Court of Appeal
New South Wales

Case Title:	De Vries & Anor v Rapid Metal Developments (Australia) Pty Ltd
Medium Neutral Citation:	[2011] NSWCA 100
Hearing Date(s):	15 March 2011
Decision Date:	28 April 2011
Jurisdiction:	Court of Appeal
Before:	Hodgson JA at 1, Macfarlan JA at 2, Sackville AJA at 3
Decision:	1. Appeal allowed. 2. Set aside the orders made by RA Hulme J on 10 February 2010 and on 9 March 2010. 3. In lieu of the orders set aside, order that: (a) the proceedings be dismissed; (b) the Respondent pay the Appellants' costs of the proceedings, other than any costs incurred by them as the result of the adjournment of the proceedings on 3 March 2008; and (c) the Appellants pay the Respondent's costs thrown away as a result of the adjournment of the proceedings on 3 March 2008, on an indemnity basis. 4. The Respondent pay the Appellants' costs of the appeal. 5. Direct that the Respondent, if otherwise qualified, have a certificate under the *Suitors Fund Act* 1951 (NSW).

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

Catchwords:

CORPORATIONS – mortgagee in possession – corporation in business of hiring scaffolding – whether agents of mortgagee ("*Controllers*") liable under s 419A(2) of the *Corporations Act* for rent due to third party for scaffolding in possession of corporation – whether third party proved that its scaffolding was in the possession of the corporation at the date of Controllers' appointment – whether the language of s 419A(2) of the *Corporations Act* extends to the corporation's liability to make payments at the end of a period of hire – whether the primary Judge was correct not to excuse the Controllers from liability pursuant to s 419A(7) of the *Corporations Act*.

TORTS – conversion – whether sale by Controllers of scaffolding constituted conversion – whether damages should be assessed by reference to owner's list prices.

Legislation Cited:

Corporations Act 2001 (Cth)

Civil Procedure Act 2005 (NSW)
Evidence Act 1995 (NSW)
Suitors Fund Act 1951 (NSW)

Uniform Civil Procedure Rules

Corporate Law Reform Bill 1992 (Cth)

Cases Cited:

Axon v Axon [1937] HCA 80; 59 CLR 395
Chaina v Alvaro Homes Pty Ltd [2008] NSWCA 353
Deputy Commissioner of Taxation v Clark

	[2003] NSWCA 91; 57 NSWLR 113 *Hill v Reglon Pty Ltd* [2007] NSWCA 295 *House v R* [1936] HCA 40; 55 CLR 499 *Re Nardell Coal Corporation (In Liq) v Hunter Valley Coal Processing Pty Ltd* [2003] NSWSC 642; 46 ACSR 467 *Warren v Coombes* [1979] HCA 9; 142 CLR 531
Texts Cited:	J D Heydon, D Byrne, *Cross on Evidence: Australian Edition* (1996-), LexisNexis Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988)
Category:	Primary Judgment
Parties:	Antony De Vries and Riad Tayeh as joint administrators of Rildean Pty Ltd (Appellants) Rapid Metal Developments (Australia) Pty Ltd ACN 004 304 447 (Respondent)
Representation	
- Counsel:	Mr M Ashhurst SC with Mr C Bova (Appellants) Mr G Inatey SC with Mr VRW Gray (Respondents)
- Solicitors:	PMF Legal (Appellants) JGP Lawyers (Respondent)
File number(s):	**CA** 2005/00266778
Decision Under Appeal	
- Court / Tribunal:	Supreme Court of New South Wales
- Before:	Hulme RA J
- Date of Decision:	26 June 2009, 16 December 2009, 10 February 2010, 9 March 2010
- Citation:	*Rapid Metal Developments (Aust) Ltd v Rildean Pty Ltd* [2009] NSWSC 571

Rapid Metal Developments (Aust) Ltd v Rildean Pty Ltd (No 2) [2009] NSWSC 1416

Rapid Metal Developments (Aust) Ltd v Rildean Pty Ltd (No 3) [2010] NSWSC 7

Rapid Metal Developments (Aust) Pty Ltd v Rildean Pty Ltd (No 4) [2010] NSWSC 165

- Court File Number(s) **SC** 13806/2005

Publication Restriction:

JUDGMENT

1 **HODGSON JA**: I agree with Sackville AJA.

2 **MACFARLAN JA**: I agree with Sackville AJA.

3 **SACKVILLE AJA**: The question in this appeal is whether the appellants ("*the Controllers*"), the agents of a mortgagee in possession of a company carrying on a scaffolding hire business ("*Rildean*"), are liable to the respondent ("*RMD*") because they used or disposed of RMD's scaffolding equipment after their appointment as the mortgagee's agents. RMD claimed at the trial that it was the owner of scaffolding equipment in the possession of Rildean on the date the Controllers were appointed (18 July 2002) and that its equipment had never been returned by the Controllers.

4 At the trial in the Supreme Court (before RA Hulme J), RMD sought orders against the Controllers primarily on the basis of two causes of action:

- the liability imposed on the Controllers by s 419A(2) of the *Corporations Act* 2001 for "*rent or other amounts*" payable by Rildean to RMD pursuant to a hiring agreement entered into

between Rildean and RMD on 19 September 2001 ("*Hiring Agreement*"); and

- an action in conversion arising in consequence of the Controllers having entered into a Licence Deed on 8 August 2002 and a Sale Agreement on 18 November 2004 relating to scaffolding equipment in the Controllers' possession, without the permission of RMD.

5 The primary Judge found in favour of RMD on both causes of action. His Honour declined to exercise the power conferred by s 419A(7) of the *Corporations Act* to excuse the Controllers from their statutory liability under s 419A(2). His Honour ultimately entered a verdict and judgment for RMD against the Controllers in the sum of $4,873,504. The verdict included a sum representing the value of RMD's scaffolding in the Controllers' possession on 3 December 2004 (the date of completion of the Sale Agreement), calculated by reference to RMD's list prices at that date.

6 The Controllers have appealed against the primary Judge's decision. They contend that his Honour was in error in holding them liable on the causes of action relied on by RMD. They also say that the primary Judge wrongly assessed the quantum of rent and interest due by the Controllers and incorrectly assessed damages for conversion by reference to RMD's list prices for scaffolding equipment, rather than the depreciated value of the equipment.

7 The task facing the primary Judge and, for that matter, this Court was complicated by the incomplete and, in some respects, confused evidence adduced by the parties. In part this was due to the paucity of the records maintained by Rildean and the unreliability of the records that came into the hands of the Controllers. The Controllers' affidavit evidence was also prepared and filed at least five years after the relevant events. Even so, the state of the evidence is only partly explained by these matters. Despite the trial lasting for six hearing days, there were significant gaps in the evidence that seem primarily to have been attributable to witnesses not

directing their attention, or being asked to direct their attention, to significant factual issues. Perhaps for forensic reasons, cross-examination did not explore a number of the gaps or apparent inconsistencies.

8 The critical factual question at the trial, on which the parties made extensive submissions on the appeal, was whether the scaffolding equipment delivered by RMD to Rildean between September 2001 and March 2002 remained in Rildean's possession at the date of the Controllers' appointment (18 July 2002). RMD's pleaded case was that it had delivered items of scaffolding equipment, recorded in delivery notes identified in RMD's particulars, and that the Controllers had taken possession of these items on the date of their appointment.

9 Mr Inatey SC, who appeared with Mr Gray for RMD on the appeal, accepted that RMD had conducted its case at trial on an "*all or nothing*" basis – that is, RMD assumed the burden of proving that all of the scaffolding equipment supplied by it to Rildean and not returned by the date of the Controllers' appointment (minimal variations aside), remained in Rildean's possession at that date. Mr Inatey agreed that if the evidence supported a finding that a portion only of the scaffolding supplied by RMD to Rildean remained in Rildean's possession at the date of appointment. RMD may have been able to pursue an alternative claim limited to its entitlement to that portion of the scaffolding equipment. However, Mr Inatey acknowledged that RMD had not pressed any such alternative claim and that it was not open to RMD on appeal to make out a case based on its ownership of a portion of the scaffolding equipment: cf *Hill v Reglon Pty Ltd* [2007] NSWCA 295, at [96]-[107], per Beazley JA (with whom Spigelman CJ and Ipp JA agreed). The way in which RMD conducted its case at trial is a matter of considerable significance for the appeal.

10 I refer in this judgment to the scaffolding equipment supplied by RMD to Rildean and not returned to RMD before the date of the Controllers' appointment as "*the Goods*". As will be seen, the primary Judge found,

and there is now no dispute, that the Goods comprised 26,731 items of scaffolding equipment. His Honour also found that 1,091 items of scaffolding were returned to RMD after the date of the Controllers' appointment. Relief was therefore granted to RMD on the basis that the Controllers were liable in respect of 25,640 items of scaffolding. I refer to these 25,640 items as the "*Unreturned Goods*".

LEGISLATION

11 Section 419(1) of the *Corporations Act* provides that a person who enters into possession of any property of a corporation for the purpose of enforcing a charge is liable for debts incurred by that person in the course of the possession for services rendered, goods purchased or property hired, leased, used or occupied.

12 Section 419A deals with the liability of a "*controller*" under a pre-existing agreement relating to property used by a corporation. Section 419A provides as follows:

> "(1) This section applies if:
>
> (a) under an agreement made before the control day in relation to a controller of property of a corporation, the corporation continues after that day to use or occupy, or to be in possession of, property (**the third party property**) of which someone else is the owner or lessor; and
>
> (b) the controller is controller of the third party property.
>
> (2) Subject to subsections (4) and (7), the controller is liable for so much of the rent or other amounts payable by the corporation under the agreement as is attributable to a period:
>
> (a) that begins more than 7 days after the control day; and
>
> (b) throughout which:

(i) the corporation continues to use or occupy, or to be in possession of, the third party property; and

(ii) the controller is controller of the third party property.

(3) Within 7 days after the control day, the controller may give to the owner or lessor a notice that specifies the third party property and states that the controller does not propose to exercise rights in relation to that property as controller of the property, whether on behalf of the corporation or anyone else.

(4) Despite subsection (2), the controller is not liable for so much of the rent or other amounts payable by the corporation under the agreement as is attributable to a period during which a notice under subsection (3) is in force, but such a notice does not affect a liability of the corporation.

(5) A notice under subsection (3) ceases to have effect if:

(a) the controller revokes it by writing given to the owner or lessor; or

(b) the controller exercises, or purports to exercise, a right in relation to the third party property as controller of the property, whether on behalf of the corporation or anyone else.

...

(7) Subsection (2) does not apply in so far as a court, by order, excuses the controller from liability, but an order does not affect a liability of the corporation.

(8) The controller is not taken because of subsection (2):

(a) to have adopted the agreement; or

(b) to be liable under the agreement otherwise than as mentioned in subsection (2)."

13 Section 9 of the *Corporations Law* provides that "*controller*":

"in relation to property of a corporation, means

(a) a receiver, or receiver and manager, of that property; or

(b) anyone else who (whether or not as agent for the corporation) is in possession, or has control, of that property for the purpose of enforcing a charge".

The expression "*control day*" is defined in s 9 to mean, in the case of a person who is in possession or has control of property of a corporation for the purpose of enforcing a charge, the day when the person entered into possession or took control of the property.

FACTUAL BACKGROUND

Events Leading to the Controllers' Appointment

14 Rildean carried on the business of supplying and erecting scaffolding for use on building sites under the name "*Action Skyline Scaffolding*". Mr B J Baker was the sole director of Rildean. In the years preceding the Controllers' appointment, Rildean acquired its stocks of equipment either by hiring or purchasing the equipment from at least 12 different suppliers, including RMD. The scaffolding acquired from these suppliers was on-hired to builders at various building sites around the metropolitan area of Sydney.

