

ACT CIVIL & ADMINISTRATIVE TRIBUNAL

CARTER & ANOR v RUMBLES GROUP PTY LTD (Civil Dispute) [2019] ACAT 49

XD 1408/2018

Catchwords: **CIVIL DISPUTE** – oral contract to pack, uplift, store and deliver household furniture and chattels – breach of contract – furniture damaged by removalist included a Parker dining room table with special value – bailment – negligence – delay in delivery – ACL consumer guarantees due care and skill – liability admitted for damage caused – quantum disputed

Legislation cited: *ACT Civil and Administrative Tribunal Act 2008* ss 16, 17, 18
Australian Consumer Law ss 60, 61, 62, 267

Cases cited: *Darbishire v Warran* [1963] 1 WLR 1067
Dimond v Lovell [2002] 1AC 384
Farley v Skinner [2001] UKHL 49
Gray v Motor Accident Commission (1998) 196 CLR 1
Jianwei Liu v State of New South Wales [2014] NSWSC 933
Lamb v Cotogno (1987) 164 CLR 1
Liesboch Dredger v SS Edison [1933] AC 449
McCrohon v Harith [2010] NSWCA 67
Murphy v Brown (1985) 1 NSWLR 131
Tobin v Commonwealth of Australia [2013] ACTSC 240
Waldron & Anor v Baz & Anor [2005] WADC 187

List of

Texts/Papers cited: Halsbury's Laws of England (4th ed) Volume 12
Law of Torts. Third Ed. RP Balkan and JLR Davis Lexis Nexis
"Torts Cases and Commentary" (7th ed Lexis Nexis Butterworth 2004)

Tribunal: Presidential Member E Symons

Date of Orders: 30 May 2019

Date of Reasons for Decision: 30 May 2019

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) XD 1408/2018

BETWEEN:

JENNIFER JEAN CARTER
GREGORY KIM ANDREWS
Applicants

AND:

RUMBLES GROUP PTY LTD
Respondent

TRIBUNAL: Presidential Member E Symons

DATE: 30 May 2019

ORDER

The Tribunal orders that:

1. Judgment is entered for the applicants in the sum of \$15,523.41
being:

Damages	\$13,848.80
Filing Fee	\$ 559.00
Search fee	\$ 9.00
Interest from 19 December 2017	\$ 1,106.61
2. The respondent pay the sum of \$15,523.41 to the applicants by close of business 29 June 2019.

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Presidential Member E Symons

REASONS FOR DECISION

Background

1. Jennifer Carter and Gregory Andrews (the **applicants** or **Ms Carter** or **Mr Andrews**) entered into an oral contract with Rumbles Group Pty Ltd (the **respondent**) in October 2017 for the respondent to pack their household furniture and chattels in Dickson and to uplift the furniture and chattels from Dickson in the Australian Capital Territory, store it and deliver it to the applicants' new home in Googong in New South Wales in December 2017. The furniture included teak furniture which Ms Carter had inherited from her grandmother, namely an extendable Parker pedestal dining table to seat 12, six dining chairs, two lounge chairs, a coffee table and two sets of nesting tables.
2. During the uplift on 2 November 2017 one of the respondent's removalists broke a King Furniture shelving unit which formed part of a modular lounge.
3. When the furniture was delivered on 17 December 2017 the removalist showed Ms Carter the large scratches on the top of the teak dining table and on the coffee table. Ms Carter also observed scratches to the legs of the dining table, damage to the TV unit and a large chip in the veneer of another King Furniture shelving unit which also formed part of the modular lounge. The damaged items were taken away by the respondent for repair.
4. Subsequently, the applicants discovered damage to a queen-sized mattress, scratches to the front of a bedside table and a smashed bedside lamp which was one of a pair. Ms Carter notified the respondent of this damage in early 2018.
5. The applicants made repeated telephone calls to the respondent between January 2018 and May 2018 to follow up on the repairs and return of their property which had been damaged. These calls were unreturned.
6. On 14 May 2018 Ms Carter spoke to Mr David Inglis, (**Mr Inglis**) the respondent's sole director, and directed the respondent to return her furniture. Mr Inglis advised her in that telephone conversation that the damaged items had been repaired.

7. These items of furniture were delivered to the applicants on 16 May 2018. The scratches to the dining table had had varnish applied to them, notwithstanding that the table was an oiled teak table. The table was in a poor condition. The chip in the veneer of the King Furniture shelving unit had not been repaired; it had been painted over or coloured in. Ms Carter instructed the removalists to reload the items into the truck and to take them back for proper repair.
8. Ms Carter sent an email to the respondent on 16 May 2018 stating what action was needed to properly repair the damaged furniture and requiring that the furniture be repaired by 30 June 2018. Ms Carter requested that the respondent respond to her email. She did not receive a reply. Nor did she receive a reply to the multiple voice messages she left with the respondent between 16 May 2018 and 30 June 2018.
9. Ms Carter sent a further email to the respondent on 24 July 2018 requesting a response by 27 July 2018 and advising she would commence legal action on 30 July 2018 if she had not received a response. She did not receive a response.
10. Mr Andrews then telephoned Mr Inglis on 31 July 2018 and arrangements were made to return the furniture on 2 August 2018. The respondent did not return the furniture and did not advise the applicants they would not be delivering the furniture on that day.
11. Mr Andrews again telephoned the respondent and arranged with Mr Inglis for the furniture to be delivered on 15 August 2018. The respondent did not deliver the furniture that day and did not advise the applicants that they would not be delivering the furniture in accordance with the prior arrangement.
12. Mr Andrews again spoke with Mr Inglis who agreed to return the furniture on 14 September 2018. Both of the applicants rearranged their work and other commitments to ensure they would both be at home for the delivery of the furniture. At 12.25pm on 14 September 2018, Mr Inglis sent the following text message to Mr Andrews:

Greg,

We will not be delivering today. Your table has been damaged while being sanded I would like to discuss an appropriate settlement for ths (sic) and other issues raised by Jennifer. Maybe replacing some items and/or some financial recompence (sic) and return of items as is?

Please give this some consideration over the weekend. You could perhaps look on Gumtree tio (sic) see if there is anything suitable for this purpose.

Best of (sic) you email your ideas and I will respond promptly. David

Rumbles.

13. Mr Andrews replied to Mr Inglis as follows:

David, please return our furniture this afternoon. Anytime after 3.00pm will be fine. Regards, Greg

14. Mr Inglis replied to Mr Andrews as follows:

I am unable to do that

Our crew finished their shift at 12 noon

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15. On 5 October 2018 Ms Carter emailed the respondent requesting the return of their furniture in 'as is' condition between 8 and 12 October 2018 and \$20,000 compensation. The furniture was not returned.
16. The applicants paid the respondent \$6,336 for their services, being \$2,486 on 9 November 2017 for the packing and removal on 1 and 2 November 2017 and a further \$3,850 for the storage and the removal services on 19 December 2017.

The proceedings

17. On 18 October 2018 the applicants filed a civil dispute application seeking the return of their goods, damages of \$18,256, exemplary damages of \$10,000, interest in accordance with the Court Procedures Rules 2006 from 19 December 2017 and the filing fee of \$559 and ASIC search fee of \$9.
18. On 21 November 2018 the respondent filed a response in which it admitted liability in part and disputed the quantum of the claim.

