* (LexisNexis, 2012) at para 11.061). It should however be noted that that question did not arise in *Siew Kong*, which concerned actual use of the equipment by the defendant. In light of this, the juridical basis of user damages is arguably still an open question in Singapore. It may therefore be worthwhile to explore this issue in greater detail.

Precedent

57 The English courts generally stress the compensatory nature of damages for detention.

58 The compensatory nature of user damages was expressly acknowledged in *Hillesden Securities Ltd v Ryjack Ltd and anor* [1983] 1 WLR 959 ("*Hillesden*"). Both the plaintiff and defendant were in the business of letting out vehicles. The defendant converted the plaintiff's Rolls Royce car by purporting to sell it to third parties who used it for their own benefit. Parker J. ordered the defendant to pay the plaintiff £115/week for its "use and enjoyment" of the car, observing that "[w]hat the plaintiffs have lost is the use of the car over the whole period from the original conversion until ultimate return" (*Hillesden* at 963).

59 In the analogous situation where there has been a breach of a restrictive covenant, courts have, in lieu of permanent mandatory injunction, awarded damages equivalent to the sum which the plaintiff might reasonably have demanded for a relaxation of that covenant. In *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 ("*Wrotham Park*"), the plaintiff applied for a mandatory injunction for the destruction of houses built by the defendant in breach of a restrictive covenant. For social and economic reasons the court refused to make such an order. Instead, Brightman J. made an award of damages in lieu under the jurisdiction which originated with Lord Cairns' Act. Because the existence of the new houses did not diminish the value of the land "by one farthing", the plaintiff suffered no financial loss. However, Brightman J. considered that it would have been unjust if the plaintiffs were given nominal damages, or no damages at all. He assessed the damages at 5% of the defendant's anticipated profit, this being the amount of money which could reasonably have been demanded for a relaxation of the covenant.

60 As explained by Lord Hobhouse in *Attorney-General v Blake* [2001] 1 A.C. 268 ("*AG v Blake*"), Brightman J.'s award of damages in *Wrotham Park* was compensatory in nature. Lord Hobhouse stated (*AG v Blake* at 298–299):

> The question of negative covenants typically arise[s] in relation to land and covenants not to build. A complication is that they usually involve a proprietary right of the plaintiff which he is *prima facie* entitled to enforce as such. Where the plaintiff has failed to obtain or failed to apply for an injunction, he has to be content with a remedy in damages. What has happened in such cases is that there has either actually or in effect been a compulsory purchase of the plaintiff's right of refusal. (The award of damages in tort for the conversion or detinue of goods is also an example of compulsory purchase as is demonstrated by the common law rule that the payment of the damages vests the title in the goods in the defendant.) *What the plaintiff has lost is the sum which he could have exacted from the defendant as the price of his consent to the development. This is an example of compensatory damages. They are damages for breach. They do not involve any concept of restitution and so to describe them is an error. The error comes about because of the assumption that the only loss which the plaintiff can have suffered is a reduction in the value of the dominant tenement*. It is for this reason that I agree with my noble and learned friend Lord Nicholls that the decision in *Wrotham Park Estate Co. Ltd. v Parkside Homes Ltd.* [1974] 1 WLR 798 is to be preferred to that in *Surrey C.C. v Bredero Homes Ltd.* [1993] 1 WLR 1361: see also *Jaggard v Sawyer* [1995] 1 WLR 269.
>
> ... The examples given by my noble and learned friend are examples of compensatory damages. *Lord Halsbury's dining-room chair is no different ... He would have lost the use of the chair and it, like other such amenity-value assets, can be assessed by reference to the sum which has been expended on its acquisition and/or maintenance or interest upon its capital value during the period of deprivation.*

[emphasis added]

61 Sir Thomas Bingham MR also preferred the compensatory analysis, observing in *Jaggard v Sawyer* [1995] 1 WLR 269 at 281–282 as follows:

> *I cannot ... accept that Brightman J's assessment of damages in Wrotham Park was based on other than compensatory principles.* The defendants had committed a breach of covenant, the effects of which continued. The judge was not willing to order the defendants to undo the continuing effects of that breach. He had therefore to assess the damages necessary to compensate the plaintiffs for this continuing invasion of their right. *He paid attention to the profits earned by the defendants ... not in order to strip the defendants of their unjust gains, but because of the obvious relationship between the profits earned by the defendants and the sum which the defendants would reasonably have been willing to pay to secure release from the covenant*. I am reassured to find that this is the view taken of *Wrotham Park* by Megarry V-C in *Tito* v *Waddell (No 2)* [1977] Ch 106 at p335D when he said:
>
> > ... *If the plaintiff has the right to prevent some act being done without his consent, and the defendant does the act without seeking that consent, the plaintiff has suffered a loss in that the defendant has taken without paying for it something for which the plaintiff could have required payment, namely, the right to do the act. The court therefore makes the defendant pay what he ought to have paid the plaintiff, for that is what the plaintiff has lost.* The basis of computation ... is the loss that the plaintiff has suffered by the defendant not having observed the obligation to obtain the plaintiff's consent. Where the obligation is contractual, that loss is the loss caused to the plaintiff by the breach of contract.
>
> [emphasis added]

A similar analysis was adopted by Millett LJ in *Jaggard v Sawyer* at 291–292 and, more recently, Chadwick LJ in *World Wide Fund for Nature and anor v World Wrestling Federation Entertainment Inc* [2008] 1 WLR 445 at [29].

62 It appears, however, from the same judgments that user damages may also contain some restitutionary element. In spite of the "compensatory language" of the courts, they continue to place emphasis on the benefit, or gain, received by the defendant. For example, Lord Nicholls observed at *AG v Blake* at 281:

> [I]n the same way as damages at common law for violations of a property right may by *measured by reference to* the benefits wrongfully obtained by a defendant, so under Lord Cairns' Act damages may include damages measured by reference to the benefits likely to be obtained in future by the defendant.
>
> ... *The measure of damages awarded in this type of case is often analysed as damages for loss of a bargaining opportunity or, which comes to the same, the price payable for the compulsory acquisition of a right. This analysis is correct.* ...But this analysis takes the matter now under discussion no further forward. A property right has value to the extent only that the court will enforce it or award damages for its infringement. *The question under discussion is whether the court will award substantial damages for an infringement when no financial loss flows from the infringement and, moreover, in a suitable case will assess the damages by reference to the defendant's profit obtained from the infringement*. The cases mentioned above show that the courts habitually do that very thing.

[emphasis added]

63 One might argue that while Lord Nicholls made several references to the defendant's gains, these gains were relevant *not* as objects of disgorgement, but as evidence of the objective value of the plaintiff's right of *dominium* (*McInnes* at pp 80–81). The alternative rationalisation of construing the plaintiff's "loss" as the loss of a bargaining opportunity may be seen to involve an element of artificiality if the opportunity is one which the plaintiff would in no circumstances have taken (*McGregor* at para 12-009). Lord Nicholls himself expressly acknowledged that the user principle does not sit comfortably with a purely compensatory approach (*AG v Blake* at 279):

> This principle is established and not controversial. *More difficult is the alignment of this measure of damages within the basic compensatory measure.* Recently there has been a move towards applying the label of restitution to awards of this character ... *However that may be, these awards cannot be regarded as conforming to the strictly compensatory measure of damage for the injured person's loss unless loss is given a strained and artificial meaning.* The reality is that the injured person's rights were invaded but, *in financial terms, he suffered no loss. Nevertheless the common law has found a means to award him a sensibly calculated amount of money*. Such awards are probably best regarded as an exception to the general rule.
>
> [emphasis added]

64 Further observations were made by Lord Nicholls in relation to the user principle in *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 ("*Kuwait Airways*") at [87]. Again, Lord Nicholls adopted the language of both compensation and restitution:

> I have noted that *the fundamental object of an award of damages for conversion is to award just compensation for loss suffered*. Sometimes, *when the goods or their equivalent are returned, the owner suffers no financial loss.* But the wrongdoer may well have benefited from his temporary use of the owner's goods. *It would not be right that he should be able to keep this benefit.* The court may order him to pay *damages assessed by reference to the value of the benefit he derived from his wrongdoing*. I considered this principle in *Attorney General v Blake* [2001] 1 AC 268, 278-280 . In an appropriate case the court may award damages on this "user principle" in addition to compensation for loss suffered. For instance, if the goods are returned damaged, the court may award damages assessed by reference to the benefit obtained by the wrongdoer as well as the cost of repair.
>
> [emphasis added]

It should be noted here, however, that Lord Nicholls seems to be saying that damages based on the restitutionary principle of forcing the wrongdoer to disgorge his profit may, in an appropriate case, be awarded in addition to damages paid to compensate the owner for his loss.