15 RMD carried on business throughout Australia, hiring and selling formwork and scaffolding products.

16 The Controllers were principals of a chartered accountancy practice with a speciality in insolvency.

17 On 23 November 1998, Rildean factored its debts to Navmost Pty Ltd ("*Navmost*"). Rildean granted a fixed and floating charge over its assets to Navmost.

18 On 19 September 2001, Rildean entered into an agreement with RMD. The agreement set out RMD's terms and conditions of trading, to which Rildean agreed. Mr Baker and his son, Mr B A Baker, executed a deed

whereby they guaranteed the due payment by Rildean of all moneys payable by it to RMD.

19 RMD hired scaffolding to Rildean on various occasions during the period between 21 September 2001 and 16 March 2002. RMD's records, which were accepted by the primary Judge as accurate, showed that 29,191 items of scaffolding had been hired to Rildean during that period and that 26,731 items had not been returned to RMD by the date of appointment. (These 26,731 items comprise the Goods.) The precise circumstances in which 2,460 items were returned to RMD before 28 July 2002 (that is, 29,191 items hired, less 26,731 items not returned) were not made clear in the evidence, although Mr Dutton of RMD gave evidence of RMD's practice in relation to returns of scaffolding equipment.

20 On 8 July 2002, Bryson J delivered judgment on a claim against Rildean by a supplier of scaffolding, TJF Scaffolding Hire and Maintenance Pty Ltd ("*TJF*"): *Rildean Pty Ltd v TJF Scaffolding Maintenance and Hire Pty Ltd* [2002] NSWSC 605. His Honour found that TJF had a contractual entitlement to delivery by Rildean of 658,970 items of scaffolding stock. His Honour made declarations accordingly and entered judgment for TJF for damages to be assessed.

21 Bryson J declined to make an order for delivering up of specific items because he considered that it was not practically possible to locate the particular items belonging to TJF and that it was "*very improbable*" that Rildean actually had stock available with which to comply with any such order. Mr Ashhurst SC, who appeared with Mr Bova for the Controllers on the present appeal, accepted that Bryson J's judgment could not be used to prove in these proceedings the existence of any fact in issue in TJF's proceedings: see *Evidence Act* 1995 (NSW), s 91.

22 On 12 July 2002, presumably in consequence of Bryson J's decision, the board of Rildean appointed the Controllers as joint voluntary administrators

of Rildean pursuant to s 436A of the *Corporations Act.* Their appointment was terminated by an order made by the Supreme Court on 17 July 2002.

23 On 18 July 2002, Navmost, in exercise of the powers conferred by its charge, appointed the Controllers to be agents for the mortgagee in possession of the assets of Rildean. The Controllers thereupon entered into possession and took control of the property of Rildean for the purpose of enforcing Navmost's charge.

24 On 25 July 2002, an order was made for the winding up of Rildean and for the appointment of an official liquidator.

Events After the Controllers' Appointment

25 At the date of the Controllers' appointment, Rildean had a large quantity of scaffolding that it either owned or had hired from its suppliers. Much of this scaffolding had been hired out and deployed on building sites. The balance of the items were stored at Rildean's yard at Camellia.

26 The Controllers assigned Mr David Petrina to work on Rildean's affairs. He rapidly concluded that Rildean's records were deficient and did not provide information as to the ownership of the items of scaffolding in Rildean's custody or which it had hired out.

27 On 19 July 2002, Mr Macdonald, the managing director of RMD, demanded the return of all RMD's scaffolding equipment that had been hired to Rildean. Shortly thereafter, Mr Wassens, a regional manager for RMD, sent Mr Macdonald documentation specifying the items hired to Rildean. The documents included a schedule identifying the Goods (a total of 26,731 items) that remained outstanding.

28 Around this time, Mr Petrina was contacted by many suppliers asserting that scaffolding owned by them was in Rildean's possession. Between 18 and 22 July 2002, Mr Petrina visited ten building sites in Sydney but,

according to the primary Judge, the visits were "*unproductive in determining ownership of the scaffolding he viewed*".

29 One of the difficulties confronting Mr Petrina was that it was very difficult and sometimes impossible to identify the owner of scaffolding by its appearance alone. For example, while RMD had a practice of painting its scaffolding green with orange tips, scaffolding was sometimes repainted to suit the requirements of hirers at particular building sites. Accordingly, there was no guarantee that scaffolding retained its distinctive colouring once it was hired out by Rildean.

30 Another problem was that Rildean stockpiled scaffolding in its yard on pallets by reference to its size and type, but not by reference to its ownership. Thus items owned by different suppliers were intermingled. When particular types of scaffolding were needed at a building site, the practice was simply to collect the quantities required from the yard, regardless of ownership. Ordinarily scaffolding was required at a building site for a period of between 12 and 20 weeks. When no longer required at the site, this scaffolding was returned to Rildean's yard and stockpiled on pallets in the same manner.

31 On 23 July 2002, Mr Petrina held a meeting at Rildean's yard with representatives of its scaffolding suppliers, including Mr Dutton from RMD. The representatives disagreed as to the ownership of most of the items stored in the yard. However, all parties present agreed that certain scaffolding painted in RMD's unique colours could be returned to it. This process resulted in the return of 1,058 items to RMD.

32 On 8 August 2002, the Controllers, Rildean and others entered into a Licence Deed with Action Construction Services Pty Ltd ("*ACS*") concerning the scaffolding equipment in Rildean's possession or under its control. On the same day ACS entered into a factoring agreement with Navmost. The terms of the Licence Deed will be referred to later (at 62]).

33 In the weeks following the Controllers' appointment, they engaged O'Mara Valuers and Auctioneers ("*O'Mara*") to carry out a stocktake of equipment at Rildean's yard and on building sites. O'Mara reported on 9 August 2002 that Rildean held about 154,000 individual items of scaffolding at the yard and on various building sites. However O'Mara did not obtain access to all building sites to which it was directed. The primary Judge found that of the 30 different kinds of scaffolding claimed by RMD, 98,005 individual items were listed in the O'Mara report.

34 On 25 October 2002, Mr Austin, a building consultant who was engaged by the Controllers as an expert, presided over a meeting at Rildean's yard which was attended by representatives claiming to own scaffolding equipment. The representatives still could not agree as to ownership of most of the scaffolding, although they agreed that a further 33 items belonged to RMD. These items were treated by the primary Judge as having been returned to RMD.

35 Mr Austin came to the view that determination of ownership of the scaffolding equipment in Rildean's possession or control was difficult if not impossible. On 25 November 2002, Mr Austin presented a report in which he pointed out that neither the paint colour nor branding of individual items provided a reliable means of identifying ownership. He also noted that the scaffolding in the yard was only a small proportion of that on hire and that the owners, between them, had claimed ownership of substantially more scaffolding than was known to exist. Mr Austin recommended that the scaffolding retained by Rildean (other than items as to which ownership was agreed) should be auctioned and the proceeds distributed to the claimants in proportion to the quantities claimed by each.

36 Upon receipt of Mr Austin's report, Mr Petrina formed the view that it was impossible for any of the claimants to establish ownership of any particular portions of the remaining scaffolding.

37 On 30 October 2002, TJF commenced proceedings against Rildean, RMD and the various claimants, seeking a declaration that scaffolding held by Rildean was not Rildean's property and a declaration as to the ownership of the scaffolding held by Rildean among the claimants. TJF, however, went into receivership on 8 July 2003 and the proceedings were discontinued on 23 December 2003.

38 On 16 January 2004, the solicitors for the Controllers wrote to RMD and advised that, because the TJF proceedings had terminated, the Controllers were in a position to sell the scaffolding. The Controllers invited offers from RMD and other claimants. RMD objected to the proposed sale.

39 Nonetheless, the Controllers proceeded with the proposed sale and received two offers for the scaffolding equipment. The Controllers informed the claimants of the offers that had been made and invited them to seek an injunction in relation to the proposed sale if they wished. RMD responded with a threat to commence legal proceedings if its equipment was not returned.

40 On 18 November 2004, after some further correspondence, the Controllers entered into an agreement for the sale of the scaffolding to ACS, one of the claimants, for $1,000,000 plus GST ("*Sale Agreement*"). The Sale Agreement included a provision that Rildean was not selling any scaffolding that belonged to any third party. The Sale Agreement also provided that Rildean and the Controllers gave no warranties that Rildean owned or was capable of delivering or transferring title to the scaffolding to ACS.

41 The Sale Agreement was completed on 3 December 2004 and the proceeds of sale were paid into Rildean's account. Apart from withdrawals to pay for legal costs and disbursements, it appears that the monies paid into the account remain intact.

THE PRIMARY JUDGMENTS

42 The primary Judge delivered four separate judgments. In the first, he held that RMD was entitled to judgment against the Controllers: *Rapid Metal Developments (Aust) Ltd v Rildean Pty Ltd* [2009] NSWSC 571 ("*Liability Judgment*"). In the second, the primary Judge dismissed a motion by the Controller that the Liability Judgment be recalled: *Rapid Metal Developments (Aust) Ltd v Rildean Pty Ltd (No 2)* [2009] NSWSC 1416 ("*Recall Judgment*"). In the third, his Honour dealt with the quantum of hire charges, interest and damages to which RMD was entitled: *Rapid Metal Developments (Aust) Ltd v Rildean Pty Ltd (No 3)* [2010] NSWSC 7 ("*Quantum Judgment*"). In the fourth, his Honour awarded RMD the costs thrown away by an adjournment granted in consequence of a late amendment to the Controller's pleadings, on an indemnity basis: *Rapid Metal Developments (Aust) Pty Ltd v Rildean Pty Ltd (No 4)* [2010] NSWSC 165 ("*Costs Judgment*").

Liability Judgment

The Parties' Contentions

43 The primary Judge noted RMD's claim that it remained the owner of the Goods and its further claim that the Controllers, after their appointment, had taken possession of and continued to use the Goods. RMD asserted that, pursuant to s 419A(2) of the *Corporations Act,* the Controllers were liable for the payment of hire charges and interest in respect of the Goods for the period commencing seven days after their appointment. RMD also asserted that, by reason of s 419A(2) and the terms of the Hiring Agreement, the Controllers were liable for the value of the Goods, calculated by reference to RMD's list prices.

44 In the alternative, RMD pleaded that the Controllers had converted its property for their own use and the use of Navmost and ACS. The acts of conversion were said to be the entry into the Licence Agreement of 8

August 2002 and the Sale Agreement of 18 November 2004. RMD claimed that the Controllers were liable in damages for the loss of hire that RMD could have earned after the date of the Controllers' appointment and for the value of the Goods that had not been returned to RMD.

45 The Controllers denied that RMD could establish that Rildean was in physical possession of the Goods at the date of appointment. In any event, they denied that they had taken custody or control of the Goods or that there had ever been any physical interference with the Goods such as would establish a cause of action in conversion. If they were held liable, the Controllers disputed that any damages should be assessed by reference to the list price of the unreturned Goods.

46 The Controllers also resisted RMD's claim under s 419A(2) of the *Corporations Act* on the ground that the Court should excuse them from liability pursuant to s 419A(7).

Possession of the Goods

47 The primary Judge identified (at [59]) the first question as follows:

> "Is it more probable than not that the items supplied by the plaintiff to Rildean and not returned were still in the possession of Rildean as at 18 July 2002?"

His Honour pointed out (at [60]) that this formulation did not ignore the other claims to ownership of scaffolding in Rildean's possession. The question, however:

> "directly focuses on the issue that [RMD] is required to make good if it is to succeed".

48 The primary Judge accepted (at [61]) RMD's submission that Rildean had received the Goods: that is, all scaffolding items disclosed in RMD's records as having been hired to Rildean between 19 September 2001 and 18 July 2002 and not returned by the latter date. His Honour also

accepted that RMD had not subsequently received any of the Goods, other than the 1,091 items that had been returned by agreement. However, his Honour observed that it was still necessary to determine where the Goods were on 18 July 2002 and whether they could be reliably identified as belonging to RMD.