19. The parties attended a preliminary conference on 7 January 2019 when orders were made by consent for the respondent to return the four items of furniture in its possession to the applicants on 14 January 2018 and for the applicants to “review the damage and repairs to determine the amount of compensation required for all items damaged” and to provide a copy to the Tribunal and to the respondent. The preliminary conference was adjourned. The respondent returned the four items of furniture to the applicants.
20. On 18 February 2019, at the adjourned preliminary conference, this matter was set down for hearing on 12 April 2019 and directions were made requiring the parties to file the documentation on which they relied.
21. The applicants filed an amended application in which they sought \$24,781 calculated as follows:

(a) Compensation for restitution

Two King Furniture shelving units	\$ 1,280
Teak dining table	\$12,078
Teak coffee table	\$ 1,430
IKEA TV unit	\$ 250
Queen mattress	\$ 799
Bedside table	\$ 275
Two glass bedside lamps	\$ 500
Total compensation	<u>\$16,612</u>

(b) Damages for breach of contract

20% of contract costs	\$ 1,267
	<u>\$ 1,267</u>

(c) Exemplary Damages

\$ 5,000
<u>\$ 5,000</u>

(d) Filing Fee

ASIC Search fee	\$ 9
Interest	\$ 1,334
	<u>\$ 1,902</u>

TOTAL **\$24,781**

22. The applicants and the respondent each filed written submissions.

23. The application was heard on 12 April 2019. The applicants represented themselves. Mr Inglis represented the respondent pursuant to an Authority to Act for a Corporation. Ms Carter, Mr Andrews and Mr Inglis gave evidence and were cross examined. At the conclusion of the hearing the Tribunal reserved the decision. This is the Tribunal's decision.

Applicant's contentions

24. In the applicants' detailed written submissions and in the civil dispute application they set out their arguments in support of the amounts they claimed for compensation, damages and exemplary damages as set out in [21] above. As the issue to be decided is the quantum of their claim, the tribunal sets out their submissions below. The Tribunal has set out in bold the remedies sought by the applicants.

2 x King Furniture shelving units (< 10 years old)	\$1,280	The shelving units were in excellent, as new condition and the applicants should be compensated for the full value of these items. The shelving units form part of a King Furniture modular lounge suite and damage caused to the shelving units de-values the lounge as a whole. The shelving units cannot be repaired and must be replaced. There are no other options on the market except to purchase from the original supplier, King Furniture. Restitution claimed is for their replacement value.
Teak dining table (Parker Furniture)	\$12,078	The teak dining table was in excellent condition, and has been regularly cared for to maintain its condition. Table was inherited from grandmother and was originally purchased in the 1960s. There was minor wear and tear commensurate with the age of the furniture, however there were no scratches on the surface of the table and no major obvious marks. The dining table is an antique and the applicants anticipated the furniture being used by future generations. The table is a unique design, with pedestal legs and can extend to seat 12 people. A similar quality product is not available in the second hand market. In addition, the table is accompanied by six chairs, and the replacement of the table with a second hand model will not guarantee a match with the existing chairs. The applicants are seeking compensation to replace the table with a comparably high-quality solid timber dining suite that would be expected to last

		multiple lifetimes. The amount claimed is the cheapest amount of the three quotes obtained.
Teak coffee table	\$1,430	The teak coffee table can be repaired, however the table forms part of a suite of teak lounge furniture. To match the colour of the furniture, the matching nesting side tables also need to be re-surfaced. The restitution claimed is the amount it will cost for the re-surfacing of the coffee table and the nesting side tables.
IKEA TV unit purchased about five years ago	\$ 250	It cannot be easily repaired and the costs of doing so would exceed the depreciated value of the item. The applicants are seeking \$250 as compensation for the damage caused by the respondent. The claim has been reduced to reflect the condition of the unit prior to uplift.
Queen mattress	\$ 799	The queen mattress was in perfect as new condition and had been barely used prior to uplift. There is now a hole in the mattress and the sides were damaged with friction burns. The applicants are seeking the full replacement value of the mattress.
Bedside table purchased from Harvey Norman in 2004	\$ 275	The bedside table can be repaired and the amount claimed is supported by a quote for this repair work.
2 x Glass bedside lamps	\$ 500	The lamps were in perfect, as new, condition prior to uplift. They were purchased from the US and shipped to Australia approximately five years ago and have been re-wired by a qualified Australian electrician. One of the lamps was found smashed in the box packed by the respondent. There is no similar product on the market, however the applicants have provided the costs for a similar style two-piece lamp set. The amount claimed includes the purchase price of the lamps, international shipping and an estimate for the costs of re-wiring the lamps for compatibility with Australian electrical standards.
20% of contract costs	\$ 1,267	The applicants are claiming 20% damages for breach of contract as the entire move consisted of five truckloads of items. The damaged goods would fill one truckload, and account for 1/5 th of items uplifted, stored and delivered. The amount is claimed as the applicants did not receive the

		service paid for in accordance with the contract.
Exemplary damages	\$ 5,000	For breach of contract as Mr Inglis told the applicants prior to uplift that the respondent had insurance and he did not deliver all of their furniture under the contract until Tribunal order 13 months after the original delivery date during which time the applicants did not have the use and enjoyment of their furniture. The amount claimed represents an approximation of the applicants' foregone income for the days wasted waiting for delivery, when delivery did not occur.

25. Ms Carter told the Tribunal that, in the telephone call with Mr Inglis in October 2017 when discussing engaging the respondent to undertake their furniture removal, she had specifically asked whether the respondent provided insurance for her furniture and effects while in the respondent's possession and she, again, asked the respondent's removalist, who was carrying out the actual removal, about insurance when they were packing their furniture. When one of the King Furniture book shelves was broken on the day of the removal she said the removalist had told her the respondent's insurance would cover its repair.
26. Ms Carter also said that she had told Mr Inglis in the October telephone call, and the removalist on the day their furniture was uplifted, that she had inherited the teak furniture from her grandmother and she would be particularly upset if any of it was damaged by the respondent. In her email sent to the respondent on 16 May 2018 she had, again, made the respondent aware of the significant value of the teak furniture to the applicants. It was after this email that the respondent arranged for the dining table top to be sanded and this had ultimately resulted in the damage which caused Mr Inglis to send the SMS (see [12] above) to Mr Andrews. In the response the respondent admitted damaging the dining table and offered to replace it with an acceptable one (see [28] below).
27. Ms Carter submitted that the respondent should have returned the items of their furniture to them, as they had repeatedly requested, in its 'as is' condition. Instead, they had to obtain an order from this tribunal for the return of the

furniture in January 2019. The applicants wished to sever their relationship with the respondent and Mr Inglis.

Respondent's contentions

28. In the response filed on 21 November 2018 the respondent stated:

1. *The amount claimed is far in excess of the value of the items.*
2. *All items were standard (second hand/used) in nature with normal amount of ware (sic) & tare (sic) and some were scratched when picked up.*
3. *We have attempted to return some items (in May 2018) but were turned away.*
4. *We have offered to help source equivalent items but this was not acted on.*
5. *We admit damaging (sic) to dining table & would like to replace it with an acceptable one.*

29. In the subsequent response filed on 18 March 2019 the respondent denied that Ms Carter had requested insurance and that they had agreed to ensure that the applicants' goods were fully insured during uplift, storage and delivery phases of the work. Mr Inglis said that if the applicants had requested insurance, they would have been given their standard response – items on the truck and in transit are covered by the respondent's insurance policy for fire, crash or rollover to a value of \$100,000 for any one load.

