ACES System Development Pte Ltd *v* Yenty Lily (trading as Access International Services) [2013] SGCA 53

Case Number	: Civil Appeal No 149 of 2012
Decision Date	: 04 October 2013
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: N Sreenivasan SC and Valerie Ang (Straits Law Practice LLC) for the appellant; Lee Mun Hooi and Lee Shihui (Lee Mun Hooi & Co) for the respondent.
Parties	: ACES System Development Pte Ltd — Yenty Lily (trading as Access International Services)

Tort – Detinue

Damages – Assessment – Compensation – User principle

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2013] 1 SLR 577.]

4 October 2013 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 This is an appeal by the Appellant, Aces System Development Pte Ltd, against the decision of the High Court Judge ("the Judge") in *Yenty Lily (trading as Access International Services) v ACES System Development Pte Ltd* [2013] 1 SLR 577 ("the Judgment"), which had allowed the appeal by the Respondent, Yenty Lily, against the decision of the Assistant Registrar ("the AR").

Parties to the dispute

2 Both parties carry out business in the construction industry. The Respondent was a subcontractor of the Appellant for the project known as the "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"). The Appellant was appointed by the Bishan-Toa Payoh Town Council in the first half of 2008, and the Respondent entered into the subcontract with the Appellant ("the subcontract") on 10 July 2008.

Background to the dispute

3 In the subcontract, the Respondent was to provide mobile platforms as well as erect and dismantle these platforms at various locations at the site of the project where the Appellant was carrying out work. She was to provide six sets of single mast climbing platforms and accessories (collectively, "the platforms") for a maximum period of 16 months, ending 31 January 2010.

4 Notably, the subcontract contained a provision for the Appellant to financially assist the Respondent to purchase the platforms, and this was executed in the form of a letter of credit in favour of the vendor of the platforms. The Respondent would repay the purchase price and the

charges incurred by the Appellant in relation to the letter of credit by 12 equal monthly instalments, and such instalments would be deducted from the progress payments to be made by the Appellant to the Respondent pursuant to the subcontract.

5 Under the subcontract, the Respondent would be paid a total of $850,000 for work done at 39 blocks of flats: $21,795 each for the first 38 blocks, and $21,790 for the last block. The Respondent carried out the subcontract works and submitted progress claims to the Appellant for payment. By July 2009, there was an outstanding balance of over $188,000 due to the Respondent. On 3 July 2009, the Respondent informed the Appellant that she was unable to carry out further works on the site. The next day, the Appellant replied that if the Respondent did not proceed with the work, it would engage a third party and recover the cost of employing the third party from the Respondent. On 7 July 2009, the Respondent wrote to the Appellant noting that it had continued to use the platforms on site and stated that she would hold the Appellant responsible for any loss or damage to the same. She also stated that she would be removing the platforms from the site immediately. On the same day, the Appellant responded to the effect that the platforms were exclusive to the project and that the Respondent could not remove the platforms without the Appellant's consent. On 11 July 2009, the Appellant terminated the subcontract. The Appellant continued to use the platforms up to December 2009 when the project was completed and kept them in storage thereafter.

6 The Respondent commenced proceedings against the Appellant in August 2009 and claimed the balance sum owing to her, loss of profits, the return of the platforms and damages for wrongful detention of the same for the period that the platforms were kept in storage. The trial judge delivered judgment on 4 October 2010 and held that:

(a) The Appellant had wrongfully terminated the subcontract on 11 July 2009, and the Respondent had been entitled to terminate it on 3 July 2009;

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

(i) Cash payments received by the Respondent from the Appellant totalling $281,800;

(ii) The cost of the six platforms (which the Appellant had financially assisted the Respondent in buying) totalling $227,600.70;

(iii) The cost that would have been incurred by the Respondent to complete the project;

(c) The Respondent 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 Appellant's wrongful detention of the platforms with effect from 31 January 2010;

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

(e) The Respondent be awarded the costs of the proceedings.

7 The Appellant returned the platforms to the Respondent on 23 October 2010.

The issues with regard to assessment

8 In the assessment of damages (which are the subject of the present appeal), the AR assessed the following heads of damage, which were in contention before the Judge and remain in contention on appeal:

(a) The cost that would have been incurred by the Respondent to complete work on the remaining blocks of the project ("Issue 1");

(b) The extent to which the platforms had been damaged or lost whilst in the possession of the Appellant and the amount payable to the Respondent in respect of such loss and damage ("Issue 2"); and

(c) The quantum of damages that should be awarded to the Respondent in respect of the wrongful detention of the platforms when no loss was proved and the platforms were not put to use ("Issue 3").

The decision of the AR

9 The AR held as follows:

(a) In so far as Issue 1 was concerned, the cost of completing the project was assessed at $52,124.11, on the basis that costs of $10,000 (rounded up from $9,056.40) would be incurred per month over a five-month period, and $2,124.11 would be incurred on a one-off basis;

(b) In so far as Issue 2 was concerned, damages of €9,420.70 were assessed for damage or loss to the platforms by comparing inventories prepared in December 2009 and October 2010 (the "Insight List"). $3,748 was also awarded for maintenance, servicing and retrieval fees in relation to the platforms;

(c) In so far as Issue 3 was concerned, the Respondent's claim for substantial damages for the Appellant's wrongful detention of the platforms failed under the user principle as the Respondent had not proven any actual loss. She awarded $100 as nominal damages.

Being dissatisfied with the quantum awarded by the AR, the Respondent appealed.

The decision of the Judge

10 On appeal, the Judge varied the assessment of damages as follows:

(a) In so far as Issue 1 was concerned, the Judge found that the Respondent's notional costs should have been assessed over a two-month period instead of (as the AR held) over a five-month period. Based on the evidence, costs of $7,975.50 would have been incurred monthly, and costs of $480 would have been incurred on a one-off basis. The Respondent's cost of completing the project was therefore $16,431.80.

(b) In so far as Issue 2 was concerned, the Judge assessed damages by reference to the original list that was sent to the Appellant in July 2009 as well as the Insight List. Based on this comparison, the Respondent had sustained a loss of €15,050.52. The Respondent was entitled to recover $695.50 as the cost of obtaining the Insight List because she needed to determine the number of items collected as well as the damage done to them when the platforms were finally re-delivered to her. The AR's award of $3,748 for maintenance, servicing and retrieval fees in relation to the platforms was affirmed.

(c) In so far as Issue 3 was concerned, the Judge disagreed with the AR's legal analysis of the user principle and allowed damages for the wrongful detention of the platforms. The Respondent was awarded $189,000, being the rental that she could have earned from February to October 2010.