49 The primary Judge noted (at [63]) that, apart from the items identified at the yard meetings of 23 July 2002 and 25 October 2002, there was no direct evidence that the Goods were in Rildean's possession at the date of the Controllers' appointment. Accordingly, RMD was inviting the Court to infer from the available evidence that the scaffolding was indeed in Rildean's possession at that date.

50 His Honour, in an important paragraph, accepted RMD's invitation (at [64]):

> "The [Controllers] referred to the evidence of the possibility that RMD scaffolding may have become lost, damaged or stolen at building sites, or returned to other hirers. That possibility, however, could hardly be thought to account for anywhere near the majority of RMD items. Regard must be had to the relatively short period of the relationship between RMD and Rildean. If it was a relationship that had extended over some years, then the inference of loss, damage, theft, or return to other hirers might be more significant. [RMD] acknowledged that evidence but submitted that there was no evidence that any items were in fact lost, either in the period 19 September 2001 to 18 July 2002, or from then until the sale in November 2004. **Therefore, it was submitted, the court should infer that Rildean did not lose any of RMD's scaffolding. I accept that submission. In the absence of direct evidence or a reliable basis to draw that inference, to conclude otherwise would be speculative**." (Emphasis added.)

51 The primary Judge referred (at [65]) to a schedule that had been prepared by Mr Campbell. Mr Campbell was employed by Rildean from November 2001 as its manager of operations, with responsibility for monitoring and overseeing stock control of scaffolding on building sites supplied by Rildean. The schedule recorded that Rildean itself had acquired 418,543 items of scaffolding equipment by hire or purchase in the past. The document also recorded that three claimants (Ace Access Pty Ltd,

Landlush Pty Ltd ("*Landlush*") and Kensea Pty Ltd) claimed that, between them, they had supplied Rildean with 36,208 items of scaffolding, which remained in Rildean's possession at the date of the Controllers' appointment. The Controllers had submitted that the total of 454,751 items accounted for more than all the scaffolding equipment that O'Mara had ascertained to be in Rildean's possession and that these items accounted for nearly all of the categories of equipment claimed by RMD.

52 The primary Judge said (at [66]) that the problem with Mr Campbell's schedule was that he had relied on material from Mr Baker showing acquisitions by Rildean. Mr Baker had compiled the information in 2003 with a view to defeating the claims made by TJF. (The schedules that Mr Baker had prepared or compiled were exhibited to an affidavit sworn by him in 2007 in the present proceedings.) Rildean had acquired the scaffolding over a number of years. There was no corresponding data as to any disposals by sale or losses by theft, damage or misplacement. Thus the schedule said nothing about equipment acquired by Rildean that was on hand at the date of appointment.

53 His Honour also pointed out (at [67]) that 92 per cent of the items recorded in Mr Campbell's schedule were attributable to items of equipment acquired by Rildean over the years "*with no evidence as to how many may have been on hand at the date of appointment*". The balance represented scaffolding claimed by three parties, but their claims were not supported by any evidence demonstrating their reliability or accuracy. While documents produced to Mr Austin had supported claims that these suppliers had delivered equipment to Rildean, there was nothing to indicate how much of the equipment was on hand at the date of appointment. Of the 36,208 items claimed by the three suppliers, for example, 23,867 were claimed by Landlush, which had dealt with Rildean since at least June 1999. For these reasons, his Honour did not regard Mr Campbell's schedule as providing a reliable basis to conclude that all or anywhere close to nearly all the scaffolding on hand at the date of appointment belonged to Rildean or the three suppliers.

54 The Controllers also relied on the O'Mara report to demonstrate that for seven of 30 product lines claimed by RMD, no such products had been identified as remaining in Rildean's possession. His Honour observed that, even if this was taken at face value, it accounted for only 616 items of the 25,673 claimed by RMD. Moreover (at [71]-[72]), the O'Mara stocktake was an incomplete account of all the scaffolding that Rildean had hired out to building sites. Therefore the fact that an item was not included in the stocktake did not mean it was not on hand at the date of appointment.

55 The primary Judge noted (at [73]) that there were four different lists of the building sites at which scaffolding supplied by Rildean was deployed. The total number of sites ranged from 62 in a document provided by Mr Baker to Mr Macdonald, to 38 listed in the O'Mara stocktake. In any event, it was "*almost impossible to reconcile the information in each list*". Furthermore, there were discrepancies between the number of items recorded at particular sites. For example, at a site in Leichhardt, the Rildean printout obtained by Mr Petrina recorded 472 items, while the O'Mara stocktake recorded only 180 items. Thus there was (at [75]) considerable force in RMD's submission that scaffolding belonging to RMD "*may well have been found on sites that are not included in the O'Mara listings*".

56 After discussing the evidence, his Honour concluded as follows (at [79]-[82]):

> "79 There is direct evidence that 26,731 items of scaffolding were outstanding on hire from RMD to Rildean as at 18 July 2002. There is no direct evidence, or evidence that would justify a reliable inference, that any of those items were lost or the like. Of all of the inferences suggested in the course of submissions, the one that has the higher degree of probability is that the items were still in the possession of Rildean as at that date.
>
> 80 Claims were made by RMD and other companies to ownership of scaffolding that was on hand as at 18 July 2002. There was quantification of the claims made by four companies but not in the case of any of the other companies. None of those claims were substantiated in the evidence. Indeed, no real

attempt was made on behalf of the [Controllers] to do so. The evidence only goes so far as to establish the fact of the claims, not their correctness.

81 The stock-take conducted by O'Mara ... counted a total of about 154,000 items, 98,005 being of the same description as items claimed by RMD. That stock-take was incomplete in that a number of building sites at which scaffolding on hire from Rildean was deployed were not attended.

82 Absent proof that items of scaffolding belonging to RMD had been lost prior to the date of appointment, or that claims made by Rildean or other parties were correct to the extent that it could not be possible that the items on hand as at the date of appointment were sufficient to meet the claim by the plaintiff, it must be concluded that all of the items claimed by the plaintiff came into the possession of the defendants upon their appointment. To conclude otherwise in the absence of such evidence would be to engage in processes of reasoning that I was counselled to avoid."

RMD's Claim Pursuant to s 419A(2) of the *Corporations Act*

57 The primary Judge found (at [84-85]) that RMD had made out its case under s 419A(2) of the *Corporations Act:*

"84 I have determined that Rildean was in possession of [RMD's] scaffolding as at the date of appointment, or, the 'control day'. It enjoyed that possession under an agreement made before the control day. It continued after that day to possess and use that property. [RMD] was the owner and lessor of the property and the [Controllers] became the 'controller' of that 'third party property'. (See the definitions of 'control day' and 'controller' in s 9). As a consequence the preconditions in s 419A(1) for the application of the section are satisfied. With it being common ground that no notice under s 419A(3) was given, the [Controllers] became liable for so much of the rent and other moneys payable by Rildean under the hire agreement during the period that began more than 7 days after the control day, that is, 25 July 2002, in which Rildean continued to use or be in possession of [RMD's] property and the [Controllers] were the controller of that property. The only remaining question would be whether the court should excuse the [Controllers] from liability pursuant to s 419A(7).

85 Unless excused, the [Controllers] would become liable after 25 July 2002 for payment of rent for equipment remaining out on hire until such items were returned, interest accruing from that date on overdue payments of rent, and also to pay for replacing any lost or damaged goods at RMD's ruling list prices."

The Controllers' Claim to be Excused

58 At the trial, the Controllers relied on a number of matters to support their contention that they should be excused from liability under s419A(7) of the *Corporations Act:*

- they could not serve a notice under s 419A(3) because they were unable to establish ownership of the scaffolding in Rildean's yard or on sites;
- they had acted responsibly in giving the claimants an opportunity to identify their scaffolding and in appointing Mr Austin to attempt to resolve matters;
- they had not entered into any new agreements with third parties for the use of the scaffolding;
- interpleader proceedings were not available to them; and
- RMD was at fault in not advising the Controllers that its representatives had attended building sites and identified some of their scaffolding on those sites.

59 The primary Judge rejected the last of these matters on the ground that, even if RMD had advised the Controllers of the results of their inspections, the Controllers would have refused to take any action without agreement from the other claimants. His Honour accepted, however, that the Controllers were unable to avail themselves of the interpleader procedure in the *Uniform Civil Procedure Rules,* Pt 43, because they themselves were claiming a portion of the scaffolding equipment as belonging to Rildean.

60 The primary Judge considered (at [92]-[95]) that other matters pointed against the Controllers being excused from liability:

- there was "*some force*" in RMD's submission that the Controllers could have given a notice under s 419A(3) that did not admit their

possession of any scaffolding equipment as to which they were not satisfied that ownership had been established;

- notwithstanding the difficulties the Controllers undoubtedly had in determining the competing claims, they continued to use scaffolding belonging to RMD, thereby generating revenue that reduced the debt owed to their principal (Navmost); and
- while it was true that the Controllers had not entered into new agreements to hire scaffolding to third parties, they had entered into the Licence Deed with ACS that permitted Rildean to use scaffolding belonging to RMD (among others) to perform existing and new contracts.

61 The primary Judge concluded (at [97]) as follows:

> "These considerations do not all point in the same direction. On balance, however, I have concluded that the [Controllers] should not be excused from liability under s 419A(7). The most persuasive consideration is that the [Controllers] continued with use of RMD's scaffolding in a manner that brought financial benefit to Navmost and, indirectly, Mr Baker, with no recompense to RMD. Excusing the [Controllers] from liability would not be just in those circumstances."

Conversion

62 The primary Judge considered that the key provisions of the Licence Deed were recital H and cl 2, as follows:

> "H. For the purposes of maximising the prospects of the [Navmost] debts being paid, recovering the debts owed to Rildean ... in respect of contracts that were not assigned to [Navmost] and recovering work-in-progress performed by Rildean ... it is essential for the Business [i.e. Rildean's business] to be continued both by having contracts already entered into by Rildean ... performed as well as by having new contracts entered into by [ACS] for the purposes of, inter alia, providing additional and ongoing support to those parties utilizing the services that had been provided by the Business.
>
> ...

> 2. Licence for [ACS] to perform Contracts and Enter New Contracts
>
> a. [ACS] has agreed to perform the obligations which are outstanding and to be performed under the Contracts at cost to [ACS] excluding any profit margin for [ACS] but including an allowance for overheads to be reasonably calculated by [ACS] having regard to industry standards and failing agreement such allowance for overheads to be determined by an expert in the building industry appointed by the [Controllers].
>
> b. [ACS] may enter into New Contracts."

In addition, ACS agreed that all moneys paid to it would be paid to the Controllers for the purpose of discharging the debt to Navmost.

63 The primary Judge was satisfied (at [109]) that the effect of the agreement was to confer upon ACS effective possession and control of all scaffolding previously in Rildean's possession and control. However, ACS acquired that possession and control on behalf of Rildean and the agreement did not purport to transfer proprietary rights in the scaffolding to ACS. In effect the Licence Deed appointed ACS as the agent for Rildean and the Controllers in carrying on the business formerly conducted by Rildean.

64 Nonetheless, this view of the Licence Deed did not mean that the Controllers had not committed an act of conversion. The Licence Deed (at [112]):

> "enabled ACS to use scaffolding that include that belonging to RMD for its own purposes and for the benefit of entities not including RMD. RMD had no contractual relationship with ACS and no control over how and where its scaffolding was used. It received no benefit for the use of its scaffolding. ACS was given a right of control over the scaffolding that was inconsistent with RMD's right to immediate possession. Accordingly I find that the licence agreement constituted an act of conversion."

65 In relation to the Sale Agreement of November 2004, the primary Judge first noted (at [115]) that there was no evidence that any items were "*lost*" between the date of appointment and the date of sale. Accordingly, his Honour was satisfied that the scaffolding equipment on hand at the date of

the Licence Deed that belonged to RMD was still on hand at the date of the Sale Agreement.