30. Mr Inglis told the Tribunal that the applicants' claim was "beyond reasonable" as there were comparable items available for sale on eBay and Gumtree. He provided copies of advertisements in March 2019 from both eBay and Gumtree for Parker teak dining tables and coffee tables and bedside lamps.

31. He also told the Tribunal that if every removalist had to pay damages on the basis of the amount sought in the application there would not be any removalists working in Canberra.

Legislation

32. Section 17 of the *ACT Civil and Administrative Tribunal Act 2008 (ACAT Act)* provides that a person may make a civil dispute application to the tribunal. Section 16 of the ACAT Act provides that a civil dispute application consists of one or more of the following:

(a) a contract application

(b) a damages application

...

(i) an application for an order under the Australian Consumer Law (ACT).¹

33. In civil dispute applications the tribunal has the same jurisdiction and powers as the Magistrates Court under the *Magistrates Court Act 1930*, part 4.2 (Civil Jurisdiction).
34. Pursuant to section 18 of the ACAT Act, a civil dispute application cannot be made to the tribunal for an amount greater than the tribunal's jurisdictional limit of not more than \$25,000 unless section 20 of the ACAT Act allows the application to be made.²

Consideration

35. The applicants seek damages of \$24,781 and are relying on the following causes of action arising from the respondent's actions - (a) a damages application to recover damages caused by the respondent's negligence in removing and delivering their furniture and chattels (an action in tort) and in negligently storing their furniture and chattels (bailment); (b) a goods application for recovery of part of the cost of the services under Australian Consumer Law for failing to meet the consumer guarantees and for damage caused by the detention of their goods; and (c) a contract application seeking damages, including exemplary damages, for breach of contract.
36. While it will not often matter which cause of action is relied on, the choice becomes important in the assessment of damages. The text, *Law of Torts*,³ states (omitting footnotes):

Assessment of damages. *There are certain differences in the assessment of damages. First, the purpose of an award in tort is to put the plaintiff, as nearly as possible, in the position which obtained before the wrong was committed, whereas the purpose of an award for breach of contract is generally to put the plaintiff in the position which would have been enjoyed*

¹ ACAT Act section 16(a)-(i)

² Section 20(1): This section applies if a person would be entitled to make an application claiming an amount greater than \$25,000 in a court of competent jurisdiction.

Section 20(2): The person may, by a civil dispute application to the tribunal, abandon the excess by limiting the claim to \$25 000.

³ Third Ed. RP Balkan and JLR Davis Lexis Nexis Butterworth 2004 page 840 [27.45]

had the contract been performed. Secondly, some types of damages are recoverable in one cause of action but not the other. For example, exemplary damages in some tort actions, but at least in Australia, not for breach of contract; and damages for emotional distress while recoverable for at least some torts, may be recoverable in contract only if the defendant expressly or impliedly promised to provide enjoyment or to prevent vexation ... Thirdly, the test of remoteness in tort, depends upon either the reasonable foreseeability of the type of damage at the time of commission of the wrong or a determination of the natural and probable consequences of the wrong, whereas in contract the limit of remoteness is set at that which was in the reasonable contemplation of the parties at the time of entering into the contract. However, if the plaintiff might found the action either in contract or in tort, then in the absence of any countervailing provision in the contract, the remoteness test in tort is applied, whatever cause of action was relied upon by the plaintiff.

37. In the NSW Court of Appeal decision of *McCrohon v Harith*⁴ McColl JA said, in relation to damages:

An injured plaintiff is not entitled to make a profit in an action in tort or contract; in other words, to be awarded damages for a loss never suffered (Wertheim v Chicoutimi Pulp Co [1911] AC 301 (at 307 – 308) per Lord Atkinson) or, in the case of contract, to be placed in a superior position to that which he or she would have been in had the contract been performed: The Commonwealth of Australia v Amann Aviation Pty Ltd [1991] HCA 54; (1991) 174 CLR 64 (at 82) per Mason CJ and Dawson J.

The general rule is that “damages for tort or for breach of contract are assessed as at the date of the breach” – the date of breach rule: Johnson v Perez (at 367) quoting Miliangos v George Frank (Textiles) Ltd [1976] AC 443 (at 468) per Lord Wilberforce. However, the general rule is not rigid and “will yield if, in the particular circumstances, some other date is necessary to provide adequate compensation”: Johnson v Perez (at 367) per Wilson, Toohey and Gaudron JJ; (at 370 – 371) per Brennan J; (at 386 - 387) per Dawson J; see also Golden Strait Corporation v Nippon Yusen Kubishika Kaisha [2007] UKHL 12; [2007] 2 AC 353. ...

Liability

38. Before turning to consider the applicants’ causes of action, the Tribunal notes that the respondent admitted liability for the damage in part. This included the scratches to the teak dining table top and legs and the respondent’s attempted repair by varnishing the scratches when the table had an oiled finish and then by

⁴ [2010] NSWCA 67

sanding the table top and further damaging it when the sander caught on a corner of the table.

39. Mr Inglis did not dispute that the respondent damaged the teak dining room table. In his SMS (see [12] above) he had offered to source equivalent items and to settle the table and “other issues raised by Jennifer – replacing some items and/or some financial recompense and return of items as is.”⁵ It was clear from the evidence of the parties that the furniture the subject of this application, when packed and uplifted by the respondent, was second hand in that it had been used by the applicants and had some wear and tear, but was otherwise described by Ms Carter as in excellent condition, and when it was first delivered to the applicants, had been damaged and was not in the same condition it had been when uplifted. The Tribunal is satisfied and finds, having considering the available evidence, that the respondent damaged each of the items of the furniture that are the subject of this application while the furniture was in its possession, care and control.

Insurance

40. There was a dispute between the parties in relation to whether or not Ms Carter, on behalf of the applicants discussed and confirmed with Mr Inglis that the goods would be fully insured during the removal process. Ms Carter said that this discussion and confirmation of insurance took place in late October 2017 in the telephone call she had with Mr Inglis before she engaged them to carry out the uplift and delivery. In this telephone call she said she also confirmed the respondent’s availability, costs, storage arrangements as the furniture was to be stored by the respondent between uplift on 2 November 2017 and delivery on 19 December 2017 and the special arrangements for the care of the teak furniture while in storage.
41. Ms Carter reiterated, as set out in [26] above, that she had told Mr Inglis in the October 2017 telephone conversation, and the respondent’s removalists on the day of the uplift how particularly special the teak furniture was for the applicants. She requested that it be carefully handled, specially wrapped and protected and

⁵ SMS from Mr Inglis to Mr Andrews 14 September 2017

she said that the removalists had acknowledged this and promised to ensure all items were well protected.