In the appeal before us, the Appellant sought to reinstate the AR's decision.

Our decision

Issue 1 and Issue 2

11 We are of the view that the Judge was correct in arriving at the decisions she did with respect to the first two issues (*viz*, Issue 1 and Issue 2). The Judge, in the *de novo* hearing, had the power to make her findings of fact and then exercise her discretion. Her discretion would only be upset if it was shown that she had erred in principle or had reached a conclusion that was manifestly wrong.

12 It is trite law that the nature of an appeal from a registrar of the High Court to the judge in chambers is by way of rehearing of the application and the judge treats the matter *de novo*, as though it came before him or her for the first time (see, for example, the decision of this court in *Chang Ah Lek and others v Lim Ah Koon* [1998] 3 SLR(R) 551 at [19] and [20], and approved (also by this court) in *Ho Yeow Kim v Lai Hai Kuen* [1999] 1 SLR(R) 1068). In other words, in a registrar's appeal, the judge's discretion is not fettered by the registrar's discretion in coming to his or her decision.

Issue 3

Introduction

13 We agree with the Judge's *decision* with respect to Issue 3 (*viz*, that relating to the detention of the platforms). However, we differ with regard to the *reasoning*. For reasons which we will set out in a moment, we are of the view that there was sufficient evidence on record to permit the court to arrive at the (same) conclusion with respect to this particular issue without accepting the Judge's analysis of the user principle by relying, instead, on what we shall see is the more general compensation principle. At this juncture, it would be appropriate to commence with our reasons as to why we differ from the *reasoning* (and, consequently, approach) which the Judge adopted in arriving at her decision in so far as this particular head of damages is concerned.

The compensation principle

14 The compensation principle is a general principle which prescribes that when a tortious wrong is committed by the defendant, the plaintiff ought – as a matter of logic, commonsense as well as justice and fairness – to be put in the same position (as far as it is possible) as if the tort had not been committed. In the oft-cited words of Lord Blackburn in the House of Lords decision of *Livingstone v The Rawyards Coal Company* (1880) 5 App Cas 25 (at 39):

> [W]here any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

15 In the present proceedings, the AR found that the user principle did not apply and proceeded to consider whether the Respondent had suffered any loss. She found that the Respondent had failed to prove actual loss caused by the detention, and therefore only nominal damages could be awarded to the Respondent as compensation. She stated:

> ... For example, if the [Respondent] had rented platforms from other sources in order to carry on its business, it would have been entitled to claim the cost of that rental. However, the [Respondent] had not done so. If the [Respondent] had been unable to secure alternative platforms when it had been invited to quote for a job, it may be entitled to claim the loss of a chance of earning profits on that job by adducing sufficient evidence of its inability to secure alternative platforms, the likelihood it would have obtained the job, and the likely profit it would have earned on that job. Unfortunately, such evidence was lacking.

16 On the basis of the evidence before us, we would respectfully differ from the learned AR in her findings of proof of loss. In our view, there was *in fact* sufficient evidence to award the Respondent substantive damages based on the *compensation principle* and, that being the case, there was *no need* to turn to the user principle. Let us elaborate.

17 It is clear that the Respondent had intended to utilise the platforms in the context of her business. Indeed, in entering into the subcontract, the Respondent had hoped that the platforms, which she would ultimately receive from the Appellant, would constitute a main (if not the) basis for her future business. It would perhaps be an understatement to state that the Respondent's business was at an embryonic stage at the time the Appellant committed the tort. In point of fact, the Appellant had – through its wrongful detention of the platforms – not only sterilised the use of those items but had simultaneously thrown a giant spanner in the Respondent's attempts to get her start-up business off the ground. It would, in the circumstances, appear to defy logic, common sense as well as justice and fairness to arrive at the conclusion that the Respondent had suffered no substantive loss. In fairness to the Appellant, however, the onus does nevertheless lie with the Respondent – from an evidential perspective – to prove what loss she has suffered (*cf* the Privy Council decision (on appeal from the Court of Appeal of Trinidad and Tobago) in *Carlton Greer v Alstons Engineering Sales and Services Limited* [2003] UKPC 46; see also the decisions of this court in *Chartered Electronics Industries Pte Ltd v Comtech IT Pte Ltd* [1998] 2 SLR(R) 1010 at [16]–[17] (in relation to losses caused by conversion) as well as *The "Pioneer Glory"* [2002] 1 SLR(R) 232 at [47] (in relation to losses caused by wrongful detention of goods)). However, in fairness to the Judge, this was a fact situation in which the result would have been the *same*, regardless of whether the compensation principle *or* the user principle was applied – a point which we will also elaborate upon below from the more general perspective of legal principle.

18 Returning to the *compensation principle*, at the most general level, it is clear, in our view, that the Respondent had been deprived by the Appellant of the *use* of the platforms for the purposes of her business. She would of course be under an obligation to mitigate any loss caused by the Appellant's actions. However, she would have needed only to have taken *reasonable* steps and what would have been reasonable would have depended, in the final analysis, on the precise facts. What were these facts? It is clear that the Respondent could *not* have been expected to have gone out into the market to purchase substitute platforms or rent platforms in the market and sublet them. On these two submissions put forward by the Appellant in the court below, the Judge had found that the Appellant knew that the Respondent did not have "the financial muscle to acquire the platforms on her own and had needed the [Appellant's] assistance to do so" (see the Judgment at [72]). The Judge did also note the Respondent's argument to the effect that the supply of platforms in the market "had been very tight and she [the Respondent] had not been able to obtain any" and that "[i]n any case, ... if she [the Respondent] 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" (see *ibid*). In the Judgment, the Judge rejected the Appellant's argument in this regard, and we are in agreement. Additionally, it would likewise have been unreasonable, in our view, to have expected the Respondent to enter into contracts first *before* hiring the substitute platforms – as the learned AR had suggested. Put simply, the Respondent was placed in such an invidious position *precisely because of the Appellant's wrongful detention of the platforms*. In fairness to counsel for the Appellant, Mr N Sreenivasan SC ("Mr Sreenivasan"), he did not (and correctly so, in our view) seek to press any of these points. On the contrary, whilst submitting forcefully on behalf of his client, he did not seek to proffer arguments that were unpersuasive and/or unreasonable; he merely sought to put forward the best possible case on behalf of the Appellant.

19 The only issue was whether or not there was sufficient evidence in the context of the present proceedings as to the quantum of damages which ought to be awarded to the Respondent based on *the compensation principle*. In this regard (as we note below at [59]), we agree with the reasoning of the Judge. That having been said, as we also elaborate upon below, the *same quantum* of damages could – on the facts of *this* particular case – have been awarded pursuant to the *user principle*. However, this coincidence of remedy will not always obtain in *every* fact situation. In order to understand why this is so, a detailed understanding of the user principle as well as how it relates to the compensation principle is necessary, and it is to these specific issues that our attention must now turn.