66 His Honour continued as follows (at [116]-[118]):

> "116 The [S]ale [A]greement constituted a complete transfer to ACS of the proprietary rights in all of the scaffolding that was, effectively, the subject of the [Licence Deed]. The [S]ale [A]greement includes a provision about ownership of the scaffolding and another provision in which it was said that Rildean and the [Controllers] were not selling any scaffolding that belonged to any third party. Those clauses may give rise to some action between the parties to the agreement but it does not avoid the fact that the agreement purported to transfer ownership to ACS of scaffolding that actually belong to RMD.
>
> 117 The fact that the [Controllers] may have been motivated by good intentions and thought that they were entitled to proceed as they did in relation to both the [Licence Deed] and the [S]ale [A]greement is of no benefit to them. Property rights are protected at the expense of an innocent mistake ...
>
> 118 The same reasoning I applied in relation to the [Licence Deed] should also be applied in relation to the [S]ale [A]greement. Clearly it constituted a further act of conversion in that it purported to completely divest ownership of all scaffolding then being used by ACS, which included [RMD's] scaffolding, in further conflict with [RMD's] right to possession."

67 His Honour went on to hold that it was not necessary for RMD to establish physical interference with the scaffolding. The Licence Deed and the Sale Agreement each transferred possession of RMD's scaffolding to ACS. This was to enable ACS to perform existing contracts and to pursue new ones and also to transfer ownership to ACS. In these circumstances physical interference with the scaffolding was unnecessary.

Summary of Findings

68 The primary Judge summarised (at [127]-[129]) his findings as follows:

> "127 The [Controllers] are liable pursuant to s 419A *Corporations Act* for rent and other amounts payable by Rildean under the agreement with [RMD] of 19 September 2001 on and from 25 July 2002.

> 128 The [Controllers] are not excused from that liability under s 419A(7).
>
> 129 The [Controllers] are also liable for conversion of [RMD's] property by the [Licence Deed] and the [S]ale [A]greement ..."

Accordingly, his Honour entered judgment for RMD.

Recall Judgment

69 After the primary Judge delivered the Liability Judgment, the Controllers filed a motion seeking an order that the judgment be recalled pursuant to *Uniform Civil Procedure Rules* ("*UCPR*"), r 36.16. The basis of the motion was that his Honour may not have appreciated the significance of evidence given by Mr Baker and Mr Campbell. (The Schedule prepared by Mr Campbell has been referred to earlier: [51]).

70 His Honour summarised the evidence relied on by the Controllers as follows (at [7]-[8]):

> "7 ... the evidence was to the effect that there was a general mixing of items of scaffolding and that no-one really cared whether they were sent or received items that actually belonged to them so long as the items were of the required number and type.
>
> 8 The upshot of the contention is that there is no way that one could be satisfied on the balance of probabilities that all of the items hired by [RMD] to Rildean from September 2001 to March 2002 and that had not been returned to the plaintiff were still on hand with Rildean as at the date of appointment."

71 The primary Judge quoted para [64] of the Liability Judgment. He conceded that he might have made it clearer that the references to items that had been "*lost*" was intended to include items that had been stolen, returned to other hirers or damaged. His Honour confirmed that that had been his intention. He also confirmed that he had been well aware of the evidence given by Mr Baker and Mr Campbell. He pointed out that he had discussed the evidence at some length in the Liability Judgment.

72 The primary Judge rejected (at [18]) the Controllers' submission that once the evidence of Mr Baker and Mr Campbell was accepted, it was not possible to infer that all items of scaffolding claimed by RMD remained in Rildean's possession at the date of the Controllers' appointment:

> "The short answer to this [contention] is that I was satisfied that the items of scaffolding hired by [RMD] to Rildean actually found their way into the possession of Rildean and I was not prepared to accept that **any of it** was subsequently transferred to one or more of the third party hirers because (a) there was no direct evidence of this, and (b) the inference that this occurred was speculative. It should be noted that the evidence of Mr Baker and Mr Campbell was put in very general terms. They provided no direct evidence of [RMD's] scaffolding going to any third party. **At its highest, their evidence raised this as a possibility but to infer that this in fact occurred I regarded as a matter of conjecture.** Clearly [RMD] bore the onus of proof and I was satisfied that it had been discharged." (Emphasis added.)

Quantum Judgment

73 The primary Judge noted that RMD's claim was made under four heads:

- hire charges from 25 July 2002 until 3 December 2004 (the date the Sale Agreement was completed);
- a sum equivalent to the value as at 3 December 2004 of scaffolding not returned to RMD;
- interest on hire charges pursuant to the Hiring Agreement between RMD and Rildean; and
- interest pursuant to s 100 of the *Civil Procedure Act* 2005 (NSW) ("*CP Act*") from 3 December 2004 on the amounts awarded to RMD in respect of the first three heads.

Hire Charges

74 There was no issue that the Controllers were liable for hire charges under the Hiring Agreement by reason of s 419A(2) of the *Corporations Act.* However, the Controllers maintained that they were only liable for charges

in respect of the period from 25 July 2002 (seven days after the date of appointment) until 8 August 2002 (the date of the Licence Deed). This contention was based on the proposition that the Controllers had not "*use[d]*" RMD's scaffolding equipment, for the purposes of s 419A(2) of the *Corporations Act*.

75 The primary Judge rejected (at [20]-[21]) the Controllers' argument:

> "20 ... the entry into the [Licence Deed] by the [Controllers] did not bring about an end to the 'use' by Rildean of the RMD property and thereby end the liability of the [Controllers] under s 419A(2). Up until 8 August 2002 Rildean clearly had use of that property. After that date they still had use of it but in a different way. That is by authorising ACS to do the actual work in performing existing contracts, entering into new contracts, and recovering sums due under such contracts. The 'corporation' (Rildean) continued to use the 'third party property' (RMD's property) and it achieved a benefit for such use. That benefit being the continuation of the business of Rildean and the return of money to go towards the reduction of Rildean's debts. Putting it a little more succinctly, RMD's property was still being used by the corporation and for the benefit of the corporation
>
> 21 It is just in these circumstances that RMD should be compensated in proportion to the hire charges for which Rildean, and in turn through s 419A(2) the [Controllers], were liable from 25 July 2002 until the date of completion of the sale agreement, 3 December 2004."

Value of Scaffolding Not Returned

76 RMD's claims rested on cl 22 of the Hiring Agreement, which relevantly provided as follows:

> "22. In addition to and without derogating from the generality of the preceding terms where the Goods are HIRED out by RMD to the Customer, the Customer is granted a licence to use the Goods on the following further terms and conditions:
>
> (a) The Goods must be returned to RMD cleaned and oiled and in a condition at least equal to when they were despatched from RMD's depot, fair wear and tear excepted, the assessment of which condition shall be made solely by RMD. The customer will be responsible for the cost of any repairs and/or cleaning.

(b) **At the end of any period of hire, the Customer will be responsible for replacing all lost or damaged Goods at RMD's ruling list prices at the time of replacement or repair, in addition to hire charges already rendered.**"

...

(d) The Customer will be wholly responsible for the goods dispatched until returned to RMD's depot.

...

(m) Hire charges will commence on the day of dispatch or collection from the RMD depot and terminate on the day of receipt back into the RMD depot, both days being charged as full days." (Emphasis added.)

77 The Controllers' principal argument was that the amount claimed did not constitute "*rent or other amounts payable by the corporation under the agreement*" within the meaning of s 419A(2) of the *Corporations Act*. They relied on the view expressed by Campbell J in *Re Nardell Coal Corporation (In Liq) v Hunter Valley Coal Processing Pty Ltd* [2003] NSWSC 642; 46 ACSR 467, that the expression "*other amounts*" in s 419A(2) must be read *ejusdem generis* with "*rent*" and thus should be confined to periodic payments. The Controllers argued that Rildean's liability under cl 22(b) of the Hiring Agreement could not be described as *ejusdem generis* with rent.

78 The primary Judge pointed out (at [27]) that the view expressed by Campbell J was not necessary for the decision in that case. The actual issue in *Nardell* was whether the controller in that case was liable to pay the GST relevant to each of the periodical payments of rent. The primary Judge in the present case observed that this was clearly a liability that fell within the expression "*other amounts* payable" in s 419A(2) of the *Corporations Act*. No recourse to the *ejusdem generis* rule was required to reach that conclusion. Moreover, there was no warrant for identifying a genus from the single word "*rent*", nor for reading down the words "*other amounts payable*". The primary Judge pointed out (at [28]) that in *Deputy Commissioner of Taxation v Clark* [2003] NSWCA 91; 57 NSWLR 113, at

143, Spigelman CJ said that it is essential for the application of the *ejusdem generis* rule that some common characteristic described as a genus is to be identified and that at least two different species are required to determine a relevant genus. In the primary Judge's view (at [29]):

> "The liability of the controller under s 419A(2) is ... quite clearly for amounts payable by the corporation under that agreement in respect of the use, occupation or possession of that property. In the present case, part of what is payable in respect of the use or possession of [RMD's] scaffolding is the amount specified by cl 22(b)."

79 His Honour also rejected (at [32]) an argument by the Controllers that the scaffolding had not been "*lost or damaged*" within the meaning of cl 22(b) of the Hiring Agreement, but had simply been converted. His Honour considered (at [32]-[33]) that cl 22(b):

> "32 ... should, quite obviously in my view, be understood and construed as providing that the 'Customer' will reimburse RMD for items either not returned, or returned in a damaged state. The overall effect of clauses 22(a) and (b) is that the customer will restore the Goods to RMD in a fit state for them to be re-hired and to make good by way of compensation any failure of the customer to perform that obligation. The words 'replacement or repair' clearly point to the purpose of the clause being that the customer will compensate RMD if any items required either replacement or repair.
>
> 33 'Lost' must, in the overall context in which this clause appears (a commercial contract for the hire of scaffolding) be construed broadly to the effect of items being lost to the use of RMD. It would be absurd to construe the clause to render the customer liable to pay for replacement if an item was lost in the sense of being misplaced or having disappeared but not liable if an item was not returned for some other reason. In short, to construe this clause in the manner for which the [Controllers] contend would not be to give it a sensible commercial operation."

80 The Controllers had conceded (at [34]) that if they were liable under cl 22 of the Hiring Agreement and s 419A(2) of the *Corporations Act*, the sum due to RMD should be assessed in the manner described in cl 22(b).

Interest on Hire Charges

81 RMD's claim for interest on the hire charges was based on cl 15(d) of the Hiring Agreement, which provided as follows:

> "15. Payment is required 30 days from the date of the invoice unless otherwise agreed in writing. Should payment be in arrears then RMD reserved the right to:
>
> ...
>
> d) raise interest charges of 1.5% per month on any overdue balance at the end of a month."

82 The Controllers resisted the claim on the ground that RMD had never raised any interest charges. However, the primary Judge accepted (at [39]) RMD's submission that there was no temporal element to cl 15(d) and that the interest charges could be raised by means of the relief sought in the amended statement of claim. The relief sought had included "*interest on all moneys payable by the [Controllers] to [RMD] in accordance with any relevant contract*".

Damages in Conversion

83 The Controllers conceded, in view of the findings made in the Liability Judgment, that they were liable in damages for the act of conversion, to the value of the Goods converted. However, they asserted that RMD could not claim both the hire charges and damages for conversion.

84 The primary Judge held (at [44]) that the Controllers were liable for hiring charges up to the point of conversion and, at that time, became liable for the value of the scaffolding. His Honour noted, however, that he had already determined that the Controllers were liable for hiring charges until 3 December 2004 and were liable, pursuant to cl 22(b) of the Hiring Agreement and s 419A(2) of the *Corporations Act*, to pay for the Goods at RMD's ruling list prices.

85 Nonetheless, his Honour addressed RMD's alternative claim that the Controllers were liable in damages for conversion under the general law,

rather than pursuant to the Hiring Agreement. On this basis, the Controllers submitted that the appropriate measure of damages was the wholesale or secondhand value of the scaffolding at the date of conversion.