42. Mr Inglis told the Tribunal that insurance cover had not been requested or offered prior to the uplift, and that, until the aborted return of the items of furniture in May 2018, insurance had not been discussed between the parties.
43. The applicants submitted, in the alternative to their claim, that the respondent had agreed to insure their goods during the uplift, removal, storage and delivery of the items and that “the terms of the oral contract between the parties were understood to be terms that are used and agreed in the removal industry as a matter of general course.”⁶
44. It falls to the Tribunal to determine the credibility of the witnesses and the issues in dispute on the available evidence.
45. Having considered Ms Carter’s evidence and Mr Inglis’s evidence the Tribunal finds that insurance coverage was discussed. Ms Carter said that the respondent’s employee had told her on the day of uplift that the broken shelving unit would be covered under their (the respondent’s) insurance and that she could put in a claim after the goods had been delivered. This would have reinforced Ms Carter’s belief that the respondent would be insuring the furniture and chattels. Mr Inglis did not call this removalist to challenge Ms Carter’s evidence notwithstanding that he was on notice from the time the application was filed that this was Ms Carter’s claim (as set out in attachment A to the application). The Tribunal found Ms Carter a credible witness. The Tribunal accepted her evidence.
46. This insurance issue may have been avoided if the parties had entered into a written contract. It was not satisfactorily explained during the hearing why neither party sought to have their agreement recorded in writing.
47. However, it appears to the Tribunal that the insurance cover dispute is somewhat peripheral to the causes of action relied on by the applicants. If the applicants are successful in relation to part or all of their claim then an order will be made

⁶ Applicant’s written submissions at [6]

requiring the respondent to pay the damages assessed. It was apparent at the hearing that Mr Inglis had chosen to represent the respondent without involving his insurance company. However, he indicated once he knew the amount he had to pay for the damages he would probably discuss it with his insurer.

The applicants' claim in tort, in bailment, in contract and Australian Consumer Law

Liability

Negligence - Tort

48. The respondent owed the applicants a duty of care to undertake the packing and removal of the applicants' goods, to store them and to deliver them undamaged to the applicants. The Tribunal refers to [38] above.
49. Not only was the Parker dining table damaged by the respondent, but it is clear from the various photographs provided by the applicants, that a wooden bedside table, a veneer covered TV unit, a circular teak coffee table which matched the dining room table, two wooden shelf fittings for a lounge made by King Furniture, a mattress for a queen sized bed and a glass bedside table lamp, which was one of a matching pair, were also damaged. These items were damaged while in the respondent's care and control and due to their negligence. The Tribunal finds that the respondent breached that duty of care. It was reasonably foreseeable that if the respondent failed to provide that duty of care and were negligent that some of the items of furniture would be damaged.
50. Having considered all of the evidence, the Tribunal is satisfied and finds that the elements of the tort of negligence are made out in relation to the applicants' claims for each of the items of furniture set out in [21] (a) above.

Negligence – Bailment

51. The applicants also brought a claim in bailment against the respondent alleging the respondent had been negligent in relation to the care of their furniture and chattels as these goods were bailed goods and had been returned to the applicants in a damaged condition.
52. The Tribunal finds that the parties had agreed that the respondent would store the applicants' goods for a period of time between the uplift and delivery phases.

Bailment is the act of placing property in the custody and control of another, which in this matter was by agreement with the respondent. As holder of the goods the respondent was responsible for their safe keeping and return. The respondent did not dispute that the applicants' furniture and chattels were held on bailment. Mr Inglis also did not dispute that the respondent or its employees had attempted to repair the damaged items of furniture when the applicants required the respondent to have the damaged furniture repaired in May/June 2018. The furniture was being stored by the respondent during this time and was further damaged by the respondent's employees.

53. Having considered all of the evidence, the Tribunal finds that the services provided by the respondent included the bailment of the applicants' goods; the respondent negligently undertook the bailment and, as a result, some of the applicants' furniture and chattels was returned to them in a damaged condition.

Breach of contract

54. The Tribunal is satisfied, from considering all of the evidence, that the respondent breached the contract with the applicants, and for which the applicants paid the respondent \$6,336, in that it did not transport the furniture and chattels from the applicants' Dickson residence to the applicants' Googong residence undamaged.

The Australian Consumer Law

55. While considering the question of liability the Tribunal has considered whether the respondent's furniture removal service the subject of this application met the consumer guarantees in sections 60, 61 and 62 of *The Australian Consumer Law (ACL)*⁷. These sections state:

60 Guarantee as to due care and skill

If a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill.

61 Guarantees as to fitness for a particular purpose etc.

(1) If:

⁷ *Competition and Consumer Act 2010* Schedule 2

- (a) a person (the **supplier**) supplies, in trade or commerce, services to a consumer; and
- (b) the consumer, expressly or by implication, makes known to the supplier any particular purpose for which the services are being acquired by the consumer;

there is a guarantee that the services, and any product resulting from the services, will be reasonably fit for that purpose.

(2) If:

- (a) a person (the **supplier**) supplies, in trade or commerce, services to a consumer; and
- (b) the consumer makes known, expressly or by implication, to:
 - (i) the supplier; or
 - (ii) a person by whom any prior negotiations or arrangements in relation to the acquisition of the services were conducted or made;

the result that the consumer wishes the services to achieve;

there is a guarantee that the services, and any product resulting from the services, will be of such a nature, and quality, state or condition, that they might reasonably be expected to achieve that result.

- (3) This section does not apply if the circumstances show that the consumer did not rely on, or that it was unreasonable for the consumer to rely on, the skill or judgment of the supplier.

62 Guarantee as to reasonable time for supply

(1) If:

- (a) a person (the **supplier**) supplies, in trade or commerce, services to a consumer; and
- (b) the time within which the services are to be supplied:
 - (i) is not fixed by the contract for the supply of the services; or
 - (ii) is not to be determined in a manner agreed to by the consumer and supplier;

there is a guarantee that the services will be supplied within a reasonable time.

56. Under the ACL businesses must guarantee products and services they sell for under \$40,000.⁸ The guarantees are automatic regardless of any other warranties a business gives or sells.
57. Having considered all of the evidence, the Tribunal is satisfied and finds that the respondent did not provide its services with acceptable care and skill or technical knowledge and taking all necessary steps to avoid loss and damage; that the respondent's services did not give results that the applicants and the respondent business had agreed to, namely packing, uplifting, storing and delivering their furniture and chattels without damage and, as the furniture was finally delivered some 13 months after the respondent's due delivery date, the services were not supplied within a reasonable time. The respondent's services did not meet the consumer guarantees set out above.
58. The ACL sets out remedies for failure to comply with consumer guarantees. Section 267 of the ACL states:

267 Action against suppliers of services

- (1) *A consumer may take action under this section if:*
- (a) *a person (the **supplier**) supplies, in trade or commerce, services to the consumer; and*
 - (b) *a guarantee that applies to the supply under Subdivision B of Division 1 of Part 3-2 is not complied with; and*
 - (c) *unless the guarantee is the guarantee under section 60--the failure to comply with the guarantee did not occur only because of:*
 - (i) *an act, default or omission of, or a representation made by, any person other than the supplier, or an agent or employee of the supplier; or*
 - (ii) *a cause independent of human control that occurred after the services were supplied.*
- (2) *If the failure to comply with the guarantee can be remedied and is not a major failure:*
- (a) *the consumer may require the supplier to remedy the failure within a reasonable time; or*

⁸ Subsection 3(3) of the ACL

(b) *if such a requirement is made of the supplier but the supplier refuses or fails to comply with the requirement, or fails to comply with the requirement within a reasonable time--the consumer may:*

(i) *otherwise have the failure remedied and, by action against the supplier, recover all reasonable costs incurred by the consumer in having the failure so remedied; or*

(ii) *terminate the contract for the supply of the services.*

(3) *If the failure to comply with the guarantee cannot be remedied or is a major failure, the consumer may:*

(a) *terminate the contract for the supply of the services; or*

(b) *by action against the supplier, recover compensation for any reduction in the value of the services below the price paid or payable by the consumer for the services.*

(4) *The consumer may, by action against the supplier, recover damages for any loss or damage suffered by the consumer because of the failure to comply with the guarantee if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure.*

(5) *To avoid doubt, subsection (4) applies in addition to subsections (2) and (3).*

59. Pursuant to section 267(4) of the ACL the respondent is liable to pay compensation to the applicants for the damage and loss caused by its breaches of the ACL. It was reasonably foreseeable that the respondent's failure to comply with any of the guarantees set out in [54] above would cause the applicants to suffer loss and damage.