The user principle

20 The user principle has been often perceived as constituting an *exception* to the general compensation principle. This might be because the user principle has, on a number of occasions, been invoked simply because the application of the general compensation principle only yields *nominal* damages in favour of the plaintiff. Put simply, in this fact situation, the plaintiff has suffered *no substantive loss* calculable on the compensation principle. This can be due to a variety of reasons. For example, the plaintiff might be unable to adduce sufficient *evidence* of his or her loss. Or the plaintiff might, on the specific facts of the case, have really suffered no loss *in fact* although the defendant might have benefited from his or her wrongful (here, tortious) act. What this signals is that a court ought to be sensitive always to the precise fact situation before it.

21 Hence, in applying the user principle in the present case, the Judge must, *ex hypothesi*, have proceeded on the assumption that the Respondent had suffered *no loss* from a *compensatory* perspective (which ought to be made good based on the compensation principle). We would, however, note that it is not always the case that the user principle would constitute an *exception* to the compensation principle. As we elaborate upon below (at [47]), much would depend upon the precise factual matrix.

22 As stated above at [17], the Respondent nevertheless had to furnish the court with sufficient evidence upon which an award of damages could be made in her favour. As already noted, the AR held that insufficient evidence had been furnished by the Respondent. In the circumstances, the Judge utilised the user principle instead. However, what we find curious is that the Judge – after undertaking a comprehensive survey of the relevant decisions as well as secondary literature – arrived at the conclusion that an award of damages pursuant to the *user principle* was (in a large part at least) *compensatory* in its basis. She then examined the specific evidence and held that, on the available evidence, the Respondent ought to be awarded $189,000 (see the Judgment at [74]–[77]). If, in fact, the Judge had utilised – in the main – a *compensatory* basis for the award of damages to the Respondent *and* found that there had been sufficient evidence available on the facts, the Respondent would have been awarded damages based on the *compensation principle*, thus obviating

the need to invoke the user principle as an exception. In fairness to the Judge, it could be argued that the specific evidence considered by her was in relation to the *user principle*. Such an interpretation is supported by the fact that the Judge was of the view that the user principle was *not* based *wholly* on the *rationale* of *compensation* (see the Judgment at [67]–[68]). However, this was, in our view, an instance of the immense confusion that has surrounded the nature and function of the user principle, and resulted in an incorrect analysis of the user principle. Such confusion is of course due, in no small part, to the different views expressed by the judges in the seminal English Court of Appeal decision of *Strand Electric and Engineering Co Ltd v Brisford Entertainment Ld* [1952] 2 QB 246 ("*Strand Electric*"), to which we will now turn.

Strand Electric

23 In *Strand Electric*, the plaintiffs had hired out portable switchboards to a theatre which the defendants later came to own. Upon taking possession of the theatre, the defendants disclaimed any responsibility for the plaintiffs' hire equipment. The plaintiffs sued for the return of the switchboards or its value. While the Court of Appeal was unanimous in their *decision* that the assessment of damages for the period of unlawful detention must be the fair price of the hire, the *reasons* given by the judges differed.

Denning LJ's decision

24 Only Denning LJ (as he then was) was clearly of the view that the damages awarded pursuant to the user principle were *restitutionary* in nature (although he did not express any views on the situation where the defendant had made *profits* as a result of its wrongful use of the goods or chattels concerned as it was not the situation in *Strand Electric* itself (see below at [26]–[32] for further elaboration on this particular point)). In his words (see *Strand Electric* at 254–255):

> 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*** .
>
> ...
>
> 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.*
>
> [emphasis added in italics and bold italics]

It is, in our respectful opinion, the case that, in Denning LJ's view, the restitutionary principle appeared to consist of the *disgorgement of the benefit* that the wrongdoer had obtained, where the *benefit* was for the *ability* to *use* the property (thus not necessarily involving the *actual use* of the property) *without payment.* The *quantification* of that benefit, according to Denning LJ, was the fair price of hire of the goods as it could be proven that the defendant had *used* the goods without payment of hire. In his own words (at 254):

> 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.

In Denning LJ's view, the restitutionary user principle did *not* look to *remedying* the claimant's loss, but, rather, to *disgorging* the wrongdoer's gain or benefit.

25 It should, however, be noted that Denning LJ appeared to suggest that, in a situation where the goods concerned were *not used* by the defendant (which is in fact the situation in the present appeal), the plaintiff could only recover its actual loss (see *Strand Electric* at 254):

> 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. [emphasis added in italics and bold italics]

Do these observations by the learned Lord Justice suggest that, in a situation where there has been detention but *no actual use* by the defendant of the goods concerned, the damages recoverable by the plaintiff would *not* be *restitutionary* in nature? If this is indeed the case, then this would be *inconsistent* with the analysis proffered below (at [39]–[41]). We would respectfully suggest that, at the very most, Denning LJ's observations in this particular regard are ambiguous. First, he gives us two examples where, in a situation of detention with no use, the damages awarded are measured by the loss sustained by the plaintiff, *viz*, those involving a carrier or a warehouseman. This suggests that where the person detaining the good is characterised as a *non-user* whose function would not involve enjoying beneficial use of the good concerned, but merely engages in the moving or storage of it, then the concept of the user would not be an appropriate *measure* of damages that the plaintiff has suffered (see John Glover, "Restitutionary Principles in Tort: Wrongful User of Property and the Exemplary Measure of Damages" (1992) 18 Monash U L Rev 169 ("*Glover*") at pp 184 and 187). Secondly, the reference to the damages being "measured by" a loss does not mean that Denning LJ had abandoned the restitutionary analysis, and we respectfully suggest that it meant that the underlying rationale remained restitutionary even if the damages were to be "measured by" the loss to the plaintiff. If this is indeed the interpretation which is to be adopted, then it is *wholly consistent* with the analysis below (at [39]–[41]) to the effect that damages awarded pursuant to *the user principle* are *always restitutionary* in *nature*, and that the benefit does not always have to be evidenced by actual use of the detained good. Regardless of whether Lord Denning's suggested measure of loss in the non-user cases is defensible, the underlying basis or rationale remains restitutionary.

Disgorging profits?