86 The primary Judge rejected (at [47]-[51]) this submission:

> "47 I accept the submission of [RMD] that damages should be assessed upon a consideration of the position the plaintiff would have been in if no tort had been committed: *Butler v Egg and Egg Pulp Marketing Board* (1966) 114 CLR 185 at 190-191. With this in mind, it would be appropriate that the plaintiff be compensated with reference to what the value would have been to RMD if the scaffolding had been in its possession as at 3 December 2004.
>
> ...
>
> 49 Mr Gray [for RMD] referred me to the evidence of Mr Baker which was to the effect that RMD sold scaffolding as well as hired it and in both cases the scaffolding had RMD's distinguishing paint markings. From that he invited me to infer that RMD was not selling 'mint condition' scaffolding but scaffolding that had been previously hired.
>
> 50 The evidence on this subject is somewhat lacking in precision but I have come to the view that the appropriate and just way of resolving the issue is to consider that if the [Controllers] had not committed the act of conversion but had returned the Goods to [RMD], [RMD] would have been in a position to not only hire the Goods out but also to sell them. It would have sold them at its prevailing list price. That seems to be an appropriate measure of what [RMD] lost by the act of conversion, the ability to realise a sale of the Goods at that price.
>
> 51 Accordingly the quantum of the liability of the [Controllers] is identical, whether it be by reference to s 419A and clause 22(b) or by reference to its liability for damages for conversion."

RELIEF

87 For these reasons, the primary Judge was prepared to grant all the relief sought by RMD.

88 As has been noted, the primary Judge ultimately entered judgment in RMD's favour for $4,873,504. This figure was not explained in any of the

judgments. However, by reference to RMD's written submissions at the trial, it appears that the figure included the following components:

	$
• hire charges to 1 December 2004, inclusive of GST, as per the Hiring Agreement	1,494,083
• interest on hire charges as per the Hiring Agreement	345,396
• value of Unreturned Goods not returned, based on RMD's 2004 list prices less an allowance of 30 per cent	1,393,722
TOTAL	**3,233,201**

The total represented the amount due to RMD at 3 December 2004. The balance of the verdict comprised interest from that date until the date of judgment.

89 The Quantum Judgment does not identify the sum the primary Judge would have awarded as damages for conversion of the Unreturned Goods. However, it appears that his Honour would have awarded the same sum ($1,393,722) as he awarded RMD for the value of the Unreturned Goods pursuant to s 419A(2) of the *Corporations Act* and cl 22 of the Hiring Agreement. As I have said, that sum represented RMD's 2004 list prices for the Unreturned Goods, less an allowance of 30 per cent. The relevant arithmetical calculations were in evidence, but not the basis for allowing a discount of 30 per cent.

Costs Judgment

90 In the Quantum Judgment, the primary Judge indicated that he would award costs against the Controllers on the usual basis, subject to any further submissions. RMD sought an award of indemnity costs against the Controllers for costs thrown away by the matter being adjourned on 3

March 2008, the first scheduled day of the trial. The adjournment was occasioned by the filing by the Controllers, by leave granted on that day, of an amended defence.

91 The primary Judge considered that it was appropriate, having regard to the principles discussed by Basten JA in *Chaina v Alvaro Homes Pty Ltd* [2008] NSWCA 353, to order the Controllers to pay the costs thrown away by the adjournment on an indemnity basis.

SUBMISSIONS

The Controllers' Submissions

Possession

92 The Controllers challenged the primary Judge's finding that all of RMD's scaffolding equipment (other than the items found to have been returned) were in Rildean's possession at the date of appointment. Mr Ashhurst submitted that the burden lay on RMD to prove on the balance of probabilities that each item of scaffolding equipment claimed by it had not been lost, destroyed or returned to third party hirers during the period from September 2001 to the date of the Controllers' appointment (18 July 2002).

93 According to Mr Ashhurst, as there was no evidence as to the rate of return of scaffolding to third party hirers during the relevant period, the primary Judge was not entitled to conclude that it was more probable than not that each of RMD's scaffolding items had not been "*lost*" by being returned to third party hirers. Mr Ashhurst submitted that the primary Judge could only have reached the conclusion he did by reversing the onus of proof.

94 Mr Ashhurst in his oral submissions forcefully and repeatedly asserted that the reasoning of the primary Judge demonstrated that he had reversed the

onus of proof. This had led his Honour to engage in impermissible speculation about possibilities which he resolved in RMD's favour by finding that the Controllers had not adduced sufficient evidence to rebut the speculative possibilities.

95 Mr Ashhurst argued that the evidence established that items hired out by Rildean came back from the sites every 12-20 weeks. Therefore, during the period RMD was hiring equipment to Rildean, there would have been four or five complete rotations of stock. This was more than sufficient time for RMD's equipment to have been "*returned*" to third parties. Further, there was evidence adduced by the Controllers which showed that scaffolding, including RMD's equipment, was regularly returned to other owner-hirers. In the absence of reliable records maintained by Rildean, RMD simply could not establish that the equipment hired by it to Rildean was in the latter's possession on the date of appointment.

96 Mr Ashhurst submitted that, once the primary Judge's finding on possession was set aside, as it had to be, the appeal had to succeed and an order made dismissing the proceedings.

Replacement Cost of Scaffolding

97 The Controllers disputed the primary Judge's conclusion that Rildean's obligation under cl 22(b) of the Hiring Agreement to replace all lost or damaged Goods at RMD's list prices should be regarded as a liability "*for so much of the rent or other amounts payable by Rildean*" within the meaning of s 419A(2) of the *Corporations Act*. Mr Ashhurst submitted that Campbell J's construction of s 419A(2) in *Nardell Coal* was correct and that the expression "*or other amounts payable*" should be read *ejusdem generis* with rent. On this basis, so Mr Ashhurst argued, Rildean's obligation to replace lost or damaged Goods was not caught by s 419A(2) and thus the Controllers were not liable to RMD under s 419A(2) for the value of lost or damaged Goods. For similar reasons, the Controllers

submitted that Rildean's liability to pay interest under the Hiring Agreement was not within s 419A(2) of the *Corporations Act*.

98 The Controllers also submitted that Rildean's obligation under the Hiring Agreement to replace all lost or damaged goods was outside the scope of s 419A(2) because it was not a liability for payment attributable to the period identified by the sub-section: that is, a period commencing seven days after the control day throughout which Rildean continued to use or be in possession of RMD's property. Mr Ashhurst submitted that this obligation was not referable to a period at all, but arise at the end of the period when the hirer no longer had possession of the Goods. He further submitted that Rildean's contractual obligation to pay interest on overdue charges, was outside s 419A(2) of the *Corporations Act*, since it was not dependent on the period during which the Controllers used or were in possession of the scaffolding equipment.

The Refusal to Excuse the Controllers

99 The Controllers contended in their written submissions in chief that in exercising adversely to them the discretion conferred on the primary Judge by s 419A(7) of the *Corporations Act*, his Honour had erred by failing to give adequate weight to a number of matters. In particular, so it was argued, the primary Judge had failed to give weight to the fact that the Controllers had no means of ascertaining whether or not Rildean was in possession of RMD's scaffolding at the date of their appointment. In these circumstances, the "*only practical way forward*" was for the Controllers to adopt Mr Austin's suggestion: that is, to sell the scaffolding and distribute the proceeds pro rata among the various claimants. Furthermore, the primary Judge had erred by finding that the Controllers' use of the Unreturned Goods provided revenue which was used to reduce the debt due to the secured creditor, Navmost. There was no evidence to support any such finding.

100 In their written reply submissions, the Controllers maintained, apparently inconsistently with their written submissions in chief, that the primary Judge had not exercised a discretion in the sense used by the High Court in *House v R* [1936] HCA 40; 55 CLR 499. Rather, his Honour had made a "*value judgment*". Accordingly, this Court was in as good a position as the primary Judge to consider the correctness of his Honour's decision.

Conversion

101 The Controllers challenged his Honour's finding that the entry by the Controllers into the Licence Agreement constituted conversion of the Unreturned Goods. RMD advanced no arguments in opposition to the challenge. In effect, therefore, it became common ground that the finding should not stand, although RMD's position seems to have owed more to tactical considerations than to a recognition that his Honour's reasoning could not be supported.

102 The Controllers also challenged the finding that the Controllers actions in entering into and completing the Sale Agreement constituted conversion of the Unreturned Goods. They did so principally on the ground that the purported sale of the Unreturned Goods (amongst other scaffolding) was insufficient, without physical delivery, to constitute conversion, particularly where the Sale Agreement purported to preserve the rights of the true owners of the scaffolding.

Damages for Conversion

103 The Controllers submitted that there was no evidence to support the primary Judge's finding that RMD, had the Unreturned Goods been returned to it by Rildean, sold the scaffolding at its list price. The Unreturned Goods had to be valued as secondhand scaffolding at least two years old. The only evidence relevant to such a valuation was the O'Mara report, which was prepared some two years before the entry into the Sale Agreement in November 2004. That valuation suggested that the

value of the Unreturned Goods was $457,837 on a "*going concern*" basis and $265,289 on an "*auction*" basis.

RMD's Submissions

Possession

104 RMD pointed out that the primary Judge had not found that Rildean had returned scaffolding during the relevant period to any supplier other than RMD. Nor had his Honour found that Rildean had returned any of RMD's scaffolding to suppliers other than RMD itself. In the absence of such findings, the Controllers could not succeed. Furthermore, so RMD argued, there was no evidence on which such findings could have been made.

105 According to RMD's written submissions, "*all*" that it had to prove was that the Goods (26,731 items) were in Rildean's possession on the date of the Controllers' appointment. It was open to his Honour to infer, once it was established that RMD had delivered the Goods to Rildean, that the Goods remained in Rildean's possession on the date of appointment.

106 RMD argued that the primary Judge had correctly stated that RMD had the burden of proving on the balance of probabilities, that the Goods remained in Rildean's possession. His Honour had said nothing to the contrary and his approach demonstrated that he had been alert to where the burden lay. He had drawn inferences that were appropriate, given that the Controllers had not adduced evidence that any of RMD's scaffolding had been returned to suppliers other than RMD itself or that Rildean had sold any of RMD's scaffolding. Neither Mr Baker nor Mr Campbell had given evidence to this effect and they were the witnesses with knowledge of Rildean's operations.

Replacement Cost of Scaffolding'

107 RMD submitted that the expression "*rent or other amounts payable under the agreement*" in s 419A(2) of the *Corporations Act* should be given its ordinary meaning. So read, the expression was wide enough to cover any payments Rildean was liable to make under the Hiring Agreement, whether or not in the nature of rent or other periodic payment.

108 RMD's written submissions did not explain the significance of the words "*as is attributable to a period*" in s 419A(2). However, in oral argument Mr Inatey submitted that the liability to replace all lost or damaged goods, although it could not be said to give rise to an obligation to make a period payment, nonetheless was attributable to the period when Rildean had use or possession of the scaffolding equipment. This was because the liability arose during the period or arose out of the period of use.

109 Mr Inatey accepted that the Hiring Agreement between RMD and Rildean did not provide for a fixed period of hire (see cl 22(m), [76] above). He also accepted that the period of hire terminated when the Controllers completed the Sale Agreement on 3 December 2004. Nonetheless he submitted that the liability to replace lost or damaged goods was attributable to the period of hire.

Refusal to Excuse the Controllers

110 RMD submitted that the primary Judge had made a discretionary judgment in concluding that he should not excuse the Controllers under s 419A(7) of the *Corporations Act* from their liability under s 419A(2). According to Mr Inatey, it was a matter for the primary Judge to weigh the competing considerations. His Honour had done so without committing any error of law and thus his decision not to excuse the Controllers was not vulnerable to challenge.

Conversion

111 RMD supported the primary Judge's reasons for concluding that the Controllers, by entering into and giving effect to the Sale Agreement, converted the Unreturned Goods.