60. The Tribunal is also satisfied, for the reasons set out above, that the respondent is liable to the applicants for the damage and loss they have suffered as a result of the respondent's negligence, breach of contract and its failure to meet the ACL guarantees.

Issue

61. The primary issue for determination is the quantum of compensation payable by the respondent for its negligence, breach of contract and its failure to meet the ACL guarantees.

62. In determining this issue the Tribunal will need to consider the applicants' claim that the damages should include an amount for the sentimental value of the Parker Teak dining room table which Ms Carter described as 'antique' and which she had inherited from her grandmother.
63. This raises the question of whether general damages are payable for sentimental value of these items.

Damages

64. The onus of proof is on the applicants to prove the amount of damages.
65. In *Tobin v Commonwealth of Australia*⁹ Justice Refshauge of the ACT Supreme Court stated at [165]:

Damages payable for the loss occasioned by a tort are, as Taylor and Owen JJ said in Butler v Egg & Egg Pulp Marketing Board [1966] HCA 38; (1966) 114 CLR 185 at 191, assessed by reference to the general principle upon which compensatory damages are assessed, whether in actions of contract or of tort. That principle is that the injured party should receive compensation in a sum which, so far as money can do so, will put him in the same position as he would have been in if the contract had been performed or the tort had not been committed: Livingstone v Rawyards Coal Co [(1880) 5 App Cas 25 at 39].

66. The law is also clear in relation to the measure of damages in the case of damage to goods. In general, the measure of damages is the cost of repairing the damaged article.¹⁰ However, there is an exception where a reasonable substitute is available for a price significantly less than the cost of repairs. In that situation the replacement cost is the measure of damages.¹¹
67. The Tribunal will consider the individual items for which damages is claimed.

The dining table and six dining chairs

68. The major item damaged was the teak Parker dining table and the amount claimed as compensation for this damage was the most controversial aspect of the hearing.

⁹ [2013] ACTSC 240

¹⁰ *Darbishire v Warran* [1963] 1 WLR 1067, 1071

¹¹ *Ibid*, 1071

69. The applicants sought \$10,000 in their application being “sufficient to be able to replace the dining suite with a similar high-quality wooden dining suite”.¹² By the time of the hearing the applicants had amended their damages claim for the dining room table to \$12,078 being the cost to replace the table with a comparably high-quality solid timber table and six Aspen dining chairs. They provided quotations from King Furniture Australia Pty Ltd for an Aspen Dining Table (\$7,980), a six Aspen chair package (\$4,068) and three quantities of King Guard (\$30) all of which totaled \$12,078 being the amount they now claim as compensation for the damage to the Parker teak dining table.
70. The King Furniture quotation also included a quotation for an Andoo oiled oak table (\$12,159). The third quotation was from Designcraft, which did not include chairs, and was for a Malloy Walnut Timber Table for \$7,194. The fourth quotation was from Andoo for replacement of the dining chairs to accompany the Andoo dining table and the Malloy timber table and ranged from \$1,397 to \$1,575 a chair.
71. The applicants claimed that the compensation should include the cost of six dining chairs to match the replacement table as the teak dining chairs they owned matched the teak Parker dining table which the respondent damaged. Expressed another way, they submitted that “replacement of the table with a second hand model will not guarantee a match with the existing chairs.”¹³
72. However, there was no evidence which would satisfy the Tribunal that the respondent had caused any damage to any of the six chairs which were included in the removal of the applicants’ furniture. The claim appears to be based on the chairs being collateral damage because they had matched the damaged teak dining table. While the applicants had obtained a quotation from The Traditional Furniture Restorer to colour match the teak nesting tables with the teak coffee table after its damage had been repaired, apparently they did not make any enquiry with this furniture restorer about colour matching the existing teak dining chairs to a replacement table. They have a duty to mitigate the damages claimed.

¹² Application filed 18 October 2018, attachment A, page 3

¹³ Applicants’ Amended Application filed 6 March 2019 page 1

The Tribunal finds that they have not met this duty in relation to their claim for new chairs.

73. The Tribunal is not satisfied that in damaging the teak dining table it was reasonably foreseeable that the compensable damage would also include replacing the dining chairs which matched the dining room table and were undamaged. The applicants' claim for compensation for six new chairs fails.
74. The respondent provided copies of advertisements from Gumtree of Parker dining tables for sale in March 2019 ranging from \$695 to \$2,100 and on eBay where bids were shown as ranging from \$200 to \$750.
75. Ms Carter said that the teak Parker dining table was bought in the 1960's. She conceded that it had some pre-existing wear and tear. She added that the wear and tear was far less visible and much less significant than the damage that was done by the respondent. Ms Carter submitted:

Their dining table is part of a matched set of furniture and that the loss of the table means the applicants also lose the value and enjoyment of having a matched furniture set. The applicants submitted that the value of the dining table to them incorporates the value of having a matched set of furniture.

The applicants also submit that the correct basis for a calculation of damages is either the lost value of a matched set of furniture; or, as it is not possible to replace the applicant's destroyed table with an equivalent substitute of comparable excellent quality, the cost of a new table to replace the old.¹⁴

76. There was a dearth of evidence in relation to the market value of this table at the time the applicants entered into the contract with the respondent in October 2017 or at any time since then. They did not provide any documentary evidence to the Tribunal of the cost of carrying out repairs to the dining room table. This was surprising as they did obtain quotes from The Traditional Furniture Restorer on 27 January 2019 for the cost of repairing the teak coffee table by resurfacing it and the nesting side tables to match the colour of their teak furniture.

¹⁴ Applicants' submissions at [21] and [22]

77. As they are now claiming the cost of a new dining table it would have assisted the Tribunal if the applicants had obtained a written statement from a furniture restorer opining as to the cost of repairing the table or, if not considered viable, whether, in the restorer's opinion, as a result of the damage the Parker dining table had been damaged beyond repair.
78. Had the applicants provided evidence of market value of the teak dining room table immediately before and immediately after the damage occurred then the Tribunal could have assessed the measure of damages to this property as the difference between the two market values, unless the property was destroyed, in which case the fair market value of the item, subject to any other considerations raised by the applicants, could have been assessed as the measure of damages. It is also true that, sometimes, the measure may also be the cost of repair provided the cost does not exceed the fair market value of the property.
79. The applicants provided the Tribunal with a copy of their current home and building contents insurance policy with AAMI. The policy listed specified contents, namely climbing equipment (\$5,000) and art supplies (\$20,000). It did not include the teak Parker dining table or any of the other furniture which Ms Carter said she had inherited from her grandparents. This might be explained by the fact that in December 2018 the applicants knew that the teak Parker dining table was damaged, in their view, beyond repair. If the applicants had previously included the teak Parker dining table in the list of specified contents in their home and building contents insurance policy or policies the Tribunal would have expected the applicants to have provided a copy of such insurance policy or policies to support their claim of the value of this table in these proceedings.
80. The applicants referred the Tribunal to the following statement from Halsbury's Laws of England (4th ed):¹⁵

The basic rule is that the measure of damages in the case of damage to a chattel is the cost of repair, but if it is unreasonable from the business point of view to repair the article, or if the article is damaged beyond repair, then the basic measure is cost of replacement in an available market. If there is

¹⁵ Volume 12, 456 [1163]

no available market and it is reasonable to take steps to have a substitute made, the cost of the substitute may provide the measure of damages.