26 Denning LJ made a further comment (at 255) that he could imagine cases "where an owner might be entitled to the *profits* made by a wrongdoer by the use of the chattel, but I do not think this is such a case" [emphasis added]. In this regard, the learned Lord Justice considered *another possible* benefit which a wrongdoer might have obtained (and which the plaintiff might recover in an appropriate case), *viz*, *profits* accruing to the defendant from its wrongdoing which could – at least in the context of the modern law of restitution – arguably be claimed by the plaintiff from the defendant by way of a somewhat different legal route, for example, an accounting for gains. Bearing in mind the very important (contextual) fact that at the particular point in time that Denning LJ made the above comment, restitution for wrongs had, unlike the present, attracted little academic debate, it could not be said that Denning LJ had contemplated an accounting for gains in the technical and specific terms that are now commonly assumed in the modern law of restitution.

27 What, then, did Denning LJ mean? We preface the answer to this question by first considering the concept of restitution for a tortious wrong, in this case, the wrongful detention of goods. The scope of what precisely constitute "wrongs" in the law of restitution is still a topic of discussion, and we therefore do not wish to circumscribe that discussion in any way. However, we would observe that the wrong complained of by the plaintiff *must* be a wrong caused by the defendant, and the

defendant must have derived *some benefit* from committing that wrong (see Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 2nd Ed, 2006) ("*Virgo*") at pp 425–427). In the present appeal, we are considering a tortious wrongdoing, *viz*, the detention of property, where the *restitutionary remedy* for such wrongdoing is granted by the court pursuant to the user principle.

28 Returning to the question posed at the beginning of the preceding paragraph, we must first consider the characterisation of the benefit with respect to recovery pursuant to the user principle: was it a benefit *of* the detention of the property without the payment of a fee, *or* a benefit *from* the detention of the property without the payment of a fee? Whilst the difference may seem semantical at first blush, it is our respectful view that this is not the case, and, in particular, the extent of the damages that can be recovered by the plaintiff concerned pursuant to the user principle turns on the characterisation of the benefit in question.

29 Prof Virgo suggests (see *Virgo* at p 439) that the user principle is restitutionary as the damages awarded to the plaintiff are arrived at by reference to the amount saved by the defendant:

> … This is primarily because the method which is adopted to determine the amount whi*ch the defendant saved through the commission of the wrong* is what he or she would have had to pay the claimant to obtain that which was actually obtained by committing the wrong. So, for example, if the defendant had taken the claimant's property without the claimant's permission and so saved the cost of hiring the property, *the measure of damages will be the amount the defendant would have had to pay to the claimant to hire the property*. [emphasis added]

It is reiterated later (see *Virgo* at pp 459–460) that the defendant's benefit in *Strand Electric* consisted in saving the cost of hire which should have been paid to the claimant for the use of the property (see also Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd Ed, 2011) ("*Burrows*") at p 652 and Jack Beatson, "The Nature of Waiver of Tort" in ch 8 of *The Use and Abuse of Unjust Enrichment – Essays on the Law of Restitution* (Clarendon Press, Oxford, 1991) ("*Beatson*") at p 232 (albeit, with an emphasis on the subtraction of the plaintiff's *dominium*)).

30 This is to be *contrasted* with the situation where a defendant obtains a profit *from* the commission of a wrong. This has been applied in cases involving the breach of fiduciary duties (see *Virgo* at pp 436–437). In so far as Prof James Edelman (now a judge of the Supreme Court of Western Australia) is concerned, the restitutionary award does not focus on actual profits (although it can), and an account of profits is (in his view) a separate award of damages that acts as a means of deterrence where there is a legitimate interest in preventing the defendant's profit-making (see James Edelman, "The Measure of Restitution and the Future of Restitutionary Damages" [2010] RLR 1 at 5 and 9). In addition to this, exemplary damages may be awarded in circumstances which Prof Virgo considers (see *Virgo* at p 441) special as the defendant commits a tort *calculating* that he or she will "make a profit which might well exceed any compensation which was payable to the claimant", and these damages would not necessarily be confined to the profits of the defendant (see also James Edelman, *Gain-Based Damages – Contract, Tort, Equity and Intellectual Property* (Hart Publishing, 2002) ("*Gain-Based Damages*") at pp 143–144). Primarily then, disgorging profits from a benefit would be a *separate* award that has a different policy underpinning it.

31 In contrast, however, Lord Goff of Chieveley and Gareth Jones QC in *The Law of Restitution* (Sweet & Maxwell, 7th Ed, 2007) ("*Goff and Jones*") prefer the broader approach of including the award of an accounting for gains on the basis that this would not be punitive to the defendant as, in this regard, the tortfeasor does *not* disgorge more than he has gained (at para 36-010). Even so, the learned authors accept that this is more likely to apply where "the losses suffered by the claimant

were the profits gained by the tortfeasor", and to the "conscious tortfeasor" (although they do not rule out the possibility for a tortfeasor who acts in good faith) (see para 36-011). *Goff and Jones* therefore view restitutionary damages for tortious wrongs being awarded in the context of what we presently understand as unjust enrichment, which award reverses the unjust benefit gained by the defendant at the expense of the plaintiff. This particular approach appears to be different from that adopted by Denning LJ in *Strand Electric*, where the learned judge viewed (at 254–255) the user principle only from the standpoint of the benefit to the defendant. Furthermore, though both unjust enrichment and restitution for wrongs fall under the broad umbrella of restitution, it would be preferable, in our view, to treat unjust enrichment as being theoretically distinct from restitution for wrongs, as a wrong may be suffered by the plaintiff notwithstanding the absence of a loss, and, even if there was a loss, it might not have been one with a corresponding benefit or gain to the defendant (see also *Virgo* at pp 427–428).

32 It appears, therefore, that the user principle (at least in the form adopted by Denning LJ in *Strand Electric*) would characterise the benefit as one *of* the detention of the property without the payment of a fee, and the possible award of damages for the *profits* gained by the tortfeasor might thus be beyond the scope of the user principle. The latter issue is one which (to the best of our knowledge) has not been definitively decided by the courts and which is still very much open to debate as can be seen in the views of Edelman in his excellent book, *Gain-Based Damages* (and critiqued in *Burrows* at pp 633–635). It is also important to reiterate that this was *not* the fact situation in either *Strand Electric* or this particular appeal.

Somervell and Romer LJJ's decisions

33 Turning to the other judgments in *Strand Electric*, both Somervell and Romer LJJ appeared to adopt a *compensatory* (as opposed to a restitutionary) *principle* instead.