Damages for Conversion

112 RMD supported the primary Judge's conclusion that he would have awarded damages by reference to RMD's 2004 list prices, subject to a reduction of 30 per cent. Mr Inatey submitted that there was no evidence that the market value of "*mint condition*" scaffolding was any different from the market value of pre-used scaffolding. He relied on Mr Baker's evidence that RMD both sold and hired scaffolding and submitted that the primary Judge was entitled to infer that RMD sold used scaffolding at its list price.

Reasoning: Finding as to Possession

Burden of Proof

113 There was no dispute between the parties as to where the burden of proof lay in determining whether the Goods were in Rildean's possession at the date of the Controllers' appointment. The burden of proving that fact on the balance of probabilities remained with RMD throughout the case. This is often described as the "*legal burden of proof*": J D Heydon, D Byrne, *Cross on Evidence: Australian Edition* (1996-), LexisNexis, at [7010]; *Axon v Axon* [1937] HCA 80; 59 CLR 395, at 402, per Latham CJ; at 403, per Dixon J.

114 Once the primary Judge was satisfied that RMD had supplied to Rildean the unreturned Goods (comprising 25,673 items) and that none of these items had been returned to RMD, it was open to him to infer, in the absence of probative evidence to the contrary, that the items so supplied had remained in Rildean's possession until the date of appointment. To put the matter another way, his Honour could rely on an inference of

continuance of possession, unless there was evidence sufficient to raise a doubt as to whether the inference could properly be drawn. As Mr Ashhurst accepted, the Controllers bore the onus of adducing evidence sufficient to raise a doubt. This onus is often described as the "*evidential burden*": *Cross on Evidence*, at [7015].

115 Whether or not the Controllers advanced sufficient evidence to raise a doubt concerning the inference that otherwise might be drawn, the legal burden of proof on the issue of possession remained on RMD through the proceedings. If the Controllers adduced evidence sufficient to satisfy the evidential burden, the question for the primary Judge was whether, taking into account all of the evidence (including such weight as was proper to give to the inference of continuance of possession), RMD had proved on the balance of probabilities that the Goods were in Rildean's possession on the date of the Controllers' appointment.

116 It would have been an error for the primary Judge to have imposed on the Controllers the burden of proving that Rildean had not retained possession of RMD's scaffolding equipment until the date of the Controllers' appointment. If, for example, his Honour had regarded proof of delivery of the Goods to Rildean as casting a burden on the Controllers to prove, on the balance of probabilities, that a significant proportion of the Goods had been lost, stolen, or returned to other hirers before the date of appointment, he would have incorrectly reversed the burden of proof. However, in my opinion, although the primary Judge's language was on occasions somewhat loose, when the Liability Judgment is read as a whole, I do not think he committed the error attributed to him by the Controllers.

117 The primary Judge explicitly recognized that RMD bore the burden of proving that the scaffolding claimed by it remained in Rildean's possession at the date of the Controllers' appointment: at [59]-[60], see [47] above. If it be relevant, in the Recall Judgment (at [18]), see [72] above) his Honour expressly confirmed that he had approached the case on the basis that

RMD had borne the legal burden of proof and that he had been satisfied that RMD had discharged its burden.

118 The key paragraph of the Liability Judgment (at [64], see [50] above), if read in isolation, might suggest that the primary Judge had overlooked the clear statements concerning the burden of proof he made only a few paragraphs earlier. In that key paragraph, his Honour referred to the possibility that some of the Goods may have been lost, stolen or returned to other hirers between the date of delivery and the date of appointment. He observed that that possibility could not account for "*anywhere near the majority*" of the Goods. In the absence of affirmative evidence that any of the Goods had been lost (in the relevant sense), he inferred that Rildean had not parted with possession of **any of the Goods**.

119 It is not entirely easy to follow the reasoning in this passage. One possibility is that his Honour indeed cast the legal burden on the Controllers of proving that more than an insignificant proportion of the Goods had been lost by Rildean before the date of appointment. Having regard to his Honour's correct statement of principle a few paragraphs earlier in the judgment, I think that the better interpretation is that his Honour took the view that the evidence relied on by the Controllers was so deficient that it did not cast significant doubt on the inference of continuity of possession otherwise available from delivery of the Goods to Rildean and the absence of any returns to RMD. On this basis, he was able to accept RMD's submission that it had established, to the requisite standard, that the Goods remained in Rildean's possession until the date of the Controllers' appointment.

120 His Honour's language was also less than precise when he said (at [82], see [56] above) that in the absence of **proof** that items of scaffolding belonging to RMD had been lost prior to the date of appointment, or that Rildean held insufficient scaffolding to meet RMD's claim, he had to conclude that all the Goods remained in Rildean's possession at that date. This passage, if read in isolation, also might be understood as suggesting

that the Controllers bore the legal burden of proving that some Goods had been lost before the date of appointment or that Rildean possessed insufficient scaffolding to meet RMD's claim. However, in the last sentence of [82], the primary Judge said that to conclude otherwise (than that the Goods remained in Rildean's possession) in the absence of **evidence** would be to engage in impermissible reasoning. Again I think that what his Honour was intending to convey was that the evidence adduced by the Controllers, by reason of the deficiencies identified earlier in the judgment, fell short of casting sufficient doubt on the inferences available from delivery of the Goods and the absence of returns to RMD. I think his Honour was intending to make a similar point where he said (at [79], see [56] above) that there was no direct evidence or evidence that would justify a reliable inference that any of RMD's scaffolding had been "*lost or the like*".

121 In oral argument, Mr Ashhurst suggested that his Honour may have incorrectly assumed that the Controllers were bailees of the Goods on the date of their appointment and that this assumption led him to reverse the onus of proof. There is, however, nothing in the judgment to indicate that the primary Judge made any such assumption. Had his Honour done so, it would have been inconsistent with his own formulation of the burden of proof.

122 As I shall explain, I think that the primary Judge paid insufficient regard, in some passages in the Liability Judgment upon which Mr Ashhurst relied in relation to the burden of proof, to the "*all or nothing*" nature of RMD's case. In my opinion, while the passages may have led his Honour to underplay the significance of evidence tending to show that a significant portion of the Goods had been lost, stolen or returned to other hirers, when read in context they do not establish that he erroneously reversed the onus of proof.

Did RMD Discharge its Burden?

123 The next issue is whether the primary Judge was incorrect in finding that, on the evidence, RMD had discharged its burden of proving, on the balance of probabilities, that the Goods remained in Rildean's possession until the date of the Controllers' appointment. In this respect, there has been no challenge to any credit-based findings made by the primary Judge. Accordingly, the resolution of this issue is to be determined by the principles stated in *Warren v Coombes* [1979] HCA 9; 142 CLR 531, at 552. It follows that this Court is in as good a position as the primary Judge to decide on the facts which are undisputed or have been established by his Honour's findings. Respect and weight must be given to the conclusions reached by the primary Judge, but this Court must reach its own conclusion on the inferences to be drawn from the evidence.

Significance of the "*All or Nothing*" Case

124 While I have not accepted Mr Ashhurst's submission that the primary Judge incorrectly reversed the onus of proof, several passages relied on by Mr Ashhurst do indicate, in my opinion that his Honour did not always recognize that RMD put forward an "*all or nothing*" case. Four passages in particular suggest that his Honour may not have taken fully into account the heavy burden RMD assumed in order to make out its claim.

125 The first is the key paragraph (at [64]) to which I have already referred (see [50] above). In this paragraph, his Honour appears to have acknowledged that there was evidence suggesting that at least some of the Goods had been lost by Rildean prior to the date of the Controllers' appointment, albeit nowhere near a majority of the Goods. That being so, it is not clear why his Honour inferred from the absence of "*direct evidence*" of loss that there was no reliable basis for concluding that **any** of the Goods had been lost. The most likely explanation is that his Honour overlooked that RMD could succeed only if it proved, on the balance of probabilities, that **all of the Goods** (minimal exceptions aside) remained in Rildean's possession until the date of appointment.

126 The second passage is where his Honour noted (at [70]) that O'Mara had sighted not a single item corresponding to seven product lines claimed by RMD. His Honour dismissed this evidence as relating only to 616 items out of the 25,673 unreturned Goods. It is not obvious that 616 missing items of scaffolding equipment (2.4 per cent of the claim) can necessarily be dismissed as *de minimis* having regard to the way RMD put its case. His Honour did not explain why the apparently missing items should be so regarded.

127 The third example is the passage (at [67]) where the primary Judge observed that the schedule prepared by Mr Campbell did not provide a reliable basis for concluding that "*nearly all*" or "*anywhere close to 'nearly all'*" the scaffolding on hand at the date of appointment belonged either to Rildean or the three claimants mentioned in Mr Campbell's report. It is true that in using this language his Honour was responding to a submission by the Controllers in these terms (recorded at [65]). But the critical issue was whether Mr Campbell's report, taken together with other evidence, was inconsistent with a finding that RMD had established on the balance of probabilities that all the Goods remained in Rildean's possession at the date of the Controllers' appointment. His Honour did not specifically address that question.

128 The fourth example is where his Honour pointed out (at [75], see [55] above) that the O'Mara stocktake did not cover all sites and therefore some of the Goods "*may well have been found on sites ... not included in the O'Mara listings*". This comment was no doubt correct. But the issue was not whether some of the Goods otherwise unaccounted for **might have been** on sites not inspected by O'Mara. Once again, it was whether the evidence as a whole established on the balance of probabilities that all the Goods were in Rildean's possession at the date of the Controllers' appointment.

Assessment of the Evidence

129 As I have noted, the evidence adduced by the Controllers as to the scaffolding in Rildean's possession at various times was incomplete, although the difficulties were perhaps not primarily of the Controllers' own making. As his Honour found (at [39], [45] and [75]), Rildean's records did not accurately record the scaffolding in its possession, the ownership of scaffolding it hired from suppliers or the items of scaffolding it hired to others for use on particular building sites. Moreover, his Honour found (at [34]) that Rildean did not store separately items of scaffolding hired to it by different suppliers such as RMD and TJF. The photographic evidence confirmed Mr Campbell's unchallenged evidence that Rildean simply stored particular types of scaffolding on pallets regardless of the identity of the owner or the colouring of the scaffolding.

130 The evidentiary problems were, however, compounded by the gaps in the evidence adduced from Mr Baker and Mr Campbell. As I have noted, both were no doubt hampered by the paucity of Rildean's records and the lapse of time before they prepared their affidavits, the first of which was not sworn until July 2007, five years after the relevant events. Even so, they might have been expected to give more detailed evidence than they did as to the practices adopted by Rildean during the period in which RMD hired equipment and during which (as was common ground) some scaffolding was returned by Rildean to RMD. Their evidence was largely confined to generalities, although Mr Campbell attempted to compile a statistical schedule from the available documentation.

131 Mr Baker said in his affidavit that "*if Rildean had more scaffolding than it needed it would return excess scaffolding to RMD*". He also said that:

> "When and if Rildean returned scaffolding that it had hired from entities such as RMD and Girraween Scaffolding and Plant Hire Pty Ltd, it would return the same quality, quantity and types of scaffolding that it had hired from RMD.
>
> The effect of this mixing of scaffolding is that Rildean would often return from hire equipment that had been supplied to it from a different supplier to that which Rildean returned it to."

132 Mr Baker did not direct attention to whether and to what extent Rildean had excess scaffolding on hand during the period of nine months or so in which RMD hired the Goods to Rildean. Similarly, he did not direct attention to the quantities of RMD's scaffolding that might have been returned to other suppliers as part of Rildean's policy of classifying scaffolding by type rather than by ownership. Mr Baker's only comment was that *"[s]caffolding was returned all the time"*.

133 Mr Campbell also gave evidence that did not descend to specifics. His evidence established (as the primary Judge accepted) that, in general, he was unable to ascertain which company owned scaffolding in Rildean's possession. Although he participated in preparing the schedule discussed by the primary Judge, he did not attempt to quantify the amount of scaffolding returned to suppliers in general, or to RMD in particular, during the relevant period.