81. The applicants have a sentimental attachment to the teak furniture which belonged to Ms Carter's grandmother. They described it as antique. However, the dining table was, according to the evidence, purchased in the 1960s and is, therefore, a vintage item. Whatever the label, the Tribunal is satisfied that the value of such an item is more usually determined by whether there is a demand for it. Apart from the advertisements from Gumtree and eBay provided by the respondent, there was no evidence of any real demand for a teak Parker dining table which would support a vintage table having a higher value. They seek that the sentimental value, which is now lost, be included in assessing the damages payable to them.
82. In considering the damages to be assessed the applicants are not entitled to recover costs that are extravagant or unreasonable. They are entitled to repair or replacement but not improvement.
83. Mr Inglis submitted that the furniture owned by the applicants was, at the time of the removal, second hand or used, and there were suitable second hand or used replacement dining room tables and coffee tables, such as those he had found on Gumtree and eBay.
84. In considering these submissions the Tribunal has considered the House of Lords decision in *Liesboch Dredger v SS Edison*¹⁶ (**Liesboch**) and the Western Australian District Court decision in *Waldron & Anor v Baz & Anor*¹⁷ (**Waldron**) which the applicants rely on as authorities for identifying the value of damaged goods to the owner taking the owner's particular circumstances into account.
85. *Liesboch* concerned, among other things, the calculation of the measure of damages for the negligent destruction of a dredger which was an income earning chattel. The defendant admitted liability. The complainants claimed their actual loss and argued that all of the circumstances should be taken into account for

¹⁶ [1933] AC 449 (House of Lords)

¹⁷ [2005] WADC 187

damages, including their additional expenses for hiring a substitute dredger. Lord Wright described the issue as follows:

The substantial issue is what in such a case as the present is the true measure of damage. It is not questioned that when a vessel is lost by collision due to the sole negligence of the wrong-doing vessel the owners of the former vessel are entitled to what is called restitutio in integrum, which means that they should re-cover such a sum as will place them so far as can be done by compensation in money, in the same position as if the loss had not been inflicted on them, subject to the rules of law as to remoteness of damage. The Respondents contend that all that is recoverable as damages is the true value to the owners of the lost vessel, as at the time and place of loss.

86. The House of Lords considered the remoteness and foreseeability of the damages claimed and held that the complainant could not claim for their additional hire contract expenses, as this was not foreseeable by the defendants. The House of Lords held that the value of the replacement dredger was determined by market value at the time of loss and assessed recoverable damages as the market price of the replacement for the Liesboch dredger which included any costs that were incurred for insuring and adapting the new vessel, in order for it to be similar to the Liesbosch that was lost as this allowed the complainants to complete the contract. The damages also included compensation for the disturbance and loss to carrying out the contract and until the new one could be reasonably available.
87. *Waldron* concerned the bailment of a second-hand jarrah kitchen which had been purchased for \$11,000 and which, during the bailment, was destroyed by means of white ant infestation and water damage. The issue was whether the plaintiffs were entitled to damages for the destruction of their goods. Deane ACJ, of the Western Australian District Court, observed that the “kitchen was of unusually high quality but not unique in the true sense of the word nor is it irreplaceable Despite its condition this was nonetheless a second hand kitchen”.¹⁸ He stated:

168. Should the replacement cost be more than the market value, that cost is still recoverable if it is reasonable to replace...On the other hand Utkos v Mazzetta [1956] 1 Lloyd's Rep 209 made it plain that a plaintiff will not be entitled to the cost of a replacement where it is unreasonable to demand

¹⁸ Ibid at [167]

an exact replacement. What is reasonable or not of course will vary according to the particular circumstances. ...

88. Deane ACJ, at [170] quoted from *Uctkos v Mazzetta*¹⁹ where Ormerod J said:

I do not think here that the defendant is entitled to damages on the basis that he is entitled to the replacement of his ship. I think what he is entitled to is the reasonable cost of another craft which reasonably meets his needs as this one apparently did and which is reasonably in the same condition.

...

89. In *Waldron* Mr and Mrs Waldron were seeking damages of \$82,500. They had received a quote for \$40,000 for another kitchen they were investigating having installed. This was for a modern kitchen not using jarrah. DCJ Deane said:

172...In my view the quote they have obtained, as best as I can understand it, does cater for a reasonable kitchen in working order and one which will reasonably meet the plaintiff's needs and of course one which will be in new condition. Based on the evidence available I therefore award \$40,000 under this head of damage.

90. The Tribunal finds that nothing relevantly turns on the different causes of action pleaded by the applicants. The Tribunal finds that the respondent is liable for the damage caused to the applicants' furniture and chattels as a result of the respondent's breaches of its contractual and tortious duties to exercise reasonable care and skill in the uplift, removal, storage and delivery of the furniture and chattels. It is also liable for the damage caused to the applicants for its failure to meet the consumer guarantee under ACL.
91. It falls to the Tribunal to determine whether it is reasonable for the applicants to replace the dining room table with a new table and whether the cost of the proposed replacement is reasonable.
92. In the decision of the NSW Court of Appeal in *Murphy v Brown*²⁰ Mahoney JA said:

In some cases, to put the plaintiff in the physical position in which, uninjured, he would have been will result in his being financially in a better position than he was. Thus, it may be that to give the plaintiff what he had

¹⁹ The plaintiff's boat was destroyed by the defendant's negligence. The boat was unusual and the cost of constructing it was very expensive. Boats of comparatively similar design, construction and performance available at lower price. Held: cost of replacement chattel was in excess of value of property destroyed. Plaintiff only entitled to recover value of reasonable price.

²⁰ (1985) 1 NSWLR 131, 133

before, eg, a factory, would result in his being in a better financial position than he was: a new factory may be worth more than the factory that he had. In such circumstances, the sum to be awarded will sometimes, though not always, be reduced: cf Harbutt's case. Rules of this kind are, in principle, directed to ensuring that the plaintiff has, but has no more than, what will put him in his uninjured position.

But there is a further rule which operates by way of qualification of the general principle. Where a plaintiff claims the cost of the work necessary to put him or his property in the pre-injury condition, the work must not merely be necessary for that purpose but "it must be a reasonable course to adopt" to do that work: Bellgrove v Eldridge . And, as the defendant's argument here suggested, it will not normally be reasonable to spend, for example, \$4,000 to restore a vehicle which, undamaged, was worth, say, \$1,000

93. In the English decision of *Farley v Skinner*²¹ the House of Lords considered an appeal in relation to the assessment of damages arising out of a breach of contract. In this case the plaintiff had specifically asked a surveyor to investigate, among other things, whether the property he was considering purchasing would be affected by aircraft noise as the plaintiff did not wish to live on a flight path. The surveyor negligently reported that the property was unaffected by aircraft noise. After the plaintiff purchased the property, he found it was substantially affected by aircraft noise and sought damages for breach of contract. It was ultimately found that an objective of the contract was to avoid such inconvenience and it was enough that the term broken was known by both parties to have been important.
94. As stated above, the Tribunal found Ms Carter to be a credible witness. The Tribunal accepts her evidence that the Parker dining table held special sentimental value to her and that she conveyed this to both Mr Inglis and the removalist who packed their furniture and undertook the uplift from the applicants' Dickson home. Mr Inglis did not dispute this.
95. In considering whether the damages should include a value for the sentimental value of the teak Parker dining table and its loss from the suite of furniture which Ms Carter inherited, the Tribunal has found some guidance in the decision of the New South Wales Supreme Court in *Jianwei v State of New South Wales*.²² The

²¹ [2001] UKHL 49

²² [2014] NSWSC 933

decision concerned a claim by the plaintiff in bailment for damages for the loss of personal items confiscated by police officers and later destroyed while the plaintiff was held in custody of the New South Wales police force. The defendant had accepted liability to compensate the plaintiff. The only issue was the assessment of damages for the loss of a necklace and pendant and whether it should include an amount for compensation for sentimental value of those items.

96. The pendant was a carved jade pendant which had been given to the plaintiff's father by his paternal grandfather prior to 1945 and given by his father to the plaintiff when he was 20 in 1990.
97. After assessing the loss of the jade pendant in the amount of \$10,000 Nicholas AJ said at [33] and following:

33. The claim is to be assessed with regard to the personal or emotional value of the piece to the plaintiff, as distinct from its objective or intrinsic value. It is now settled that the scope of general damages payable in cases of the present kind is not confined to economic loss of market value, but may include an amount for non-pecuniary loss (Graham v Voigt (1989) 95 FLR; Ichard v Frangoulis (1977) 1WLR 556' Murphy v Doman [2001] NSWCA 419; Palmer on Bailment, 3rd edition paras 37-125, 37-017).

34. The plaintiff's evidence, which I accept, was that the pendant was of significant meaning to him. He regarded it as a family heirloom which had been handed down through his grandfather and father. It was given to him when he was about 20 years old, and he had worn it everyday since about 2005. I am satisfied that the pendant had real sentimental value for the plaintiff, and I infer that its loss and destruction would have been deeply felt. Furthermore, in my opinion, it was reasonably foreseeable that the pendant was a possession of sentimental value to the plaintiff.

35. Mindful that damages are compensatory, an assessment is necessarily a matter of impression as to which there are no clear standards which can be applied (Murphy para 4). Quantification should be modest (Farley v Skinner [2001] UKHL 49; (2002) 2 AC 732 at 7438. In my opinion the appropriate amount for sentimental value is \$2,500.

98. In *Jianwei* the award of general damages for the value of the items was increased by the amount of \$2,500 referable to the sentimental value.
99. In the present matter, the Tribunal finds that the importance of the sentimental value of the Parker furniture was made known to the respondent and to Mr Inglis and, therefore it was reasonably foreseeable that damage to the furniture would include damage to the sentimental value to the applicants. However, as stated in

Jianwei the quantification of sentimental value should be modest. If the Tribunal was assessing a monetary amount for the sentimental value the Tribunal would have assessed this amount at \$750.

100. However, it was clear from the application that the applicants seek a new wooden table to replace the damaged teak dining table. In these particular and unique circumstances, the Tribunal has determined that the replacement of the teak dining table with a new wooden table, is reasonable and takes into consideration the lost sentimental value of this table in itself and as part of the suite of teak furniture.
101. The question now is whether the cost of the proposed replacement table is reasonable.
102. Ms Carter, unsurprisingly, queried the condition of the various dining room tables advertised on Gumtree and on ebay and relied on by Mr Inglis. It was difficult to determine their condition from the photographs. In all of the circumstances, the Tribunal is not satisfied that the damages payable for the Parker dining table should be assessed using the advertised prices for these tables on either eBay or Gumtree.
103. The Tribunal finds that, of the quotations (in [68] and [69] above) provided by the applicants, the least expensive is for a Mallow Walnut timber table for \$7,194. In all of the circumstances the Tribunal finds that this amount is reasonable and will assess the damages payable by the respondent to the applicants for the loss of their Parker dining room table at \$7,194.

Teak coffee table and nesting tables

104. The applicants submitted that apart from the circular teak coffee table and the wooden bedside table which are able to be repaired, the other items are unable to be economically repaired and therefore, their value is to be determined as being ‘destroyed’ or ‘written off’.
105. The applicants relied on the quotation 17-19 from The Traditional Furniture Restorer for the repair of the circular coffee table of \$660. The respondent provided a copy of a March 2019 Gumtree advertisement for “a mid century

Parker Teak Coffee Table” for \$180 and of a March 2019 ebay advertisement for “a retro wooden teak round coffee table vintage – Danish Parker Eames era” for \$145. While the cost to repair the coffee table exceeds the replacement cost for a similar coffee table advertised on Gumtree and ebay in March 2019 the seller in the Gumtree advertisement was located in Huskisson and freight would be incurred. It is also quite difficult to determine the condition of the tables from the photographs which Mr Inglis filed.

106. The Tribunal is satisfied, therefore, that, in the particular circumstances of this matter where the coffee table and nesting tables were part of the inherited furniture for which the applicants had a sentimental value, the amount for repairs of \$660 is a reasonable and proper amount to compensate the applicants for respondent’s damage to the coffee table as a result of the respondent’s negligence. As the nesting tables matched the teak colouring in the coffee table and dining room table, the Tribunal is also satisfied that the repair quotation of \$770 to colour match the nesting tables is, in the particular circumstances of this case, also reasonable.

Bedside cabinet

107. The applicants have obtained a quotation for \$275 from the same furniture restorer to repair the drawer in the bedside cabinet which was also damaged by the respondent. The respondent did not provide any evidence in relation to the value of repairing the drawer. The Tribunal finds that the quotation for \$275 for this repair is reasonable and will allow it.

TV unit

108. The applicants’ TV unit was five years old and cannot be easily repaired. The cost of doing so would exceed the depreciated value of the unit. The applicants seek \$250 compensation for the damage. They obtained three quotes from IKEA for the replacement of their TV unit. The quotes ranged from \$400 to \$299. The respondent provided a copy of an advertisement on Gumtree in March 2019 for an IKEA Hemnes TV/Entertainment unit for \$120 which was located in Jerrabomberra. The respondent also provided a copy of an advertisement on eBay for an IKEA Mostorp TV entertainment unit in beige high gloss for \$329. In these circumstances, the Tribunal is satisfied that the sum of \$250 sought by the

applicants is in the range of the above prices and reasonable in the particular circumstances.

Mattress

109. The applicants are seeking \$799 for the replacement value of the mattress. They did not provide any evidence of the cost of repairing the damage. The applicants said they have not replaced this mattress. The damage has not impacted on the functionality of the mattress. The Tribunal is not persuaded that they should recover damages being the replacement cost of the mattress. The Tribunal will assess \$100 for the damage to the appearance of the mattress.

Shelving units

110. The King Furniture shelving units belong to a modular lounge which is over ten years old. The applicants did not provide evidence to the Tribunal of the current value of the modular lounge suite with and without the shelving units. They alleged the shelving units cannot be repaired but did not provide evidence corroborating this allegation. They seek \$1,280 to purchase two shelving units (\$640 a unit) from the original supplier, King Furniture. The applicants provided a quotation from King Furniture dated 23 February 2019 for the shelving units for the amount of their claim
111. The respondent did not provide any evidence of the cost of repairing or replacing these two units. The Tribunal accepts the applicants' submission that the broken units devalue this modular lounge. In these circumstances, the Tribunal finds that the amount claimed is reasonable and will assess the amount claimed, \$1,280, as compensation for the damage to the units.

Bedside lamps

112. The applicants claim compensation of \$500 to replace two glass bedside lamps which were purchased from America and shipped to Australia approximately five years ago and had been rewired by a qualified Australian electrician. The lamps had been packed by the respondent. The applicants found one of the lamps had been smashed in the box. They provided a quotation from Bed, Bath and Beyond, an American retail store, for \$A253.59 for two Safavieh Blackburn Hurricane Table lamps with glass shades and also claimed shipping of \$100 and rewiring

by an Australian electrician of \$100. The respondent provided copies of two advertisements on eBay in March 2019 for new adjustable table lamps at \$75.99 each (\$151.98) and new vintage retro bedside table lamps for \$21.99 each (\$43.98). The Tribunal assesses the compensation payable for the damaged lamp at \$152, which is in the middle of the range of the cost to purchase new lamps and, in all of the circumstances, reasonable.

Exemplary Damages

113. The applicants submit that exemplary damages are a remedy which may be awarded in civil torts claims which seek recovery of damage to goods.²³ They seek \$5,000 as exemplary damages on the basis that the respondent withheld their property for more than a year despite the applicants' multiple emails and telephone calls seeking the return of their goods. During this time, they have lost the use and enjoyment of the goods retained by the respondent.
114. The applicants also submit that the respondent intended to harm them by withholding their furniture and prevented the applicants from seeing and assessing the damage. It was not until the applicants obtained a tribunal order at the first preliminary conference some 13 months after the due delivery date that the items were returned.
115. Mr Inglis did not deny that his business had held the goods until ordered by the Tribunal to deliver them to the applicants in January 2019, but said he did attempt to deliver them on 16 May 2018 when Ms Carter rejected them on account of the unacceptable repair the respondent had carried out to the dining table top.
116. The applicants had been without their goods for 13 months, an unreasonably long period of time. Numerous days and times had been agreed for the delivery of the furniture when the applicants or one of them was at home to receive the furniture and, without notice, the respondent failed to deliver the furniture. Mr Inglis did not give any evidence which would have assisted the Tribunal understand why the goods had been held back from the applicants.

²³ Applicants' submissions at [36]

117. The applicants seek exemplary damages based on the respondent's conduct to discourage similar conduct in the future by the respondent or others.
118. Exemplary damages are available in what is normally thought of as the domain of negligence action.²⁴ In *Gray v Motor Accident Commission*²⁵ the High Court said, omitting citations:

Exemplary damages could not be properly awarded in a case of alleged negligence in which there was no conscious wrongdoing by the defendant. Ordinarily, then, questions of exemplary damages will not arise in most negligent cases be they motor vehicle or other kinds of case. But there can be cases, framed in negligence, in which the defendant can be shown to have acted consciously in contumelious disregard of the rights if the plaintiff or persons in the position of the plaintiff...

119. In *Lamb v Cotogno*²⁶ the plurality of the High Court considered an appeal from a decision of the NSW Court of Appeal upholding, by majority, an award of exemplary damages in addition to the plaintiff's substantial damages for personal injury by the Master of the NSW Supreme Court. The plurality said (omitting citations):

Exemplary damages go beyond compensation and are awarded 'as a punishment to the guilty, to deter from any such proceeding in the future, and as a proof of the detestation of the jury to the action itself': Wilkes v Wood (1763)

...

The punitive aspect of exemplary damages was emphasised by Brennan J in XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd (1985) where he said

As an award of exemplary damages is intended to punish the defendant for conduct showing a conscious and contumelious disregard for the plaintiff's rights and to deter him from committing like conduct again, the considerations that enter into the assessment of exemplary damages are quite different from the considerations that govern the assessment of compensatory damages.

...

The social purpose to be served by an award of exemplary damages is, as Lord Diplock said in Broome v Cassell & Co [1972] ... 'to teach a wrongdoer that tort does not pay'.

²⁴ "Torts Cases and Commentary" 7th ed Lexis Nexis page 487 [8.1.9]

²⁵ (1998) 196 CLR 1

²⁶ (1987) 164 CLR 1

120. The applicants stated in their submission that the sum of \$5,000 claimed for exemplary damages represented an approximation of their foregone income for the days they wasted waiting for delivery, when delivery did not occur. However, they did not provide any evidence, such as pay slips, which would enable the Tribunal to determine whether the amount claimed by the applicants was reasonable.
121. The Tribunal is satisfied, having considered all of the evidence, that the applicants were placed in an invidious position because of the respondent's conduct throughout this matter. They are entitled to an award of exemplary damages for the respondent's conscious and scornful behavior in this matter. Doing the best it can with the available evidence the Tribunal assesses this amount as \$1,900.80 being 30% of the services charged by the respondent.

ACL

122. The applicants have also claimed under the ACL. The Tribunal is satisfied for the reasons set out above that the respondent failed to provide its services in accordance with the consumer guarantees. The Tribunal assesses the damages under this claim as a further 20% of the sum of \$6,336 which the applicants paid to the respondent for their services, \$1,267.

Conclusion

123. For the reasons set out above the Tribunal will enter judgment for the applicants for the following amounts:

Damages to Parker teak dining table	\$ 7,194.00
Damages to the teak coffee table	\$ 1,430.00
Damages for replacement of 2 shelving units	\$ 1,280.00
Damages IKEA TV unit	\$ 250.00
Damages for the bedside table	\$ 275.00
Replacement of 2 bedside lamps	\$ 152.00
Damage to Queen mattress	\$ 100.00
Exemplary damages	\$ 1,900.80
Damages under ACL	<u>\$ 1,267.00</u>
TOTAL	\$13,848.80

124. To the damages of \$13,848.80 the Tribunal orders that the respondent pay interest calculated in accordance with Court Procedures Rules 2006 from 17 December 2017, \$1,106.61 and the filing fee of \$559 and the ASIC company search fee of \$9.

.....
Presidential Member E Symons

HEARING DETAILS

FILE NUMBER:	XD 1408/ 2018
PARTIES, APPLICANT:	Jennifer Jean Carter & Gregory Kim Andrews
PARTIES, RESPONDENT:	Rumbles Group Pty Ltd
COUNSEL APPEARING, APPLICANT	N/A
COUNSEL APPEARING, RESPONDENT	N/A
SOLICITORS FOR APPLICANT	N/A
SOLICITORS FOR RESPONDENT	N/A
TRIBUNAL MEMBERS:	Presidential Member E Symons
DATES OF HEARING:	12 April 2019