34 For example, Somervell LJ adopted – by analogy – the principle of *mesne profits* (see *Strand Electric* at 252, a point acknowledged by Giles J in the Supreme Court of New South Wales decision of *Gaba Formwork Contractors Pty Ltd v Turner Corporation Ltd and another* (1991) 32 NSWLR 175 ("*Gaba Formwork*") at 183 and 187 and in the New South Wales Court of Appeal decision of *Bunnings Group Limited v CHEP Australia Limited* [2011] NSWCA 342 ("*Bunnings*") at [172] and [198]). Whilst it is true that he was referring to a situation where there was in fact actual *use* of the goods concerned by the defendant, it is significant that the award of mesne profits itself does *not* depend on the defendant having actually *used* the property concerned, as opposed to having *mere custody* of it (interestingly, Denning LJ did also refer (at 253) to "the analogous case of detention of land" (see also at 254)). Indeed, in a perceptive article on this particular area of the law, a learned author points out that – in so far as *real property* (as opposed to chattels) was concerned – the user principle did *not* require that there be actual use and enjoyment of the property and that mere custody thereof was sufficient in and of itself (see generally *Glover* at 171–177). In the circumstances, therefore, it would appear that the learned Lord Justice had – in substance at least – adopted a purely *compensatory principle*. Indeed, this interpretation is buttressed by the fact that Somervell LJ was of the view (at 252) that "[t]he *actual benefit* which the defendants have obtained is *irrelevant*" [emphasis added], thereby focusing the user principle on the question of *loss* to the plaintiff. It might also be usefully noted that Somervell LJ reserved his views on the question as to whether or not the user principle would apply to goods which were not used as part of the plaintiff's business (see *Strand Electric* at 252).

35 The approach of Romer LJ was, in our view, even clearer. In his words (see *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 plaintiff's 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 in italics and bold italics]

36 It should be noted, however, that the learned Lord Justice (like Somervell LJ (see above at [34])) ventured *no view* as to what the legal position would have been had the property detained (here, a portable electric switchboard) "been of a non-profit earning character, or if, although profit-earning, the plaintiffs had never applied it to remunerative purposes" (see *Strand Electric* at 257). It would appear, therefore, that Romer LJ had found in favour of the plaintiffs in *Strand Electric* on the basis of a pure *compensatory principle* which may (again) be *contrasted with the user principle*.

Principles vs rationales and the Possible Alternative Analysis

Introduction

37 As can be surmised from the summary as well as analysis in the preceding paragraphs, the leading case on the user principle in cases of unlawful detention began the principle on uncertain juridical grounds. *Strand Electric* is a seminal decision simply because, as the judges themselves in that case acknowledged, there had hitherto been no authority dealing with what is now known as the user principle (see *Strand Electric* at 250, 253 and 256, *per* Somervell, Denning and Romer LJJ, respectively). It is confusing because, as Prof Palmer aptly observed (see Norman Palmer, *Palmer on Bailment* (Sweet & Maxwell, 3rd Ed, 2009) at para 33-007), "[t]he Court of Appeal in *Strand Electric* did not speak with one voice and a uniform ratio is elusive". We agree with this observation (*cf* also the decision of this court in *Siew Kong Engineering Works (a firm) v Lian Yit Engineering Sdn Bhd and another* [1993] 1 SLR(R) 736 where the decision in *Strand Electric* was applied without discussion of any of the different views in that decision itself). Unfortunately, the case law following *Strand Electric* has not been helpful in clarifying the use and application of the user principle either. However, for the purposes of the present appeal, this rather tangled legal web does not need to be resolved completely. As such, we will only be considering the user principle in the case of unlawful detention, and attempt to shed some light on the rationale and principle of the user principle in a more modest fashion.

38 Perhaps one possible analysis of the various views expressed in *Strand Electric* as set out in the preceding paragraphs is that there are, in point of fact, two distinct *principles* (*viz*, the compensation principle and the user principle) – as opposed to two different *rationales* with respect to the *same principle* (here, the user principle) (see also Nicholas Poon, "Turning Example into Exemplary: Ten Years On, The Curious Case of Attorney-General v Blake" (2011) 29 Sing L Rev 139 at 146). To elaborate, the difficulties which have arisen as a result of *Strand Electric* may have been the result of the perception that, in addition to Denning LJ, both Somervell and Romer LJJ were also dealing with the *same principle*, *viz*, the *user* principle. As we have noted earlier in this judgment, the user principle is *different* from (and, depending on the precise fact situation, may even be an *exception* to) the general approach, *viz*, the *compensation principle*.

39 A possible *alternative* analysis ("the Possible Alternative Analysis") is simply to acknowledge that Somervell and Romer LJJ were in fact referring to the *compensation principle* when arriving at their respective decisions. If so, then *only* Denning LJ was utilising the *user principle* in arriving at his decision. And, if this be the case, then it would follow that the *user principle* has – as Denning LJ clearly acknowledged – *restitution* (as opposed to *compensation*) as its *underlying rationale* (see also *per* Lord Nicholls of Birkenhead in the House of Lords decision in *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 ("*Kuwait Airways*") at [67]; *per* Giles J in *Gaba Formwork* (at 188) and *Bunnings* (at [193]–[205]; though *cf per* Allsop P (with whom MacFarlan JA agreed), *ibid*, especially at [173]–[185]); the Singapore High Court decision of *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543 ("*Cavenagh Investment*"), especially at [48]–[50]; as well as the observations in Harvey McGregor QC, *McGregor on Damages* (Sweet & Maxwell, 18th Ed, 2009) at para 12-015)). Consequently, whilst the damages awarded may be an objective calculation of the market hire, this does not detract from the *restitutionary* rationale, *and* does *not* mean that the award is compensatory. In taking this analysis a step further, when approaching a remedy for a tortious wrong, pleading the compensatory principle and the user principle in alternative would have to occur in certain cases (see below at [47]–[48] for further elaboration). Also, under the Possible Alternative Analysis, the remedy (*viz*, normal market hire) awarded pursuant to the user principle would still be dependent on proof of the loss by the plaintiff that the defendant had benefited from the detention of the property, not unlike the compensatory principle (see below at [48]).

The utility of the Possible Alternative Analysis

40 It is worth noting – parenthetically – that Denning LJ demonstrated prescience that was decades ahead of its time. The law of restitution became an established part of the English legal landscape only relatively recently, commencing with the seminal House of Lords decision of *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 ("*Lipkin Gorman*") (see also Peter Birks, "The English recognition of unjust enrichment" [1991] LMCLQ 473). Notwithstanding the relatively substantial interval in time between Denning LJ's observations in *Strand Electric* and *Lipkin Gorman*, there appears to be no inconsistency between the former and the present law of restitution (at least in so far as the latter includes the concept of restitution for wrongs). Indeed, and more recently, Lord Nicholls of Birkenhead, in the House of Lords decision of *Attorney General v Blake (Jonathan Cape Ltd Third Party)* [2001] 1 AC 268 ("*Blake*"), in referring to *Strand Electric* as well as to the observations quoted below (at [45]), observed as follows (at 279):

> [The] principle [set out, *inter alia*, in *Strand Electric*] 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: see, for instance, *Ministry of Defence v Ashman* [1993] 2 EGLR 102, 105 and *Ministry of Defence v Thompson* [1993] 2 EGLR 107. ***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 in italics and bold italics]

Reference may also be made in the context of the secondary literature with respect to the law of restitution to *Virgo* at pp 459–460; *Burrows* at pp 651–652; and Keith Mason, J W Carter & G J Tolhurst, *Mason and Carter's Restitution Law in Australia* (LexisNexis Butterworths Australia, 2nd Ed, 2008) at pp 671–674.

41 The Possible Alternative Analysis is not, in our view, unpersuasive and would avoid many of the principally *juridical* difficulties that have bedevilled this particular area of the law (see, for example, the perceptive analysis (with regard to chattels) in *Glover* at 177–188 and observations by Lord Walker of Gestingthorpe in the Privy Council decision (on appeal from the Court of Appeal of Jersey) of *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd and others* [2011] 1 WLR 2370 at [48]). In particular, it is not inconsistent to state that a particular plaintiff could claim damages based on *either* (and *not* both) the *compensation principle* (which is *an approach*) *or* the *user principle* (which is *an alternative approach*). Indeed, it might well have been the case that the Board, in the Privy Council decision (on appeal from the Court of Appeal of the Commonwealth of the Bahamas) of *Inverugie Investments Ltd v Hackett* [1995] 1 WLR 713 ("*Inverugie*"), had, with respect, arrived at the conclusion (at 718) that *the user principle* combined both compensatory as well as restitutionary *elements* (a point emphasised by the Judge in the Judgment at [67]–[68], and which was subsequently followed in the Singapore High Court decision of *Thomas Teddy and another v Kuiper International Pte Ltd* [2013] SGHC 7 ("*Thomas Teddy*")) precisely because it had *omitted* to consider the alternative of distinguishing principles or approaches from underlying rationales altogether. With respect, it could be argued that, if we view the user principle as embodying elements of both compensation and restitution, it would result in the court applying competing interests viewed from different ends of the same problem, thereby obscuring the reasons for the result arrived at by the court itself. It is thus our view that the Possible Alternative Analysis allows (and attractively so) the user principle to be regarded as a *wholly separate principle or approach* premised on a *restitutionary* basis.

The confusion arising from the absence of actual use

42 In our view, possible confusion in the court below arose as a result of the fact that, on the facts of this case, there was allegedly *no evidence* of the Appellant's benefit pursuant to the *actual use* of the Respondent's platforms simply because there was no such (actual) use to begin with. This is a point which constitutes the central plank of the Appellant's case in the present appeal. However, this did *not* mean, in our view, that the Appellant could *not* be liable under the user principle.

43 Must there in fact be actual use of the goods concerned by the plaintiff before the user principle can be invoked? It seems to be the case that such a requirement is *not* present in cases where *land* has been appropriated wrongfully by the defendant (see above at [34] and *Glover* at 175–177). What, then, about *goods*? If the underlying basis for awarding damages to the plaintiff is that the defendant has wrongfully appropriated the plaintiff's property and has thereby gained an *opportunity* to *use* the plaintiff's goods, why, then, should the defendant be exempt from liability to pay the plaintiff damages if it has not in fact exercised the opportunity to actually use the plaintiff's goods (see also the Judgment at [69])? In light of this, the terminology of the "user principle" is, to that extent at least, a misnomer. The user principle applies even when there is *no loss suffered* by the plaintiff because, as Denning LJ had pointed out in *Strand Electric* (at 254), it is a *restitutionary award*. Under the Possible Alternative Analysis, as the user principle is a restitutionary remedy, it follows that the user principle acts as a disgorgement of the benefit *of* the detention of the property without the payment of a fee. Put simply, *the wrong is determined against the user* rather than the use (if any), as the wrongdoer's *fault* lies in the *unlawful detention* of the goods concerned (see above at [24]).

44 To buttress the point just made, academic literature has expounded on the *additional* factor centring on the interference with the *dominium* by the plaintiff over the goods concerned in a case of unlawful detention, thereby explaining why the wrongdoer should pay the appropriate damages of reasonable hire to the plaintiff (see, for example, Daniel Friedmann, "Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong" (1980) 80 Colum L Rev 504

(especially at pp 504, 510, 532 and 546); *Beatson* at pp 232–234; Ewan McKendrick, "Restitution and the Misuse of Chattels – The Need for A Principled Approach" in ch 35 of Norman Palmer & Ewan McKendrick (Gen Ed), *Interests in Goods* (LLP Reference Publishing, 2nd Ed, 1998) at pp 908–916; Mitchell McInnes, "Gain, Loss and the User Principle" [2006] 14 RLR 76 at pp 81 and 88 (wherein, however, the learned author adopts a compensatory approach); James Edelman, *Gain-Based Damages* at p 67; and David Howarth, "Torts and Miscellaneous Other Wrongs" in ch 12 of Steve Hedley & Margaret Halliwell (Gen Eds), *Butterworths Common Law Series – The Law of Restitution* (Butterworths LexisNexis, 2002) at para 12.35; see also the Judgment at [52]–[53] and [63]). *Dominium* is in fact a Roman law concept understood as "absolute ownership of land or goods, with full rights of possession and use" (see David M Walker, *The Oxford Companion to Law* (Clarendon Press, Oxford, 1980) at p 373 and Bryan A Garner (Gen Ed), *Black's Law Dictionary* (Thomson West, 9th Ed, 2009) at p 560), which thereby explains why the wrongdoer should pay the appropriate damages of reasonable hire to the plaintiff.

45 Reference may also be made to the relevant case law: see, for example, the following oft-cited illustrative observations by the Earl of Halsbury LC in the House of Lords decision of *The Mediana* [1900] AC 113 (at 117–118), which observations were also cited by the Judge in the court below (see the Judgment at [43]):

> What right has a wrongdoer to consider what use you are going to make of your vessel? More than one case has been put to illustrate this: for example, the owner of a horse, or of a chair. 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; but a jury have very often a very difficult task to perform in ascertaining what should be the amount of damages of that sort. 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 – and this I think has been the fallacy running through the arguments at the bar – 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, so much so that in the old system of pleading you could not recover damages unless you had made a specific allegation in your pleading so as to give the persons responsible for making good the loss an opportunity of inquiring into it before they came into court. [emphasis added in bold and italics]

And, in a similar vein, Lord Shaw observed thus (in the House of Lords decision of *Watson, Laidlaw & Co Ltd v Pott, Cassels, and Williamson* (1914) 31 RPC 104 ("*Watson*") (at 119):

> *For wherever an abstraction or invasion of property has occurred, then, unless such abstraction or invasion were to be sanctioned by law, the law ought to yield a recompense under the category or principle, as I say, either of price or of hire.* If A, being a liveryman, keeps his horse standing idle in the stable, and B, against his wish or without his knowledge, rides or drives it out, it is no answer to A for B to say: "Against what loss do you want to be restored? I restore the horse. There is no loss. The horse is none the worse; it is the better for the exercise." [emphasis added]

Reference may also be made to the more recent observations by Lord Nicholls in *Blake* (cited above at [40], and which had also cited the observations just set out in *The Mediana* and *Watson*), as well as *Bunnings per* Allsop P at [177]–[178].

46 It must be reiterated that it is only where the Possible Alternative Analysis of the user principle applies do our views on the non-requirement of actual use have a place. In any event, as we have alluded to above and will elaborate upon below, we are of the view that, in *this* case, the Respondent could, in any event, have been awarded damages pursuant to the *compensation principle.*

The user principle: exception or alternative?

47 Returning to the Possible Alternative Analysis, as already noted at [20], the user principle has been thus far viewed, in substance and effect, as an *exception* (and, perhaps, *alternative*) to the compensation principle in the event the plaintiff is unable to obtain damages pursuant to the compensation principle for the unlawful detention. There could not, of course, be double recovery pursuant to both these aforementioned principles (although whether or not there is double recovery would depend very much on the precise facts before the court (*cf*, for example, in the context of the present case, the hypothetical situation referred to in the Judgment at [73]; *per* Lord Nicholls in *Kuwait Airways* at [67]; and *Cavenagh Investment* at [52])). In practical terms, one might expect, in the normal course of events, the prudent plaintiff to plead both principles in the alternative, and the court may make such order as it thinks fit so long as there is no double recovery.

48 It is important to note at this juncture that even though the user principle could be utilised to award the plaintiff damages in a fact situation where the compensation principle could not (as in the case where there was a proven benefit but not a proven loss), this does *not* mean that the user principle will *always* be an *exception* to the compensation principle (see *per* Hoffmann LJ in the English Court of Appeal decision of *Ministry of Defence v Ashman* (1993) 66 P & CR 195 at 200–201). Everything would depend upon the precise fact situation concerned. However, it would appear that at least one thing is clear: the amount of damages which a plaintiff could claim in restitution against the defendant pursuant to the *user principle* would be the amount of damages which the plaintiff would have to *forego* under the compensation principle as a result of the defendant's tortious conduct with respect to the plaintiff's goods. Applying it to this situation, there would be an overlap – or *complete* coincidence – between the user principle and the compensation principle in so far as the *type* as well as *quantum* of damages recoverable is concerned. As, however, is the case with the compensation principle, the plaintiff would also have to adduce *sufficient evidence* in order to establish its claim pursuant to *the user principle*. Put simply, the legal requirement of adducing sufficient evidence of loss applies equally to *both* the compensation principle *and* the user principle.

49 One possible measure of damages under the restitutionary rationale of the user principle would be the benefit of the Appellant unlawfully detaining the platforms, where there has been *no actual use* of the platforms by the Appellant. This would be measured by the market hire of the platforms. In this case, it would be a measure which would *not*, *ex hypothesi*, have entailed *actual* use of the platforms. This measure of damages is *simultaneously* that which would be awarded to the Respondent pursuant to the *compensation principle* as it would be what the Respondent had lost in not being able to hire out the platforms, and this would also be a measure which did not entail actual use of the platforms as they were in the physical possession of the Appellant at the material time.

50 On the practical level, on the basis that there was no evidence of the loss, we are back to the same issue which led the AR to award the Respondent only nominal damages, while the Judge awarded the Respondent substantial damages instead. If, however, the analysis just proffered is accepted, it must follow that, while she was addressing her mind to the *user principle*, the Judge was

(quite contrary, with respect, to what she had in fact thought) *necessarily (and simultaneously)* finding that there *was sufficient evidence* to justify the award of *substantial* damages pursuant to the *compensation principle*.

Observations

51 The Possible Alternative Analysis described in the preceding paragraphs is attractive because it draws a distinct line in the legal sand between the compensation principle on the one hand and the user principle (premised on a restitutionary basis) on the other. Both principles would no longer *necessarily* have the relationship of general principle on the one hand (*viz*, the compensation principle) and exception (*viz*, the user principle) on the other. More importantly, contrary to the Judge's adoption of a *mixed* (*ie*, compensatory and restitutionary) basis or rationale for *the user principle* (as also followed in *Thomas Teddy*), the user principle would be premised (as Denning LJ held in *Strand Electric* (see above at [24])) *only* on a *restitutionary* basis. This would also clarify any possible confusion that might arise in the context of the present appeal. We have already noted above (at [22]) that the Judge had adopted a *compensatory basis*, albeit *not* the *compensation principle* in arriving at the award of damages in favour of the Respondent in the court below. The Possible Alternative Analysis would *preclude* such an analysis in so far as the utilisation of the *user principle* would be premised on a *restitutionary* basis *only.*

52 Even so, the Possible Alternative Analysis is, it ought to be pointed out, just that. On a theoretical level at least, there is still much debate because it is perceived (in some quarters at least) that there is much more at stake. Indeed, the nub of the debate appears to be more than a semantical or even formalistic one. If, for example, proponents of the aforementioned view believe that damages under the user principle are compensatory in nature, then there would not be any legal room for a restitutionary perspective at all. All damages awarded pursuant to the user principle would come within the compensation principle instead.

53 Unlike the debate as to whether damages in a situation of breach of *contract* such as that to be found in *Blake* are restitutionary or compensatory in nature, the argument *against* a restitutionary approach in this particular context (*viz*, the user principle and unlawful detention in the tortious context) appear to be *less compelling*, *especially* if courts are prepared to continue to recognise the user principle as a *distinct principle.* If this is the case, then the user principle *cannot*, *ex hypothesi*, be *subsumed* within the compensation principle as was done by the court below. Significantly, however, the *same* arguments for drawing the distinction utilise the same decisions as well as legal literature (see the Judgment at [59]–[61] and, for example, *Blake*, the English High Court decision of *Wrotham Park Estate Co Ltd v Parkside Homes Ltd and others* [1974] 1 WLR 798 ("*Wrotham Park*") as well as the English Court of Appeal decision of *Jaggard v Sawyer and another* [1995] 1 WLR 269 and R J Sharpe & S M Waddams, "Damages for Lost Opportunity to Bargain" (1982) 2 OJLS 290 (which focuses on *Wrotham Park*)). Indeed, in *Blake* itself, Lord Nicholls referred (at 278–279) to both *Strand Electric* as well as related precedents.

54 In light of the circumstances, as this is a rather thorny area of the law of damages, it would be appropriate, in our view, to defer arriving at a conclusive or definitive view as to what the law ought to be and, in particular, whether the Possible Alternative Analysis outlined in this judgment should be adopted instead as part of Singapore law. As already noted above, there is *sufficient evidence in the present case* to permit this court to arrive at a decision utilising the *compensation principle*.

55 Nevertheless, a summary of the Possible Alternative Analysis would be useful, if nothing else, for consideration in a future decision. In essence, the Possible Alternative Analysis views the user principle as being premised on a restitutionary basis. If so, then only Denning LJ should be considered

as having invoked the user principle in *Strand Electric*, with Romer and Somervell LJJ being considered as having invoked the compensation principle instead. More specifically, the damages awarded in the context of the user principle where a tortious wrong consisting in the wrongful detention of the plaintiff's goods has been committed by the defendant (as is the situation in the present appeal) ought to be measured by reference to the benefit which has accrued to the defendant (*viz*, the market hire of the goods), and the lack of *actual* use as such would not suffice to negate the existence of such a benefit. It should also be noted that the user principle can be invoked by the plaintiff in this manner where it could not otherwise prove its loss pursuant to the compensation principle. However, as also noted above, there is no need for the Respondent to invoke the user principle in the present case as there is sufficient evidence for it to prove its loss pursuant to the compensation principle (and hence no need for this court to pronounce definitively on the legal status of the Possible Alternative Analysis). Finally (and returning to a more general level), whether or not the user principle would enable the court to award damages *beyond* that relating to the market hire of the goods is an issue that a later court will also have to decide when the issue (which does not arise on the facts of the present case) arises directly for decision.

The present case

56 However, what does seem clear is that the present case relates to what the Judge in the court below perceived to be an exceptionally hard case. Bearing in mind the old (yet no less valid) adage that "hard cases make bad law", we should nevertheless be clear about the (at least potential) difficulty which the Judge faced. Given that she was of the view that the Respondent could not prove her loss based on the compensation principle, she considered whether damages could be awarded under the exception to the aforementioned principle (*viz*, the user principle) instead. However, the Appellant's argument was to the effect that there had been *no use* of the platforms in the first place. If this argument is correct, this would leave the Respondent without a remedy in substantive damages. It is true that her legal right would be vindicated through an award of nominal damages (which was the result the AR arrived at), but this would have been a mere Pyrrhic victory, given the consequences of this particular detention as mentioned above (at [17]–[18]). If the user principle was really one containing both restitutionary and compensatory elements, and was also subsumed within the compensation principle, the Respondent might well have found herself back at "square one", so to speak, since she had not (apparently) adduced sufficient evidence of her loss to justify an award of damages pursuant to the general compensation principle in the first place.

57 Fortunately, there is, as we have alluded to above, no difficulty on the facts of this particular case. As we shall elaborate on below, there was sufficient evidence of the Respondent's loss to establish an award of damages under both the general compensation principle and the user principle. In this regard, we would respectfully differ from the AR who was wholly correct with regard to the relevant legal principle that the plaintiff must adduce sufficient evidence to prove his or her loss in the first place, but who did not think that there was sufficient evidence on the facts of this case. It is only with respect to this last-mentioned finding that we differ from the AR. Before proceeding to consider the facts of the present appeal, we would like to make a couple of further observations with regard to possible instances of difficulty.

58 A possible instance of an unsatisfactory situation might occur where the plaintiff cannot prove his or her loss, *but* the defendant deliberately (and perhaps even maliciously) detains the plaintiff's goods. When asked for his views with respect to this particular situation, Mr Sreenivasan argued that *punitive* damages might possibly be awarded (we would observe parenthetically that depending on the precise facts, *aggravated* damages might also be a possibility). However, what if the defendant was merely careless or reckless in detaining the plaintiff's goods but (once again) the plaintiff was unable to adduce sufficient evidence to prove his or her damage? All this underscores the thorny nature of

this particular area of the law which has already been noted above (at [54]), and as already mentioned, the court will deal definitively with the various issues when they next arise directly for decision. However, it is important to note that when determining damages in accordance with the intention of the defendant, such damages would fall under an additional head of damage and would *not* overlap with the assessment of damages under either the compensation principle or the user principle (as it currently stands in *Strand Electric*, or as proposed in the Possible Alternative Analysis). In this respect, we would, with respect, differ from the case of *Thomas Teddy* which considered (at [41]–[43]) the intention of the wrongdoer in the detention of the good when assessing damages for the wrongful detention of the plaintiff's goods (which detention, in any event, involves a tort of strict liability) (see *Bunnings* at [117] and [124]–[125], as well as Clerk & Lindsell on Tort (Sweet & Maxwell, 20th Ed, 2010) at paras 17-07–17-08.

59 Turning now to the facts of the present appeal, given the fact that the Respondent had (as noted above at [18]) acted reasonably in not seeking to either purchase or hire substitute platforms and that, in these circumstances, could not therefore proffer evidence of actual contracts she had entered into (because, *ex hypothesi*, she could not), we can – as the Judge did in the court below – proceed on the possible rentals she could otherwise have obtained by deploying the detained platforms by having regard to other similar contracts in the industry. In this regard, we would agree with the analysis by the Judge (see the Judgment at [74]–[77]).

60 What, then, of the *quantum* of damages (*viz*, $189,000) awarded by the Judge in the court below? In this regard, it is important to bear in mind that the reason for awarding the Respondent damages was because she was deprived by the Appellant of the use of the platforms for the purpose of her business. The Appellant was therefore obliged to compensate the Respondent for her loss. It followed that the computation of the damages to be awarded to the Respondent during the relevant period of detention ought to be based on reasonable market hire of those six platforms. In this respect, we agree with the Judge's reasoning in the Judgment (at [77]) which led to the quotation she chose and to the amount of damages she awarded as a result. It is also important to note (as we have in fact found) that it was not reasonable to expect the Respondent to take any steps during the period of detention to mitigate her loss (see above at [18]). Additionally, it was immaterial in awarding the Respondent compensation for her loss whether the Appellant had actually used the platforms or not. In the circumstances, we affirm the Judge's award of $189,000 in damages to the Respondent.

Conclusion

61 For the reasons set out above, we dismiss the appeal with costs. The usual consequential orders will follow.