134 The primary Judge's evident dissatisfaction with the Controllers' evidence was understandable. Nonetheless, despite the deficiencies, the evidence before his Honour made it very difficult to conclude that RMD had discharged its burden of proving that all but an insignificant portion of the Goods remained in Rildean's possession on the date of the Controllers' appointment.

135 Mr Campbell said the following in his affidavit of 8 December 2008:

> "When I determined that there was excessive stock sitting in the yard, I would take steps to have that amount of excessive scaffolding returned to companies from which Rildean had hired scaffolding. In this regard I directed Mr Clive Walker, Rildean's Yard Manager, to return scaffolding to the particular third party hirer (such as TJF or RMD). I did not direct Mr Walker to return a particular third party hirer's scaffolding because to my mind it was impossible to determine which scaffolding actually belonged to that entity. I would observe Mr Walker arranging for trucks to be loaded with scaffolding, that was mixed in colour, for delivery to the Third Party hirer, or to be picked up by the Third Party hirer."

This evidence was not challenged in cross-examination.

136 Mr Campbell was employed by Rildean only from November 2001 until the Controllers were appointed (thereafter he was employed by a different company controlled by Mr Baker). He therefore must have been speaking of his practice during the period of his employment by Rildean. While he did not attempt to quantify the amount of excess scaffolding returned to owners, his unchallenged evidence established that Rildean returned a number of truckloads of scaffolding to suppliers. Further, his evidence was that the scaffolding was returned without regard to its true ownership, but by reference to the kinds of equipment that had been hired to Rildean by the particular supplier.

137 Mr Dutton, a sales representative employed by RMD between 1998 and 2005, gave evidence as to RMD's practice concerning scaffolding returned by Rildean. As I have noted, it was common ground that 2,460 items of scaffolding belonging to RMD had been returned by Rildean to RMD during the relevant period. Mr Dutton's unchallenged evidence was that if Rildean delivered to RMD items of scaffolding that did not belong to RMD, those items would not be accepted. RMD would then notify Rildean that Rildean should collect the items erroneously returned. If Rildean did not do so, RMD would return them on the next occasion its own truck went to Rildean's premises.

138 Mr Dutton's evidence is consistent with that of Mr Campbell. He acknowledged that Rildean's practice was to return to a supplier scaffolding of the same kind the supplier had hired to Rildean, but which did not necessarily belong to supplier. Mr Dutton did not explain precisely how RMD ascertained that the scaffolding it accepted actually belonged to it. An available inference is that RMD accepted only scaffolding which retained its distinctive colours and had not been painted over.

139 In any event, Mr Dutton's evidence strengthens the inference that during the relevant period Rildean returned to RMD scaffolding that did not

belong to RMD. If Rildean took that course in relation to RMD, having regard to the evidence of Mr Campbell or Mr Baker the inference is readily available that Rildean took the same course with other suppliers. That being so, the probabilities are that significant quantities of RMD's scaffolding were "*returned*" to other suppliers during the relevant period.

140 This conclusion is supported by the inability of RMD's representatives to identify any but a small proportion (totaling 1,091 items) of its scaffolding in Rildean's possession after the date of the Controllers' appointment. It will be recalled that the meeting of 23 July 2002 at Rildean's yard resulted in only 1,058 items being returned to RMD, while the meeting of 25 October 2002 resulted in the return of another 33.

141 It is true that scaffolding in RMD's distinctive colours was often overpainted and that some scaffolding was scattered at sites other than Rildean's yard (some of which were visited by Mr Dutton). But RMD's inability to identify more than about four per cent of the Goods, when it had a powerful incentive to do so, strongly suggest that significant quantities of its scaffolding were no longer in Rildean's possession or control after the date of the Controllers' appointment.

142 While the statistical evidence was incomplete, it too reinforces the conclusion that a substantial proportion of the Goods were no longer in Rildean's possession at the date of appointment. The schedule prepared by Mr Campbell showed that Rildean had acquired 418,543 items of scaffolding by way of hire or purchase over a period that his Honour described (at [66]) as "*quite a number of years*". This information was based on computer records maintained by Rildean, supported by invoices and other documentation. The cross-examination of Mr Campbell and Mr Baker cast no doubt on the figure as an historical record of Rildean's "*stock purchases*". In any event, his Honour appeared to accept the figure as broadly accurate, pointing out (at [67]) that business records had been provided to Mr Austin in support of the claims of prior deliveries of scaffolding to Rildean.

143 The O'Mara report listed a total of about 154,000 items on hand at Rildean's yard and at some 38 sites to which Rildean had delivered scaffolding. The primary Judge pointed out (at [42]) that O'Mara had not gained access to all sites at which scaffolding hired by Rildean was located, but the O'Mara report itself records that the list included all sources found to be "*active*", except for one (a prison) to which access was not granted.

144 It is no doubt correct that the O'Mara report, as the primary Judge said (at [71]), must be taken as an incomplete record of all the scaffolding Rildean had out on hire. As his Honour noted, the number of sites to which Rildean sent scaffolding could have been anywhere between 51 and 62. In addition, Rildean's (unreliable) computer records of scaffolding hired out did not match the results of the O'Mara stocktake. Nonetheless, the evidence as a whole makes it very unlikely that the total number of items in Rildean's possession or control on the date of appointment exceeded, say, 200,000 to 250,000. Mr Inatey did not appear to dispute in oral argument on the appeal that this was a fair estimate of the upper range of scaffolding on hand.

145 Furthermore, as Mr Ashhurst pointed out, there were very great disparities between the number of items recorded by Rildean on particular sites and the results of the O'Mara stocktake. For example, on one site in Manly, Rildean's records acquired by the Controllers showed that 2628 items had been delivered to that site, yet the O'Mara stocktake recorded only 254 items on site. Rildean's records were undoubtedly inaccurate. Nonetheless, the great disparities between those records and the O'Mara stocktake tend to confirm that substantial quantities of scaffolding were lost, for a variety of reasons, from the sites to which the scaffolding had been delivered.

146 The primary Judge discounted the apparent disparity between the number of items of scaffolding recorded as having been acquired by Rildean and

the number of items found in its possession after the date of appointment. His Honour did so on the ground that there was no evidence as to how many of the items acquired by Rildean were on hand on the date of appointment. In particular, there was no evidence as to disposals by sale or as to losses of scaffolding by reason of theft, damage or misplacement.

147 It was not suggested at trial or on appeal that Rildean had sold any significant quantities of equipment. Mr Baker, however, did give evidence that in his experience a large proportion of equipment hired out by Rildean was lost, stolen or returned with no docket. It is a clearly available inference from the evidence, and one that should be drawn, that a very substantial proportion of the scaffolding obtained by Rildean over a period of several years had been lost, stolen or "*returned*" to suppliers other than the true owners.

148 The primary Judge thought that the fact that RMD had been supplying Rildean with equipment for only about nine months prior to the date of appointment militated against a finding that a significant proportion of scaffolding had been lost, stolen or "*returned*" to other suppliers. But the undisputed evidence was that scaffolding stayed on a building site for between 12 and 20 weeks on average, before being returned to Rildean (subject to losses). While the period undoubtedly could vary from site to site, a period of nine months was ample for the Goods to be subject to a similar rate of attrition as other scaffolding in Rildean's possession or control. Of course the proportion likely to have been lost or "*returned*" to other suppliers over a nine month period would have been less than the proportion lost or "*returned*" over a longer period. But the evidence to which I have referred strongly suggests that by the date of the Controller's appointment, Rildean no longer had in its possession a significant proportion of the Goods RMD had supplied to it.

149 The primary Judge considered that the claims to scaffolding made by suppliers other than RMD were of little significance because the claims had not been substantiated by documentary evidence. Even if that were

so, it is hardly likely that a number of suppliers would claim to have supplied Rildean with large quantities of scaffolding if all their claims lacked any basis. In any event, it is not correct that the only evidence before the primary Judge was that of the bare claims made by the various suppliers. Mr Austin's "*expert appraisal*" of 25 November 2002, noted that he had requested and received "*comprehensive lists*" from the majority of suppliers of the scaffolding supplied by them to Rildean. He also accepted that most of the scaffolding in Rildean's yard or at the sites was rightfully owned by the various suppliers. This provided the basis for his recommendation that the scaffolding be sold and the proceeds divided in proportion to the quantity of each category of items owned by the claimants. Mr Austin's appraisal provides evidence supporting the conclusion that the claims made by most of the suppliers were soundly based.

150 I should add that I have not overlooked Mr Dutton's evidence that he had visited six sites nominated by Mr Baker as locations for the Goods, and that he had seen scaffolding belonging to RMD at those sites. In cross-examination, however, Mr Dutton acknowledged that he had been unable to gain access to the sites. His Honour accepted that Mr Dutton had seen some scaffolding in RMD's colours at the sites, but that it was difficult to determine whether the scaffolding he saw at a distance did in fact belong to RMD. Mr Dutton's evidence is of little assistance to RMD.

151 RMD also placed some reliance on a statement by Mr Baker in one of his affidavits that to his knowledge the equipment hired by Rildean had not been returned by Rildean at the date of the Controllers' appointment. This statement, however, was made with reference to scaffolding provided by four named suppliers. While Mr Baker was not cross-examined on this statement, he was also not cross-examined on apparently inconsistent statements, notably that scaffolding was "*returned all the time*" and that excess scaffolding would be returned to suppliers without regard to ownership of specific items. Mr Baker's qualified statement can be given little weight having regard to the other evidence to which I have referred.

CONCLUSION

152 In my opinion, RMD failed to discharge the burden of proving on the balance of probabilities that the Goods hired by it to Rildean remained in Rildean's possession until the date of the Controllers' appointment. The evidence as a whole, despite the gaps and apparent inconsistencies, is not consistent with such a finding. Indeed, had the onus been on the Controllers to prove on the balance of probabilities that the Goods (minimal variations aside) did not remain in Rildean's possession until the date of appointment, I would have concluded that they had discharged that burden.

153 When analysed, the evidence comfortably demonstrates that significant quantities of the Goods had been stolen, lost of "*returned*" to other suppliers before the date of the Controllers' appointment. It follows that the foundation for RMD's case is wanting and the Controllers' appeal must be allowed.

REASONING: OTHER ISSUES

154 In view of the conclusion I have reached, it is not necessary to address any of the other issues argued on the appeal. However, it is appropriate to comment briefly on some of those issues.

Value of Scaffolding Not Returned

155 I have referred to RMD's claim under s 419A(2) of the *Corporations Act* to recover the value of the Unreturned Goods that were lost or damaged while in the Controllers' possession. It will be recalled that his Honour found that RMD was entitled under s 419A(2) to recover the value of the Unreturned Goods calculated by reference to RMD's ruling list prices. This entitlement was created by cl 22 of the Hiring Agreement ([76] above) and,

according to his Honour, could be enforced by RMD against the Controllers pursuant to s 419A(2).

156 The argument on the appeal focused primarily on the primary Judge's rejection of the Controllers' contention that Rildean's liability to pay the value of Goods lost or damaged was not a liability "*for so much of the rent or other amounts payable by [Rildean] under the [Hiring Agreement]*" within the meaning of s 419A(2) of the *Corporations Act*. If all RMD has to do in order to succeed in its claim under s 419A(2) is to bring itself within the words just quoted, it would be able to do so. I would adopt the primary Judge's reasons for rejecting the Controllers' *ejusdem generis* argument.

157 However, it is not enough for RMD, if it is to uphold the primary Judge's conclusion that RMD is entitled to recover from the Controllers the value of lost or damaged scaffolding, to demonstrate that his Honour correctly rejected the Controllers' *ejusdem generis* argument. RMD must also establish under s 419A(2) that Rildean's liability under the Hiring Agreement to replace lost or damaged Goods was:

> "attributable to a period:
>
> (a) that begins more than 7 days after the control day; and
>
> (b) throughout which:
>
> (i) the corporation continues to use or ... to be in possession of [RMD's] property; and
>
> (ii) the controller is controller of [RMD's] property."