65 No English case has been cited to me in which a property owner has been deprived of damages on restitutionary principles. This has only happened in Australia. In the Supreme Court of New South Wales, it was decided at first instance that damages for wrongful detention were only restitutionary in nature. In *Gaba Formwork Contractors Pty Ltd v Turner Corporation Ltd and anor* [1991] 32 NSWLR 175 ("*Gaba Formwork*"), the plaintiff (Gaba) sought damages for the wrongful detention of its formwork materials by the defendant (Turner). Giles J. who favoured the restitutionary approach was of the view that the availability of user damages depended upon actual use by Turner of the detained materials (*Gaba Formwork* at 188):

> I should follow [*Strand Electric*] so far as it applies to the facts before me. It has stood for nearly forty years and, while confined to where the defendant has used for his own purposes goods which the plaintiff would or might otherwise have hired out for reward, has been generally accepted in that situation. It produces a just result, and ... a degree of departure from the principle of compensatory damages ... is permissible in such circumstances ... *In particular, that the influences which inform the law of unjust enrichment are not without effect in our law ... has since been underlined by the recognition in the High Court that the basis of actions where the law imposes or imputes an obligation to make compensation for a benefit accepted is restitution* ...
>
> ... With some influence from equity, *where the circumstances require the common law has departed from the basic principle of compensatory damages.*
>
> On this basis, it would seem that Gaba is entitled to the hiring fee for the period to 17 May 1991, since although there is no express finding by the referee it may be inferred that the formwork materials were used by Turner or its sub-contractor the second defendant for its benefit during that period. At the least, therefore, Gaba's damages are $106,538.53 and interest. I do not feel able to make the same inference in the case of the unreturned materials for the period following 17 May 1991. They may have been retained and used by Turner or its sub-contractor; they may have been simply retained; or they may have been lost or disposed of. *If they were retained and used by Turner or its sub-contractor, Gaba is additionally entitled to a hiring fee for the unreturned materials to the date of judgment. if they were not, it is not so entitled in the absence of proof of actual loss*.
>
> [emphasis added]

66 This Australian decision is the only one where a pure restitutionary approach has been adopted. This must be because the user principle cannot be purely restitutionary in nature since it does not lie in the mouth of the defendant to argue that he had failed to derive actual benefit or make a profit from his tort (*Andrew Grubb* at paras 12.39–12.40). As Romer LJ pointed out in *Strand Electric* at 256, one does not have to evaluate the actual benefit to the defendant in order to assess the plaintiff's loss. Along the same lines, the Privy Council observed in *Inverugie Investments Ltd v Hackkett* [1995] 1 WLR 713 ("*Inverugie*") at 718 that if a man hires a concrete mixer, he must pay daily hire, even though he may not in the event have been able to use the mixer because of the rain; a trespasser who takes a mixer without the owner's consent must pay the going rate even if he has derived no benefit from its use.

67 The mixed nature of the user principle was well illustrated in *Inverugie*. The plaintiff was a lessee of 30 units in a hotel complex operated by the defendants. The defendant wrongfully took possession of those units during the term of the lease and used them as part of the hotel, which had an average occupancy of 35% to 40%. This trespass continued over a period of 15.5 years and the Privy Council was faced with the question of the appropriate measure of damages to be awarded to the defendant. The Privy Council confirmed that a person who lets out goods on hire can recover damages from a trespasser who has wrongfully used the goods whether or not he can show that he would have let the property to anybody else, and whether or not he would have used the property himself (*Inverugie* at 717). The Privy Council made the following observations on the basis of the awards of user damages (*Inverugie* at 717–718):

> *It is sometimes said that these cases are an exception to the rule that damages in tort are compensatory. But this is not necessarily so. It depends on how widely one defines the "loss" which the plaintiff has suffered.* ... The plaintiff may not have suffered any *actual* loss by being

deprived of the use of his property. But under the user principle he is entitled to recover a reasonable rent for the wrongful use of his property by the trespasser. Similarly, the trespasser may not have derived any *actual* benefit from the use of the property. But under the user principle he is obliged to pay a reasonable rent for the use which he has enjoyed. *The principle need not be characterised as exclusively compensatory, or exclusively restitutionary; it combines elements of both.*

[emphasis added]

The present case

68 In my judgment, the recognition that the user principle may not be wholly compensatory but may also contain elements of restitution does not lead to the conclusion that a plaintiff cannot recover in a situation where the defendant has not made any discernable use of the plaintiff's detained or misappropriated property unless she proves actual damage. The only category of cases where such a conclusion has been reached (excepting *Gaba Formwork*) is that in which the goods had been detained by a warehouseman or carrier. Those were decided before *Strand Electric* and may now have to be placed in a special category as the law has since recognised that even where the defendant has gained no benefit at all from the use of the plaintiff's goods (*eg*, in *Inverugie*) the defendant still has to provide substantial compensation to the plaintiff. In my view, depriving the plaintiff of damages simply because the defendant (not being a warehouseman or a carrier), having chosen to detain the plaintiff's profit-earning goods, has done nothing with them, cannot be justified on principle. As *Andrew Grubb* notes at para 12.53 footnote 1:

It was further suggested by Denning LJ in *Strand Electric Co Ltd v Brisford Entertainments Ltd* (see also *Brandeis Goldschmidt & Co Ltd v Western Transport Ltd* [1981] QB 864, [1982] All ER 28) that in the absence of actual use or damage by the defendant there can be no damages under the user principle. There is thus no liability under this head for a warehouseman who detains goods without using or damaging them. ***But the distinction is not entirely clear*** . If I take your goods and then happen to do nothing with them, why should I not have to pay a reasonable fee for having them? How is that situation different from where I use them unsuccessfully? Is my intention to use them decisive? What if I do not know what purpose I will put them to, and in the event do nothing with them? Can it count as holding the goods for my purposes that I simply want to have them (eg works of art which I put in a bank vault)? *Is the extra point about the warehouseman really non-use, or is it that having acquired the goods legitimately he merely refuses to hand them back?* Is it that there might be no element of depriving the claimant of an opportunity to negotiate with the defendant?

[emphasis added]

69 The questions posed in *Andrew Grubb* as to the lack of a distinction between the case where the defendant uses the assets and the case where he chooses not to cannot, I think, be answered by pointing to the fact that the user principle contains elements of restitution. For many years now, judges have described the principle as being compensatory and have forcefully repeated that description even as some of them also recognise the restitutionary element. It may be that what is important is the fact that, by the detention or appropriation, the defendant gains the opportunity to use the property concerned whilst simultaneously depriving the owner of such opportunity. From this perspective, the defendant's failure to exploit such opportunity is irrelevant.

70 Coming to the present case, we have a situation in which the plaintiff, as the defendant well knew, acquired the platforms in order to use them in the course of her business and to make a profit

from them. The defendant could have acquired the platforms itself and merely hired the plaintiff to erect and dismantle them. That was, however, not the bargain between the parties. Instead, the defendant agreed to finance the plaintiff's acquisition of the platforms on the basis that they would be used exclusively for the project during the period of the subcontract. It may be that the defendant chose this course because it recognised that it had no long term need for the platforms beyond the end of the project and did not want to acquire equipment it would thereafter have no further use for. So it found the plaintiff, a subcontractor who was willing to go into the platform supply business. The defendant must have known that when the project ended the plaintiff would have continued to hire out or attempt to hire out the platforms and make a profit from their use.

71 The defendant used the platforms until December 2009. Thereafter, it refused to return them to the plaintiff. Its action can be likened to that of the dog who buries the bone it no longer wants to chew. The proceedings were then in full swing and the defendant's response to the plaintiff's claim to ownership of the platforms was to deny the same and assert its own rights over the platforms. The defendant never waivered in this stand and, indeed, did not release the platforms to the plaintiff until the court ordered it to do so, notwithstanding that the defendant apparently had no use itself for the platforms after December 2009, since it left them in the premises of WYN2000.

72 The defendant, therefore, knowingly deprived the plaintiff of the use of a profit-earning chattel, which the defendant knew had been acquired only for business purposes. It knew also that the plaintiff had not had the financial muscle to acquire the platforms on her own and had needed the defendant's assistance to do so. Yet, the defendant contended that the plaintiff should have gone about the business of hiring out platforms either by acquiring new ones or by renting ones that were in the market and subletting them. The plaintiff gave evidence that she had attempted to rent alternative platforms but that the supply had been very tight and she had not been able to obtain any. In any case, she said that if she had been able to rent them and then sublet them, her hire charges to her clients would have been above the market rates and she would have found it hard to get customers.

73 In my judgment, the fact that the plaintiff could not, or even by choice, did not, obtain new platforms and rent them out so as to be able to show actual loss cannot justify relieving the defendant of the liability to pay compensatory damages. If the plaintiff had gone into business with alternative platforms, she may have been able to use the losses from such business to establish a claim for actual loss but such claim would have been in addition to her claim for damages to be assessed under the user principle. This is indicated in many of the paragraphs that I have cited from the cases starting with *The Mediana* (at [43] above). It does not lie in the mouth of a converter of profit-earning property to deny the property owner substantial damages simply because the converter chose not to use the same in even the most tenuous way.

74 The next issue that I have to decide is the quantum of the damages to be awarded to the plaintiff. I have set out the basis of the plaintiff's computation in [39] above. It was agreed by the defendant's managing director that when a platform is rented out there are two cost components involved: the rental for the platform itself and the cost of erecting and dismantling it. This position was also accepted by two other witnesses who appeared for the defendant and who are in the business of providing platforms.

75 The plaintiff produced quotations and claimed that the average rental per platform per month without including the cost of erection/dismantling was $2,833. She justified demanding the additional erection/dismantling costs of $1,500 per occasion on the basis of a quotation from Scan-Rent (S) Pte Ltd ("Scan-Rent") given to the defendant in October 2010 which gave the following figures:

(a) rental charges of $1,480 per month for platforms with a mast height of 40 m;

(b) erection and installation charge of $700 per unit;

(c) dismantling charge of $200 per unit; and

(d) transportation charge (to and fro) $600 per unit.

76 The plaintiff relied on three quotations with regard to rental. The first, from Mega Engineering (S) Pte Ltd, quoted a rental of $2,500 per unit per month, which included transport of the platforms. This quotation did not mention erection/dismantling charges. The second quotation, from Sante Access System Pte Ltd, also quoted rental of $2,500 per unit per month and provided that the installation and dismantling and shifting would be done by the hirer. The third quotation, from Hock United Engineering Pte Ltd, quoted $3,500 per month and also did not mention the other costs. The plaintiff's position was that the Scan-Rent figure should not be used because it was in respect of platforms which had only a forty-metre mast whereas the masts of her platforms were sixty metres high.

77 It appears to me from the evidence that platform providers can either quote an overall figure for rental and erection/dismantling, like the plaintiff's documents showed, or break up the figures in the way that Scan-Rent did. Also, it may be that some hirers prefer to do their own erection/dismantling and shifting. On this evidence, I would not be justified in awarding separate figures for rental and other services. On an overall inclusive rental basis, I award the plaintiff $3,500 per platform per month. I use the quotation from Hock United Engineering Pte Ltd because it was given in January 2010 at about the time when the platforms should have been returned to the plaintiff. The two lower quotations were given in July 2009, some months before the detention commenced, and the Scan-Rent quotation was for differently sized platforms. Therefore, I award the plaintiff $189,000 as rental that could have been earned from February 2010 to October 2010 at $3,500 per unit per month.

Interest

78 The plaintiff submitted that interest should run from the date the cause of action arose and not from the date of filing of the writ of summons.

79 Under s 12(1) of the Civil Law Act (Cap 43, Rev Ed 1999), the court has the discretion to order that interest be paid between the date the cause of action arose and the date the writ was filed. In this case, there was only a short lapse of time between the accrual of the cause of action and the filing of the writ of summons. The AR decided that interest should run from the date of the filing of the writ. I see no reason to interfere with the exercise of her discretion and the plaintiff did not provide me with any reasonable basis on which to backdate the interest awarded in respect of the balance owing to the plaintiff under the subcontract.

80 The AR did not need to consider the date at which interest should accrue on the damages for detention since she awarded only nominal damages. I have now altered that award. The damages for detention should carry interest as well but the date on which such interest should accrue cannot be the date of filing of the writ since the damages themselves did not start to accrue until February 2010. To be fair to the defendant, I award the plaintiff interest on these damages at half the usual rate from 1 February 2010 to 31 October 2010 and thereafter at 5.33% per annum until the date of payment.

Conclusion

Conclusion

81 In the result, the plaintiff's appeal is allowed. The figures awarded by the AR are set aside and replaced by the following:

(a) The third amount to be deducted from the lump sum of $850,000 as ordered by the trial judge (see [8(b)(iii)] above) is $13,849.80;

(b) The defendant shall pay the plaintiff €15,050.52 plus $3,748 plus $695.50 for the damage and loss to the inventory as well as costs arising from the detention and inspection of the platforms;

(c) The defendant shall pay the plaintiff damages in the sum of $189,000 for wrongful detention of the platforms;

(d) The defendant shall pay the plaintiff interest on the sums awarded in (a) and (b) above (or the amount thereof from time to time remaining outstanding) at the rate of 5.33% per annum from the date of the writ up to date of payment; and

(e) The defendant shall pay the plaintiff interest on $189,000 awarded in (c) above at the rate of 2.665% per annum from 1 February 2010 to 31 October 2010 and thereafter at 5.33% per annum until payment.

82 The defendant shall pay the plaintiff's costs of the appeal. I shall see the parties in chambers to fix these costs.