158 The legislative history of s 419A of the *Corporations Act* is explained in detail by Campbell J in *Re Nardell Coal Corporation*, at [70]-[73]. Section 419A was enacted to implement recommendations made by the Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988) ("*Harmer Report*"). The relevant paragraphs of the Harmer Report are as follows (vol 1, at [218]-[220]):

"218. *Liability under leases.* The second matter considered was that of liability under leases of property. Although a receiver should not be considered to have adopted a lease merely because the company remains in occupation of the leased property, it does not appear equitable that a receiver should permit a company to continue to obtain the benefit of the occupation of premises or the use of chattels under a lease agreement without being liable for the payments which the company is liable to make for that continued occupation or use. It might be suggested that the owners of such property have a remedy in evicting the company from possession of the land or taking possession of the chattels, but that can take considerable time. In the meantime the company (and, indirectly, the chargeholder) has obtained the continued benefit of occupation or use while the owner of the property must rank after the chargeholder as an unsecured creditor for the payments due for such occupation or use.

219. *Proposal.* In DP 32 (para 156) the Commission proposed that the receiver be personally liable for rent or similar payments payable by the company in respect of the possession, use or occupation of property the legal title to which belongs to another person, where the company continues in that possession, use or occupation while the receiver is in control. As a safeguard for receivers the Commission proposed that the liability should not apply for a period of seven days immediately after the appointment of the receiver. ... If the company remains in occupation for only part of a period in respect of which rent or other payments is or are payable, it was proposed that the liability of the receiver be apportioned accordingly. ...

220. *Recommendation.* ... the Commission recommends that a receiver or other person enforcing a charge be liable for rent or similar payments payable by the company except for an initial seven day period. However, as in the case of the administrator, the Commission recommends a power for the court to order that the receiver or person not be liable. This would, for example, assist a receiver who is unaware of the existence of certain property of a company or of the fact that the legal title to the property belongs to another person."

159 The draft legislation prepared by the Australian Law Reform Commission provided (App A, at 54) as follows:

"Where a corporation continues in possession of, occupies or uses property the legal title to which belongs to some other person under an agreement made before and subsisting at the date of the appointment of a receiver of property of the corporation or the taking of possession of or assuming control of property of the corporation by a person under a charge, the receiver or person is

> liable for the rent or other payments payable under the agreement **with respect to any period during which the corporation continues to possess, occupy or use the property** while the receiver remains in office or the person remains in possession or control of the property of the corporation unless the Court orders that the receiver or person ought fairly to be excused." (Emphasis added.)

The Explanatory Memorandum for the *Corporate Law Reform Bill* 1992, which introduced s 419A, does not explain the slightly different wording used in the legislation ultimately enacted.

160 It will be recalled that RMD's case was that Rildean's liability under the Hiring Agreement arose on completion of the Sale Agreement on 3 December 2004. At that time, the Controllers' actions brought the bailment under the Hiring Agreement to an end and Rildean's liability to replace all lost or damaged equipment. According to RMD, the amounts payable by Rildean were attributable to the period identified in s 419A(2) of the *Corporations Act*.

161 In my opinion, the language of s 419A(2) is not apt to extend to a liability to make payments under a hiring agreement between an owner of goods and a corporation, when the liability is not incurred or is not enforceable **until the end of the period of hire**. I do not think that it can be said that the liability imposed on Rildean by cl 22(b) of the Hiring Agreement was to make payments attributable to the period of hire or to the use of the goods during that period. Rildean's liability was to replace all lost or damaged goods at RMD's ruling list prices. The liability to make payments calculated in this way was attributable to Rildean's failure, for whatever reason, to return the hired scaffolding to RMD in good condition, as required by s 419A(2). The amounts payable by Rildean were not attributable to a period, but to its failure to return the scaffolding in good condition.

162 If RMD's submissions are correct, it is difficult to see what purpose is served by the words "*as is attributable to a period*" in s 419A(2). If the

drafter intended s 419A(2) to cover all liabilities that are incurred during or at the end of a hiring agreement, it would have been simple enough to say so.

163 There is nothing in the Harmer Report or in the Explanatory Memorandum that leads to any different conclusion. The Harmer Report considered that it was inequitable that a receiver should permit a company to use chattels under a hiring agreement without being liable to the payments which the company was liable to make for that continued use. A liability to replace all lost or damaged goods is difficult to characterise as a payment for continued use of those goods. The draft legislation prepared by the Law Reform Commission suggests, if anything, that it did not intend a liability of the kind imposed by cl 22 of the Hiring Agreement to be caught by s 419A(2).

164 The reality would seem to be that the Law Reform Commission did not specifically direct attention to the issue that has arisen in the present case. Whether the Commission would have recommended widening the scope of s 419A(2) to cover a liability of the kind imposed by cl 22 of the Hiring Agreement, had it considered that question, is a matter of speculation.

165 For these reasons, had RMD succeeded on the possession issue, I would not have awarded judgment in its favour pursuant to s 419A(2) of the *Corporations Act* for the value of scaffolding equipment not returned to it by the Controllers.

Liability for Rent and Interest

166 The Controllers did not challenge on the appeal the primary Judge's finding that they were liable under s 419A(2) of the *Corporations Act* for the hire charges payable to RMD under the Hiring Agreement in respect of the Unreturned Goods (assuming, contrary to my conclusions, that RMD could establish that the Goods remained in Rildean's possession on the Controllers' date of appointment).

167 The Controllers challenged the primary Judge's finding that the Controllers were liable for interest on the hire charges under the Hiring Agreement. This challenge was based on the contention that the contractual obligation to pay interest under cl 15(d) of the Hiring Agreement was not dependent on any period for which the Controllers were in possession of the Unreturned Goods. Clause 15(d) provided that if Rildean was in arrears in the payment of an invoice in respect of hire charges, RMD had the right to "*raise interest charges of 1.5% on any overdue balance at the end of a month*".

168 I would have been inclined to the view that interest due by Rildean to RMD in respect of unpaid period hire charges would be said to be amounts payable by Rildean under the agreement that are attributable to the relevant period, as required by s 419A(2) of the *Corporations Act.* The liability arises because of Rildean's failure to pay hire charges (which themselves are attributable to the relevant period) and the quantum of the liability is calculated by reference to those hire charges.

The Primary Judge's Refusal to Excuse the Controllers

169 The primary Judge considered the Controllers' application to be excused from liability under s 419A(7) of the *Corporations Act* on the basis that they were liable, not only to pay the hire charges and interest due under the Hiring Agreement, but also to pay RMD the value of the Unreturned Returned Goods. As I have explained, I would have limited the Controllers' liability under s 419A(2) to payment of the outstanding hire charges and interest thereon. The primary Judge relied very heavily for his conclusion on the continued use by the Controllers of the Unreturned Goods in order to generate revenue to reduce the debt owed to their principal, Navmost. Most of the argument revolved around whether there was evidence to support his Honour's finding that the Controllers used the Unreturned Goods in this way.

170 The difficulty confronting Mr Ashhurst on this issue is that the Controllers adduced no evidence as to the extent, if any, of the financial benefit accruing to the secured creditor from the Licence Agreement, insofar as that agreement related to the Unreturned Goods. In the absence of evidence of this kind, it was open to the primary Judge to find, as he did, that the Controllers used the Unreturned Goods to generate revenue for the benefit of Navmost as the secured creditor.

171 The other arguments advanced on behalf of the Controllers essentially went to the weight the primary Judge accorded to the competing considerations.

172 I do not think it necessary to determine whether the primary Judge's refusal to excuse the Controllers under s 419A(7) was a discretionary decision. Having regard to the Controllers' failure to adduce evidence as to the quantum of the benefit derived from the use of the Unreturned Goods, I would have reached the same conclusion as the primary Judge, particularly if the Controllers' liability under s 419A(2) was limited to hire charges in respect of the Unreturned Goods and interest thereon. Where persons in the position of the Controllers derive benefits from the use of goods owned by a third party and they adduce no evidence as to the quantum of those benefits, the Court would generally be reluctant to excuse the Controllers from the liability to pay hire charges (and related interest charges) in respect of those goods.

Conversion

173 As I have noted, RMD did not contend on the appeal that the Controllers converted the Unreturned Goods by entering into the Licence Agreement. However, RMD supported the primary Judge's finding that the Controllers' entry into the Sale Agreement amounted to conversion of the Unreturned Goods.

174 I do not think it necessary to consider the Controllers' challenge to the latter finding, although I have some difficulty in seeing how it could succeed. The Sale Agreement would seem to have been a dealing by the Controllers with the Unreturned Goods in a manner inconsistent with RMD's rights as owner, notwithstanding the provision in the Sale Agreement that Rildean was not selling any scaffolding belonging to a third party. By the Sale Agreement Rildean purported to sell the scaffolding it owned on an "*as is where is basis*". While the Agreement was in terms limited to scaffolding owned by Rildean, the intention of the parties seems to have been that, as between Rildean and the purchaser (ACS), ACS would deal with all the scaffolding in the yard and on building sites without interference from Rildean, the Controllers or the true owners of the scaffolding (ACS undertook to deliver up any scaffolding that was established to Rildean's satisfaction in a court to belong to a third party, but that did not prevent it dealing with the scaffolding in the meantime as it saw fit.)

Damages for Conversion

175 Had it been necessary to consider the correctness of the primary Judge's assessment of damages for conversion, I would have concluded that there was no evidence justifying an award calculated by reference to RMD's list prices. In the absence of evidence that the list prices represented an appropriate basis for calculating the value of scaffolding at least two years old (with or without an apparently arbitrary 30 per cent allowance), in my opinion it was not open to the primary Judge to take the approach he did.

176 It cannot be assumed, in the absence of evidence from the party claiming damages, that the value of used goods is the same as the value of new or "*mint condition*" goods. Mr Baker's evidence did not go to this issue. In any event, the O'Mara report indicated that there was likely to be a significant difference between the value of secondhand scaffolding and new scaffolding. If RMD wished to demonstrate that it would have been

able to realize a higher value for the Unreturned Goods than suggested by the O'Mara report, the onus was on it to adduce evidence to that effect.

177 It follows that RMD would have been entitled to damages for conversion assessed by reference to the value of the Unreturned Goods as secondhand scaffolding. As the only evidence of that value, imperfect as it may have been, was the O'Mara report, damages would have to be assessed by reference to the contents of that report. In order to perform that task it may have been necessary to invite further submissions from the parties.

Costs

178 The Controllers challenged the indemnity costs order made against them in respect of costs thrown away by reason of the adjournment of trial on 3 March 2010. It suffices to say that the Controllers have not identified any error that would vitiate the exercise of the primary Judge's discretion under s 98 of the *Civil Procedure Act* 2005 (NSW) and *Uniform Civil Procedure Rules* r 42.5. His Honour pointed out that the adjournment was occasioned by the Controllers' very late application to amend their defence in a manner that recast the issues in the case and required RMD to prepare on a different basis. Contrary to the Controllers' submissions, this was not a case of "*mere prolongation*" of the proceedings, whatever the significance of that expression might be for an indemnity costs application.

CONCLUSION

179 The appeal must be allowed. The orders made on 10 February 2010 and the orders made on 9 March 2010 should be set aside. In lieu thereof orders should be made dismissing the proceedings. RMD should pay the costs of the appeal. Except for the costs thrown away as a result of the adjournment of the trial on 3 March 2008, RMD should pay the Controllers' costs of the trial. The Controllers should pay RMD's costs thrown away as

a result of the adjournment of the trial on 3 March 2008, on an indemnity basis. If otherwise qualified, RMD should have a certificate under the *Suitors Fund Act* 1951 (NSW). The costs order made by the primary Judge on 16 December 2009 in consequence of the Recall Judgment should stand.

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Associate's Stamp

I certify that this and the 60 preceding pages are a true copy of the reasons for judgment herein of the Honourable Court.

Dated: 28/04/2011
Associate: