District Court
New South Wales

Medium Neutral Citation :	Lee and Robert Rumble v Liverpool Plains Shire Council & Ors [2012] NSWDC 95
Hearing Dates :	22 May 2012, 23 May 2012, 24 May 2012, 25 May 2012 and 28 May 2012
Decision Date :	5/07/2012
Before :	Mahony SC DCJ
Decision :	1. Verdict and Judgment for the Plaintiffs against the First Defendant. 2. Verdict for the 2nd-5th, and 7th-9th Defendants. 3. Judgment for the Cross-Claimant on the Cross-Claim.
Catchwords :	Trespass, Conversion, Aggravated and Exemplary Damages
Legislation Cited :	Local Government Act 1993 Environmental Planning and Assessment Act, 1979 Motor Dealers Act 1974 Civil Procedure Act 2005 Evidence Act 2005
Cases Cited :	Matar v Jones [2011] NSW CA 304 AMP General Insurance Limited v Kull [2005] NSWCA 442 Giorginis v Kastrati [1988] 48 SASR 371 Plenty v Dillon & Ors (1991) 171CLR 635 Grant v Brewarrina Shire Council [No. 2] [2003] NSW LEC 54 The Mediana [1900] AC 113 Port Stephens Shire Council & Anor v Tellamist Pty Limited [2004] NSWCA 353 New South Wales v Ibbett (2006) 231 ALR 485 Kuru v The State of New South Wales (2008) 236 CLR 1 Uren v John Fairfax & Sons Pty Limited (1966) 117 CLR 118 Lamb v Cotogno (1988) 164 CLR 1 Rookes v Barnard [1964] AC 1129 at 1228 Fontin v Katapodis (1962) 108 CLR 177 Kidman v Farmer's Centre Pty Limited [1959] Qd R 8 Bankstown City Council v Alamdo Holdings Pty Ltd (2005) 223 CLR 660 Mid Density Developments Pty Ltd v Rockdale Municipal Council (1993) 44 FCR 290 NSW v Ibbett (2006) 229 CLR 638 at [31] XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd (1985) 155 CLR 448 Rookes v Barnard [1964] AC 1129

Texts Cited :	Luntz, Assessment of Damages for Personal Injury and Death, 4th Ed Mayne & McGregor On Damages, 12th Ed, 1961 The Law of Torts, 4th Ed, R P Balkin and J L R Davis Fleming's "The Law of Torts", 10th Ed.
Category :	Principal judgment
Parties :	Lee and Robert George Rumble - Plaintiffs Liverpool Plains Shire Council - 1st Defendant Mervyn John Prendergast - 2nd Defendant Matthew Sproul - 3rd Defendant Christine Anderson - 4th Defendant Simon Carroll - 5th Defendant The State of New South Wales - 6th Defendant (Discontinued) Paul Fahey - 7th Defendant Chris Byers - 8th Defendant Darren Clark - 9th Defendant
Representation :	Websters Solicitors - Plaintiffs Moray & Agnew - 1-5 and 7-9 Defendants Henry Davis York - 6th Defendant S Galitsky - Plaintiff J Guihot - 1-5 and 7-9 Defendants M Hutchings - 6th Defendant
File Number(s) :	11/58125
Publication Restriction :	None

JUDGMENT

The Plaintiffs' Claims

1 By an Amended Statement of Claim the plaintiffs claim to be the registered proprietors and occupiers of a property at 69 South Street Quirindi, NSW, and entitled to the exclusive possession and quiet enjoyment of the property. In fact, Mr Robert George Rumble is the registered proprietor of the property, where he has resided with his wife, Mrs Lee Rumble and their five children, since 1993.

2 Mr and Mrs Rumble claim damages for trespass to that property committed by the Liverpool Plains Shire Council ("the Council"), which was vicariously liable for the actions of its employees (the 2nd, 3rd, 4th and 5th defendants) and its sub-contractors (the 7th, 8th and 9th defendants). The trespass took place on 13 and 14 August 2009 in the circumstances outlined below.

3 In addition to their claim for damages for trespass, the plaintiffs claim both aggravated and exemplary damages in respect of the trespass. On 13 and 14 August 2009, the Council, by its employees and agents, took from the property a number of damaged and derelict cars, car bodies and various car parts, for which the plaintiffs also seek damages in conversion and detinue.

4 The plaintiffs' claim against the 6th defendant, The State of New South Wales (on behalf of two police officers who attended the property on 13 August 2009), was resolved prior to the hearing. Each of the remaining individually named defendants (that is the 2nd - 5th and 7th-9th defendants) rely on the indemnity provided by s 731 of the *Local Government Act 1993* ("LGA") which provides an indemnity from liability in carrying out duties on behalf of the Council provided those duties were carried out in good faith. Each of those defendants claim they were acting in accordance with directions given by the 2nd defendant, Mr Prendergast, or on his instructions.

5 The Council has conceded a trespass to the land. However, it submits no damage was sustained to the land upon which the trespass occurred and therefore the appropriate damages were nominal damages. It further submits that the circumstances of the trespass do not warrant an award of either aggravated or exemplary damages, and that the plaintiffs' claims for damages for conversion are alternatively not made out or are grossly overstated.

Background to the Dispute

6 From 1992 the plaintiffs had operated a business known as Quirindi Auto Spares from premises at 326 Loder Street Quirindi, selling second-hand motor vehicles and new and used car parts. Mr Rumble had left school in year 7 and had thereafter done unskilled work until 1980 when he commenced an automotive mechanical engineers certificate course at Walcha at the Institute of Automotive Mechanical Engineers. He obtained his certificate in 1986. The business operated at Loder Street until 2005 when he sold that property to the Council.

7 Following the sale, the plaintiffs moved some of the vehicles from their business to their home at 69 South Street Quirindi. They allege that in July 2005 a council officer by the name of Bob Stewart attended at the property and the following conversation took place:

> Stewart: "If you want to store vehicles and parts, you need to put up a fence.
>
> Mr Rumble: So in order for us to store some vehicles on the spare block of land on the South Street property, we need to put up a fence on that land?
>
> Stewart: Yes. Just put in a DA to apply for the fence and the storage of the vehicles and the council will approve it. There shouldn't be a problem.
>
> Mr Rumble: Okay then."

8 Both the plaintiffs then held a belief that they had approval from the Council to erect a fence and store vehicles on the property. A DA was submitted to Council and in August 2005 Mr Stewart re-attended at the property and having observed what was stored on the property, said:

> "That is fine. The Council will approve your DA. It is okay to store vehicles behind the fence."

9 Both plaintiffs deposed that they thought the development application granted by the Council was not only for the erection of a fence, but for the storage of vehicles as well. That is not borne out by the development application which is Exhibit RGR02 (Judge's Bundle p 461), which clearly shows approval granted for the proposed development of "fence only".

10 After the sale of the Loder Street property, the plaintiffs purchased a property at 73 Henry Street Quirindi. A development application was lodged with the Council for use of those premises as commercial premises for selling used vehicles and new and used car parts. An interim occupation certificate was issued on 1 September 2006, however, the final occupation certificate was not issued until 16 October 2009. The plaintiffs conducted a business known as "B L Cars" at 73 Henry Street. Due to the limited space at Henry Street, the plaintiffs used their property at 69 South Street to store some spare vehicles and car parts. However, Mr Rumble deposed that:

> "We never used the property for the purpose of selling vehicles and car parts. All the sales and business activities were carried out at Henry Street." (Para 21 of his Affidavit).

11 On 16 August 2007 Mr Rumble received a letter from the Council allowing him permission to store four cars at the front of his property for personal use only. He believed this was in addition to the vehicles that he had stored on the property already.

12 Both plaintiffs deposed that they received no visit from any council officer and no objection in respect of the use of their property from July 2005 until 2009. During that time they continued to use the property to store spare vehicles and car parts.

13 Sometime around mid 2009, the plaintiffs depose that a council officer, Mervyn Prendergast, attended at the property and suggested they place a fence on the inside of that part of the property so as to shield the cars stored on the property. He said that they did not need to put in a DA for the fence. Mr Rumble has deposed that the fence was at the left-hand side of the property and was built within the boundary of the property in accordance with the instructions of Mr Prendergast.

14 On 30 July 2009 Mr Prendergast and another council worker, Matthew Sproul, attended at the property and served on Mr Rumble a notice purporting to be pursuant to s 121 (1b) of the *Environmental Planning and Assessment Act, 1979 ("the EPAA")*.

15 On 5 August 2009 Messrs Prendergast and Sproul attended at the premises again to hand to the plaintiffs a notice of

intention to serve an order, together with another order pursuant to the EPAA.

16 Again, on 12 August 2009, the same officers visited the property and handed Mr Rumble another order dated 12 August 2009 (Exhibit RGR-07). That order required compliance within 12 hours, and also gave notice of a right to appeal against the order within 48 hours after service of the order.

17 The plaintiffs contend that the orders served on them were not valid orders, were made ultra vires and provided no right of entry to the Council or its officers onto their property.

18 The Council concedes that the documentation relied on by it (i.e. the orders served by its employee on the plaintiffs) did not satisfy the requirements of the EPAA. It also concedes a trespass to the land took place on 13 and 14 August 2009. Council further submitted that had it "complied with the legislative requirements it would have been able to take action to remove the multiple vehicles that had accumulated on the property thereby rendering it a "junkyard" within the meaning of the applicable zoning pursuant to the Quirindi LEP". That submission was made to support Council's submission that it was appropriate to award nominal damages only in respect of the trespass and no basis existed for an award of aggravated or exemplary damages.

The Events of 13 and 14 August 2009

19 The property at 69 South Street comprised two lots on the outskirts of Quirindi which were zoned residential. An aerial photo of the site taken on 25 January 2010 is annexed to the affidavit of Michael George Whitney and marked MW2 at JB5 pg 531. What occurred on 13 and 14 August 2009 is described, from the plaintiffs point of view, in their respective affidavits and is revealed in the video footage contained in five DVDs marked Exhibit B. Only the first DVD was shown in open Court, by agreement between the parties. Both Mr and Mrs Rumble were crossexamined at some length. The events of the two days was also described in the affidavit of Mervyn Prendergast (Exhibit 25) and to a lesser extent, in the affidavits of the 3-5th defendants and the 7-9th defendants. None of those deponents were cross-examined on their affidavits.

20 There is little dispute as to the circumstances of the trespass. At approximately 9am on 13 August 2009 Mr Mervyn Prendergast and Mr Matthew Sproul attended with two police officers at the front driveway gate of the premises at 69 South Street. Mr Prendergast handed to Mr Robert Rumble two documents referred to as "Delegations of Authority" (see Exhibit RGR-08, JB481-484) and asked him to open the locked driveway gate. When Mr Rumble refused to unlock the gate, Mr Sproul was directed by Mr Prendergast to use bolt cutters to cut the lock and chain. The evidence is overwhelmingly clear that Mr and Mrs Rumble were refusing their permission for the Council officers to enter, were protesting that those officers had no right to enter the property, and further, were telling those officers that they needed a Court Order to force entry and to remove any item from the property. It was not in issue that the council officers had no permission to enter onto the property and were entering it against the will of the plaintiffs. Present at the property at the time this occurred were the plaintiffs' five children and seven other friends or members of the plaintiffs' family.

21 Mr Prendergast had arranged for two police officers to be present when the entry occurred. Prior to the forced entry by the council officers, Mrs Rumble had the following conversation with those officers:

> Mrs Rumble: "Are you on the side of the Council to enforce entry? We do not give permission to anyone to enter our property.
>
> Police Officers: We are neutral. We are here to see nobody gets hurt.
>
> Mrs Rumble: Nobody will get hurt. We will do it by the book to the letter of the law."

22 Following the entry onto the property, Mrs Rumble then said to the police:

> "Please charge them with trespass after I had asked them three times to leave the property once they entered. Are you going to act against the law?
>
> Constable Harcher: "No I won't do that. Their paperwork is right. Don't tell us about the law.
>
> Mrs Rumble: If you know the law, then you should know that you will be charged with trespass too once you enter my property without my permission. Any other unauthorised persons will be charged with trespass too from this time forward."

23 In addition to the various conversations referred to, there were, exhibited on each of the gates on the property, four signs exhibiting the words:

"TO ALL PERSONS & ENTITIES

ADMITTANCE BY

INVITATION ONLY OR

TRESPASS APPLIES"

Those signs are Exhibit RGR-09 and appear at JB p 486. The document contains other content which is referred to in paragraph 45 below.

24 It was not in issue that the council officers were asked to leave the property on three occasions. They continued onto the property and used bolt cutters to cut off the lock of an interior gate to gain entry to the yard at the side of the house situated on the property. Thereafter, the council officers set about removing, by means of tow trucks and trailers, the various cars and car wrecks on the property. The process took two days.

The Issues in the Proceedings

25 As the Council conceded from the outset of the proceedings that the notices and orders relied on by the council officers were invalid, and because no defendant witness was required for crossexamination, the following matters became the focus of the hearing:

(1) The credit of Mr and Mrs Rumble.

This related to three general areas:

(a) Their previous dealings with the Council and their noncompliance with the zoning of their residential property.

(b) Their failure to comply with a subpoena served on them prior to the hearing requiring production of certain documents and a Notice to Produce.

(c) Their publicly expressed affiliation with something known as the "Independent Sovereign State of Australia" (abbreviated to "ISSA"). This was evidenced by documents that the plaintiffs had themselves forwarded to the Council (see Exhibit MP3, JB687 to 699, and Exhibit 16, a document entitled "Secession", which, on its terms, amounted to a political manifesto). By virtue of their membership, both plaintiffs asserted they were exempt from, inter alia, the Local Government Act and Commonwealth taxation legislation.

(2) The valuation of the 56 vehicles (or parts thereof) removed from the property. The plaintiff relied on evidence deposed to by Mrs Rumble as to what they paid historically for those various vehicles, together with the cost of acquisition, namely, transport and accommodation incurred in transporting the vehicles to Quirindi. The defendant challenged the lack of receipts or other documentation in respect of most of the vehicles and the basis of the evidence for damages for conversion. The defendants relied on their own valuations of the various items (Exhibits 29 and 30), the basis for which were challenged by the plaintiffs.

(3) The conduct of the various council employees and whether their conduct in the surrounding circumstances warranted an award for either aggravated or exemplary damages.

The Plaintiffs' Evidence

26 Mrs Lee Rumble swore an affidavit on 4 July 2011 (Exhibit A, Tab 20). In that affidavit Mrs Rumble set out the dealings between herself and her husband and the Council from 2005. That included evidence of various conversations she had with a Council employee, Mr Bob Stewart, in July 2005 leading to the development application that was approved by Council on 24 August 2005 for a fence to be erected around their property at 69 South Street. That led Mrs Rumble to state at paragraph 14 of her affidavit:

" ... I believe that Robert and I had approval from the Council to erect a fence and store vehicles on the property as Bob Stewart stated that there would not be a problem getting approval for the development application."

27 At paragraph 18 she stated that prior to the development application being approved, Mr Stewart had said to her words to the following effect:

"The Council will approve your DA. It is okay to store vehicles behind the fence."

28 Mrs Rumble stated in paragraph 20:

> "I thought the development application for erection of the fence together with the explanation of the purpose of putting up a fence in order to store vehicles and car parts on the property constituted development application for storage of vehicles as well. I always considered that Robert and I made the development application to the council for the fence and the storage of vehicles at the same time."

29 When Mr and Mrs Rumble commenced their new business at premises in Henry Street, she stated, at paragraph 23 of her affidavit:

> "Due to the limited space at Henry Street, Robert and I used the property to store some spare vehicles and car parts. However, the property was never used for the purpose of selling vehicles and/or car parts. All the sales were carried out at Henry Street."

30 At paragraph 26 of her affidavit, Mrs Rumble stated that after Mr Stewart attended the property in 2005, Council officers did not attend the property again until 2009. In mid 2009 Mr Prendergast attended the property and spoke to Mr Rumble about installing an internal fence. In July 2009 Mr Prendergast again attended the property and on this occasion advised Mrs Rumble that the Council had decided that all unregistered vehicles needed to be removed from the property.

31 Following that conversation, Mr Prendergast and Mr Sproul served Mr and Mrs Rumble with notices purporting to be pursuant to the EPAA on 30 July 2009 and on 5 August 2009. On 12 August 2009 they again attended the property and served Mr and Mrs Rumble with amended documents which purported to be an order that they remove all of the unregistered vehicles from the property and comply with the order within 12 hours. Further, Mr Prendergast said to them:

> "If you do not remove all the unregistered vehicles today, we will come in and remove all of them."

32 In respect of trespass itself, at paragraph 40 Mrs Rumble stated that:

> "I felt very upset and frightened about the conduct of the Council officers."

33 Of the removal of the vehicles, Mrs Rumble stated at paragraph 79 of her affidavit that:

> "The biggest disappointment is that the tilt-tray drivers took our vehicles on the main street. Our family members, neighbours and friends were watching it. Everyone knew these were our vehicles. It was and still is extremely intimidating and humiliating."

34 As to the affect on her, Mrs Rumble stated at paragraph 80:

> "I and, to my observation, my children were petrified by the horrific display of these persons forcing their way onto the property. This was our home, a place that is supposed to be safe and secure. Then police officers with weapons just came to the property and allowed the Council officers to cut our gate open and drag our vehicles and car parts. I was afraid for my safety and the safety of my children. I felt so hurtful when my children were standing there crying and asking why this is happening in front of armed police officers. My only explanation to them was that the police officers refused to listen to anything that was said to them.

35 Paragraph 81:

> "After the incident, I have a fear of police and authority and I have also observed my children exhibiting fears of police and authority."

36 Paragraph 82:

> "I have difficulty sleeping and cannot fully enjoy my life any more. I even have medical treatment for the emotional stress that I suffered from the incident. I am now on a disability pension due to the incident."

37 Part of paragraph 74 and the whole of paragraph 75 of her affidavit were objected to and not admitted. Leave was given to Mrs Rumble to call further evidence of valuation of the various damaged vehicles and items taken from the property. In examination in chief, Mrs Rumble provided an explanation for the estimates of value given to the vehicles listed in the documents exhibited to her affidavit marked LR14 and LR15, which ultimately became Exhibits D and E in the proceedings respectively (see separate judgment). Generally speaking, the valuations attributed to vehicles in both exhibits were based on the recollections of Mr and Mrs Rumble as to what they purchased the vehicles for, together with estimates of the cost of acquisition incurred in bringing those vehicles to Quirindi. Mrs Rumble prepared a further schedule of calculations as to the value of the vehicles listed in Exhibits D and E, and that schedule became Exhibit F in the proceedings.

38 In cross-examination, Mrs Rumble stated that, for the purpose of that valuation process, she had reference to documents

held in folders in a filing cabinet kept at 73 Henry Street (T45.35). Those folders contained records with a photo of the vehicle and an invoice for what was paid for the vehicle (T46.1).

39 These were the same documents that were required to be produced by the plaintiffs on subpoena, but when asked why she did not bring them to court, Mrs Rumble said, "I forgot them" (T49.27). Where a receipt existed evidencing payment, Mrs Rumble stated that she annexed it to her affidavit (T50.33).

40 With respect to the conversations Mrs Rumble had with Mr Stewart in 2005, it was put to her in cross-examination that her stated belief following her conversation with Mr Stewart that she had consent of Council to store as many vehicles as she liked for as long as she liked, could not be right. She disagreed (T54.19). She did, however, agree when the proposition was put to her that she and her husband had only sought permission for temporary storage of 20 vehicles for a maximum of 12 months and permanent storage of 10 vehicles. On that basis, she agreed that she could not have possibly considered that she had permission to store as many vehicles as she liked for as long as she liked. Notwithstanding that, at T63.25 she disagreed with the suggestion that she could not have genuinely held the belief outlined above.

41 Mrs Rumble disagreed with the proposition that the property at 69 South Street, up to 13 August 2009, was being used for the purpose of repairing and selling vehicles (T66.9). That answer was given, notwithstanding her own solicitor's letter to Council dated 14 September 2009, which was exhibit LR16 to her affidavit, which stated:

> "You are also aware that for a long period of time our clients have used 69 South Street, Quirindi for the purposes of repairing and selling vehicles in respect of which Mr Rumble is a licensed motor vehicle dealer."

42 Mrs Rumble's explanation for that letter was that "our wires got crossed" and "this letter went with the conclusion that it was only 69 South Street that was selling and repairing vehicles and that was not the case" (T66.46).

43 At T82 Mrs Rumble stated that she had sought an extension of time from Mr Prendergast on or after 5 August 2009 as they were trying to move vehicles from both the South Street and Henry Street properties. That was not a matter that was referred to in her affidavit.

44 At T84 Mrs Rumble agreed that she claimed to be a member of the "Independent Sovereign State of Australia" and that the Local Government Act did not apply to her (T84.36).

45 Mrs Rumble was asked about the notices referred to in paragraph 23 above that were placed on the four gates to the property. Under the subheading "PUBLIC NOTICE", the following words appeared:

> "This property is under the jurisdiction of the
>
> Federal Independent Sovereign State of
>
> Australia
>
> The appointed Foreign Minister under
>
> authority of the Parliament
>
> Signed Secretary of State by her seal
>
> 21 January 2005"

46 When cross-examined on this document, Mrs Rumble did not know the full name of the Secretary of State, who was the appointed Foreign Minister or what "the Parliament" was. It was her view that the Local Government Act did not apply to her (T86.45), but she did not agree that she believed that the taxation legislation did not apply to her, on the basis that she was on a disability pension (T87.2). She stated that she first applied and commenced to receive a disability pension just after the incident the subject of these proceedings (T87.22).

47 On 7 January 2010 the plaintiffs' solicitor wrote to solicitors for the Council stating:

> "Our client informs us that because our clients are members of ISSA (Independent Sovereign State of Australia) they are exempt for all taxation purposes with the Tax Office and therefore have not lodged or are liable to lodge tax returns." (T89.7).

48 The plaintiff also purported to be a Commonwealth Public Official (JD p 688) which she described was as:

"It's like a police officer only higher." (T89.20)

49 Mrs Rumble conceded that during the trespass on her property, Mr Prendergast was polite and restrained (T100.3-15).

50 It was put to her that she was not at any stage concerned for her own safety, nor indeed any other persons' safety, a proposition with which she disagreed (T102.6).

51 Of the 49 vehicles listed in Exhibit E, seven had no invoice, let alone a receipt (T104.47).

52 At T110, when asked whether her husband had a bank account, Mrs Rumble replied that the business was "cash only". She was not sure whether any Business Activity Statement was ever lodged with the Australian Taxation Office in respect of monies received for the disposal of vehicles shown in the Form 2 book required to be kept pursuant to the *Motor Dealers Ac 1974*, in respect of transactions totalling $98,540.00 (T115.46).

53 Robert George Rumble swore an affidavit on 4 July 2011. That affidavit traversed the same matters covered in Mrs Rumble's affidavit, and corroborated her evidence in respect of the dealings Mr and Mrs Rumble had with various Council officers, including the conversations with Mr Stewart in 2005. At paragraph 13 of his affidavit, Mr Rumble stated:

"I held the belief that Lee and I had approval from the Council to erect the fence and store vehicles on the property as Bob Stewart stated."

54 At paragraph 18 of his affidavit, Mr Rumble stated:

"We always considered that we made the development application to the council for the fence and the storage of vehicles at the same time. In addition, Bob Stewart had already approved it verbally."

55 Mr Rumble and his wife started trading as "BL Cars" at Henry Street, Quirindi. At paragraph 21 of his affidavit, he stated:

"Due to the limited space at Henry Street, I used the property to store some spare vehicles and car parts. However, we never used the property for the purpose of selling vehicles and car parts. All the sales and business activities were carried out at Henry Street."

56 Mr Rumble did concede he received the letter dated 16 August 2007 from Council (Exhibit 1) at paragraph 24. That letter advised him that Council would allow a "six (6) month period for the holding of the existing orders" and that the number of vehicles is to be limited to four (4) for family use.

57 Mr Rumble also stated that the Council did not attend the property between his conversation with Bob Stewart in 2005 until 2009. Around mid 2009 Mr Prendergast attended the property and had the conversation with him about the fence on the left hand side of his property (para 24).

58 On 5 August 2009 Mr Rumble had received from Council a document entitled "Notice of Intention to Serve an Order" dated 5 August 2009 (para 28, RGR-06, JB 476). That letter made it quite clear that the Council had issued a notice of intention to serve an order upon Mr Rumble in respect of the property he owned at 69 South Street, Quirindi. It went on to state:

"You have six (6) days to make representations to Council, after service of this notice on you as to why the Order should not be given or as to the terms of or period for compliance with the Order.

Representations may be made to the General Manager, Mr Robert Hunt before 11 August 2009."

59 Notwithstanding that the Notice of Intention purported to relate to 69 South Street, Quirindi, the Council also served an Order relating to 73 Henry Street (para 28, RGR-13, JB 496). Mr Rumble stated at paragraph 67:

"I had no choice but to shut down our business at Henry Street from 6 August 2009 under the requirement of the Council."

60 Prior to 13 and 14 August 2009, Mr and Mrs Rumble attempted to have a meeting with Mr Hunt, the General Manager of Council, however, all requests for a meeting were denied to them (para 71).

61 At 4pm on 12 August 2009, when Mr Prendergast handed Mr Rumble the final notice purporting to be pursuant to s 121 (1b) of the *EPAA* (RGR-07, JB 479), Mr Prendergast said to him words to the following effect:

"If you do not remove all the unregistered vehicles today, we will come in and remove all of them."

62 Mr Rumble described the order served on him as being "very confusing" to him. The period for compliance was shorter than the period for the right of appeal to be exercised. He did not have enough time to remove the vehicles and did not have a

place to move them to.

63 With respect to the actual trespass on 13 and 14 August 2009, Mr Rumble set out the conversations with Mr Prendergast and Mr Sproul, and the conversations with the two police officers, in which Mr Rumble made it quite clear that he was not giving permission to the Council officers to enter onto his property and that by doing so, the Council officers were breaking in and doing so without his authority. After gaining access to the property and entering the front of it, Mr Rumble asked the Council officers to leave the property three times (para 42). Bolt cutters were used to cut the locks off the front gate and also the internal gate, giving access through the internal fence to the vehicles.

64 Mr Rumble also stated that he advised the tow truck drivers who came onto the property to take away the wrecks, that they were not allowed on the property, that they were trespassing and breaking the law. Similarly, the Council rangers, Simon Carroll and Christine Anderson, were requested to leave the property, but only did so after removing "all the vehicles and parts" (para 57).

65 Of the entry by Mr Prendergast onto his property, Mr Rumble stated that he was "extremely upset about all of this" (para 47).

66 A short time after the event, Mr Rumble received a letter from the Council which is undated, but bears a facsimile transmission date of 26/08/2009. The letter advised that the Council did not wish to antagonise the issue "any more than was required". It stated in paragraph 2:

> "As the order was only for unregistered vehicles and although due intention was given, Council believes and is prepared for Mr Rumble to retrieve parts that were impounded which were not part of the order." (RGR-10, JB488)

67 Evidence as to valuation of the total vehicles was disallowed, and Mr Rumble was given leave to adduce evidence in chief in respect of those matters.

68 In cross-examination, Mr Rumble was asked about advice he had received from the Council in July 2005, advising that Council would not approve use of the land for storage of materials from his wrecking yard, but would consider a temporary period to enable him to dispose of materials of between six and twelve months (see JB p 599). In a letter dated 30 June 2005 Mr Rumble stated to Council:

> "As I said, we are not running or ever going to be running a business from here as we no longer hold a motor dealer's licence or wrecking licence any more." (JB p 600)

69 In a letter to Council accompanying his development application, he advised Council that he wished to include temporary storage of 20 vehicles for a maximum of 12 months (JB p 597).

70 Mr Rumble was challenged as to his statement that "since Bob Stewart attended the property in 2005 the Council didn't attend the property again until 2009" (T142.27).

71 At T 143.5, it was put to Mr Rumble that the consent of the Council granted on 24 August 2005 lapsed on 24 August 2007. He agreed that there was nothing in that development approval which would indicate consent by the Council for him to store "as many vehicles as you like for as long as you like" (T143.14).

72 At T145.46, Mr Rumble agreed that he had received on 16 December 2008 a notice of intention to serve orders from the Council. It was therefore incorrect of him to say that he'd received no objection from Council or correspondence or notice until some date in 2009.

73 By 30 July 2009 Mr Rumble had stored on the property over 100 vehicles (T148.38). He knew that he had not ever had permission or consent from the Council to store that many vehicles in his backyard (T148.42). Some of those vehicles had a dollar sign and amounts in numbers painted on the windscreen. His explanation was that they were there for "detailing" (T148.47). Mr Rumble's explanation was that the Council did not like him detailing vehicles at his car yard, meaning the premises at 73 Henry Street (T149.5).

74 At T149.29 he denied using the premises at 69 South Street for the purpose of conducting his business. However, when it was put to him that he sold a vehicle to a Mr Robertson that was stored on the property, he stated that:

> "It was parked at the front of the house, yes." (T149.46)

75 He denied saying to Mr Robertson:

> "We didn't do this deal here, but at my other yard opposite the Holden dealership just past the railway crossing in Quirindi." (T150.5)

76 At T151.5 Mr Rumble agreed that on 5 August 2009, when served with a notice of intention to serve an order by Mr Prendergast (see JB p 476), his wife had said to Mr Prendergast "This property is part of the Independent Sovereign State of Australia. Under ISSA we do not recognise the Local Government Act."

77 When served with the order dated 12 August 2009 (JB p 498), Mr Rumble said that he had told Mr Prendergast that he had been moving vehicles trying to comply with the Council's notices (T151.15), however, that was not in his affidavit.

78 At T153.15 Mr Rumble conceded that it was his belief, whether he said the words or Mr Lester Woodforce said the words in his presence, as recounted in paragraph 54 of his affidavit as follows:

> "ISSA is a state of a micro nation, what you are doing now is an invasion of another country. It is an act of war and totally out of the council's jurisdiction."

79 When asked at T154.3 whether, by reason of his citizenship of the ISSA, he did not have to pay council rates, Mr Rumble answered:

> "Under fee simple title, yes."

80 He was further asked, in respect of his beliefs:

> "Q: By your earlier answers, were you intending to convey that you understand that you have no obligation to lodge returns tending to show income derived by you with the Australian Tax Office?
>
> A: That's correct.
>
> Q: When was the last time you ever lodged any tax return and submitted it to the Australian Tax Office?
>
> A: I couldn't tell you to be quite truthful.
>
> Q: Well, was it five years ago, 10 years ago, or when?
>
> A: Somewhere between those two, yeah.
>
> Q: Well, when was it?
>
> A: I'm not sure." (T154.29-43).

81 When asked whether he had submitted any business activity statement concerning his business with the Australian Taxation Office since 1 July 2000, Mr Rumble said "Yes I have" (T155.8).

82 Mr Rumble said he had been a "citizen", meaning a member of ISSA, since 2002 (T155.50) and believed the matters set out in its manifesto (T156.25), which became Exhibit 16 (see JB p 699).

83 It was Mr Rumble's view that as owner of his property he had the right to use it for whatever purpose that he saw fit with the qualification "to a certain point" (T157.3). He also believed he had a discretion to comply with Council requirements "within fairness" (T157.16).

84 When asked whether Mr Prendergast, on 13 August 2009, had been polite and courteous, Mr Rumble agreed, but when put to him that Mr Prendergast was simply doing the task that he'd been sent to perform, Mr Rumble described him as "a man on a mission" (T161.30).

85 In respect of the valuation of vehicles, Mr Rumble assisted his wife in the compilation of Exhibits D and E. At T 163.10 he gave the following evidence:

> "Q: Did you have access to those documents that you told us about earlier this morning when you came to do your part in the compilation of that list?
>
> A: As far as the, all the vehicles?
>
> Q: Yes?
>
> A: Yes.

Q: What paperwork did you have in front of you to assist you in carrying out your part in going through vehicle by vehicle?

A: Well all the receipts as far as the Manheim ones et cetera. The ones that we'd bought that are the collector ones, which were bought many years before, some of those were 10, 12, 14 years before.

Q: You wouldn't have any independent recollection of how much was paid and when it was paid and to whom it was paid without looking at any paperwork, is that fair to say?

A: Yeah, but any of those ones that, like I said, that I wasn't selling, I knew exactly how much I'd paid for them, because I paid for them.

Q: You wouldn't be able to say when you bought them?

A: No, not exactly without going back through all the archives and dragging them out, yes.

Q: It would be possible to come up with an exact date and confirm what might or might not have been paid by looking at the actual paperwork, that's right, isn't it?

A: Yeah."

86 In respect of the subpoena to produce relevant documents concerning these vehicles at T165.38, Mr Rumble was asked as follows:

"Q: See the simple fact is you did not produce one single document in answer to the order comprising this subpoena. That's the case isn't it?

A: Yes."

87 The reason for his failure to produce documents seems to have been that he had "a lot of doubt" in his mind (T165.47).

88 At T166.34 Mr Rumble stated that he had invoices for every one of the wrecks, salvage vehicles or parts of vehicles that were stored on the property at 69 South Street.

89 Notwithstanding evidence to the contrary, Mr Rumble disagreed that he had failed to produce documents in compliance with the subpoena (T167.11).

90 It was put to Mr Rumble that, other than the vehicles listed in Exhibits D and E, what was taken from his property was "a lot of other rubbish and parts and bits of pieces of vehicles". Mr Rumble disagreed saying that he was "insulted when people classed what he does as generating rubbish" (T168.35).

91 In respect of the valuation attributed to some of the vehicles in Exhibits D and E, Mr Rumble agreed that the valuation he had attributed was on the basis that the particular vehicle was "fixed and registered" (T171.29).

92 When asked about the Form 2 book that he did produce in response to a Notice to Produce, which was a record required by the *Motor Dealers Act* and recorded his trading from 15 January 2010 and recorded vehicles bought and sold in his business (Exhibit 15), Mr Rumble was asked as follows at T177.25:

"Q: Did you ever lodge any business activity statement with respect to any of the goods, that is the vehicles, nominated in that document with the Australian Tax Office?

A: No.

Q: That's because you hold the belief that you don't have to comply with the tax legislation, including the legislation concerning goods and services tax, is that the case?

A: That's correct."

93 Mr Rumble conceded that since August 2009 he had continued to replenish the stocks of the wrecks and used and crashed vehicles stored on the property at 69 South Street (T178.47).

94 In re-examination Mr Rumble gave evidence that the collector vehicles listed in Exhibit D were not bought for the purpose of trade in his business, but were bought to keep (T181.17). Any receipts for cash paid by him for the other vehicles were recorded or included in Exhibit E (T182.46).

95 When he received the order on 5 August 2009 requiring him to move vehicles from his property, he complied with the order

to vacate his business premises at Henry Street, but he ran out of time to vacate the vehicles from South Street (T186.29). Mr Rumble finally stated that it was wrong to describe him as being "contemptuous of the law" because he definitely did shift vehicles from both premises (T186.33).

The Defendants' Evidence

96 The defendants' evidence comprised a number of documents and photographs (Exhibits 1-16), the Subpoena to Produce dated 27 April 2012 (Exhibit 17) and Notice to Produce dated 11 May 2012 (Exhibit 18), together with affidavits of the 2nd, 3rd, 4th, 5th, 7th, 8th and 9th defendants (Exhibits 19-22, 24-26).

97 The defendants also tendered affidavits of Michael George Whitney sworn on 10 October 2011 (Exhibit 23) annexing two aerial photographs of the relevant property referred to above, an affidavit by David Robertson sworn on 11 May 2012 (Exhibit 27) concerning the purchase of a vehicle from Mr Rumble on 3 August 2011 at his house at 69 South Street, Quirindi, and an affidavit of Michael Urquhart sworn on 31 August 2011 (Exhibit 28) deposing a calculation of rates outstanding on two properties owned by the plaintiffs, for the purpose of the Cross-Claim.

98 The defendants also tendered the two reports of Manheim dated 5 July 2011 (Exhibit 29) and 25 August 2011 (Exhibit 30). That evidence comprised valuation evidence of vehicles the subject of the plaintiffs' claim for damages and conversion.

99 None of the defendants or their witnesses were required for crossexamination.

100 With the exception of Mr Prendergast, each of the named defendants deposed to their involvement in the activity undertaken by the Council on 13 and 14 August 2009. Each deposes that they were acting in accordance with directions given to them by their employer and/or by the Council so as to activate the indemnity pursuant to s 731 of the *LGA*, referred to in paragraph 4 above.

Evidence of Mr Prendergast

101 Mr Prendergast swore an affidavit on 30 November 2011 (Exhibit 25). He was employed by the Council between 29 January 2008 and January 2011, as the Manager of Health and Development. He first met Mrs Rumble at the Council offices in March 2008 when she made hypothetical enquiries about creating a car yard and wrecking yard on a section of her residential property. Approximately six months later, by coincidence, he was travelling past 69 South Street, Quirindi and saw Mr Rumble effecting repairs on a vehicle outside the property. Mr Prendergast stopped his vehicle and had a conversation with Mr Rumble in which he advised Mr Rumble that he should not be storing unregistered vehicles alongside the road.

102 At about this time, Mr Prendergast became aware that orders had been made by the Council in the past in respect of the properties owned by the plaintiffs. On another occasion a short time later, Mr Prendergast drove past the property and observed vehicles parked within the property with dollar signs painted on their windscreens. He had a conversation with Mr Rumble in which he was told that the vehicles were being detailed and would go back to the Henry Street property for sale. It was on this occasion that he first observed the backyard of the property to be full of car wrecks, car parts and what he described as "junk" (Exhibit 25, para 21).

103 Mr Prendergast was aware that the plaintiffs were within 12 weeks of completing outstanding conditions in respect of the occupation certificate for their property at Henry Street and therefore reached an accommodation with Mr Rumble in respect of the property at 69 South Street, for that period.

104 In about November 2008 Council received the document exhibited and marked MP3 to Mr Prendergast's affidavit (pp 687-695).

105 It was Mr Prendergast who issued the first Notice of Intent to Serve an Order under EPAA which was served on the plaintiffs on 16 December 2008 (Exhibit MP4, JB 701). Thereafter, it was Mr Prendergast who dealt with Mr and Mrs Rumble on behalf of the Council, who formulated the administrative steps to be taken by Council to resolve what he perceived to be a problem at 69 South Street, and who prepared the further orders that were signed by Mr Ron Van Katwyk and served on the plaintiffs on 30 July 2009, 5 August 2009 and 12 August 2009. As the Council conceded that the notices were invalid, there was little focus on them during the hearing. However, I deal with the question of the invalidity of the notices and particularly

the notice served on 12 August 2009 below.

106 Having been advised by Council rangers that there were 30 people at the property on the afternoon of Wednesday 12 August 2009, Mr Prendergast arranged for police to attend at the time he and Mr Sproul attended the property to serve the order (para 44). He recalled that either Mr or Mrs Rumble said to him at the time of service:

> "Make sure you bring the police when you come to enforce the order tomorrow."

107 On 13 August 2009 Mr Prendergast did arrange for police to be present when he and Mr Sproul attended at 69 South Street at approximately 9am. He spoke to Mr Rumble and handed him two "Delegations of Authority" documents, following which he directed Mr Sproul to use bolt cutters to break the lock on the front gate after Mr Rumble had refused him permission to enter. Thereafter, there is no dispute as to what occurred as set out in paragraphs 20-24 above, and as depicted in Exhibit B.

108 At paragraph 74 of his affidavit, Mr Prendergast stated:

> "74 I can very confidently say that the utmost care was taken not to damage any vehicles. However, some of the vehicles in extremely poor condition with no wheels and it is possible that some have been slightly damaged when being removed, particularly some of the ones that had to be craned out by the excavator due to the nature of the vehicle position, with a number of vehicles being stacked in the yard on top of each other."

109 All vehicles that were removed were taken to the Council's waste management facility in Quirindi for storage and are still being stored there (para 77). At paragraph 78 Mr Prendergast stated:

> "At all times through the events involved in this matter I acted in accordance with what I genuinely believed were the duties associated with the position I held in the Council. I bore no personal malice towards the plaintiff's (sic) whom I did not know before the events of this matter. I attempted at all times to follow what I understood were the required procedures. Additionally, I was required to follow the directions given to me by my superiors in Council."

110 None of the affidavit evidence of Mr Prendergast was challenged.

The Invalid Notices

111 The Notice relied on by the Council to justify its entry onto the plaintiffs' property was Exhibit LR-06 to the affidavit of Lee Rumble (JB p 255). The Order is addressed to Mr R G Rumble and is entitled:

> "TERMS OF ORDER NUMBER 1b
>
> ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979,
>
> DIVISION 2A, SECTION 121
>
> Terms of Order No. 1b:
>
> Liverpool Plains Shire Council orders you (Mr R G Rumble) as the owner of lots 8 and 9, sec 30 DP758863, (69 South Street) Quirindi NSW 2343 to cease using 69 South Street Quirindi as a second hand car yard and have all the unregistered vehicles removed from the premises and surrounding area.
>
> Reasons for Order 1b
>
> To cease using premises for a purpose specified in the order, premises are being used for a purpose which development consent is required but has not been obtained.
>
> Note: This Order will not require registered vehicles used in conjunction with the approved use of the land (being a single dwelling house) to be removed.
>
> Period for compliance with Orders
>
> 12 hours from the date shown hereon.
>
> Right of Appeal
>
> You or any other person affected by this order, may appeal to the Land and Environment Court of NSW against the Order of a specified part of the Order. Any such appeal must be made within forty-eight (48) hours after service of this Order on you.
>
> It is an offence not to comply with this Order and the maximum penalty for failing to comply is $5,500 in the case of an

individual and $11,000 in the case of a corporation.

If you fail to comply with this Order, Council may (in addition to the fine) carry out the Order on your behalf and recover the cost of doing so from you.

For and on behalf of Liverpool Plains Shire Council

RS (Ron) Van Katwyk

DIRECTOR ENVIRONMENTAL SERVICES"

112 The plaintiffs submit that the Order on its terms, being an order to cease using the property as a second hand car yard, is an order about land use. In terms of the provisions of s 121B(1)(b) of EPAA, the plaintiffs submit the Order is ultra vires because that provision empowers the making of orders with regard to land use, not for mandatory injunctions for the doing of other things or activities. Further, the plaintiffs submit that the statement of reasons is deficient and the period of compliance, namely, 12 hours from the date shown on the document, is inadequate.

113 The plaintiffs further submit that the provision for an appeal to be made within 48 hours after service of the Notice makes the right of appeal nugatory because the period for appeal is longer than the time for compliance.

114 Finally, the Notice was signed by Mr R S Van Katwyk, who had no delegated authority to sign the Order, according to the Delegations of Authority handed to the plaintiffs at the time of service which are exhibit LR 07 to the affidavit of Mrs Rumble and appear at JB 257-260.

115 The plaintiffs opened their case on the basis that the invalidity of the Notices served on them, and in particular the Notice served on 12 August, was a matter that went to the question of bona fides of the Council officers who were defendants and undermined the defence those individuals were relying on pursuant to s 731 of the *Local Government Act*, and the immunity created thereby.

116 As the invalidity of the Notices was not in issue before me, the fact that the Council and its officers acted on, and had police officers act on, an Order that was ultra vires is a matter which is relevant to the assessment of damages in this matter. For that reason I set out the relevant statutory provisions that the Council is purporting to rely on.

Relative Legislative Provisions

117 Part 6 of the EPAA is entitled "Implementation and Enforcement". Division 2A is entitled "Orders" and s 121B provides relevantly as follows:

"121B Orders that may be given by consent, authority or by Minister etc

(1) An order may be given to a person by

(aa) The Minister or Director General ..., or

(a) a council, or

(b) any other person who exercises functions as a consent authority, except in relation to complying development for which a complying development certificate has been issued,

to do or to refrain from doing a thing specified in the following Table if the circumstances specified opposite it in Column 2 of the Table exist and the person comes within the description opposite it in Column 3 of the Table.

Column 1 To Do What?	Column 2 In what circumstances?	Column 3 To Whom?
1 To cease using	(a) Premises are being used for a purpose	Owner of premises, or person by whom

premises for a purpose specified in the order	that is prohibited. (b) Premises are being used for a purpose for which development consent is required but has not been obtained. (c) Premises are being used in contravention of the conditions of a development consent.	premises are being used for the purpose specified in the order"

118 There are 19 items listed under Column 1 and other than item 1, item 8 would be the only other item of relevance to the present situation. S 121H provides that before any Order is given, notice must be given of the intention to give an Order, and provides for representations to be made to the person intending to give the Order. This procedural step was not followed.

119 Section 121L makes provision for reasons being given by the person giving the Order. Section 121M provides for a period of compliance in the following terms:

> "(1) An Order must specify a reasonable period within which the terms of the Order are to be complied with, subject to this section."

120 Finally, s 122K provides as follows:

> "122K Entry into residential premises only with permission or warrant.
>
> This division does not empower an authorised officer to enter any part of the premises used only for residential purposes without the permission of the occupier or the authority of a search warrant under S 122M."

121 It is clear that the invalidity of the orders served on the plaintiffs here was manifest, particularly the order served on Mr Rumble on 12 August 2009.

Issues To Be Determined

122 Having regard to the totality of the evidence referred to above and the obvious invalidity of the Orders upon which the Council was purporting to act, the issues to be determined by me in the proceedings are as follows:

(1) What damages are the plaintiffs entitled to for the Council's trespass on its property?

(2) Are the plaintiffs entitled to aggravated damages?

(3) Are the plaintiffs entitled to exemplary damages?

(4) Are any of the defendants entitled to the indemnity provided by s 731 LGA.

123 Relevant to these issues are the following matters:

(i) What led the Council officers to act in the way they did?

(ii) Was the plaintiffs' conduct relevant to the assessment of damages?

(iii) What is the relevance of the plaintiffs' conduct of the proceedings, including their failure to comply with the Subpoena to Produce, their limited response to the Notice to Produce and their asserted membership of something known as the Independent Sovereign State of Australia and the beliefs acknowledged by them that that membership generated?

124 Finally, the Cross-Claim is to be determined in favour of the defendants, as it has not been contested by the plaintiffs and thus the defendant/crossClaimant claims a set-off of any outstanding rates owing by the plaintiffs on the properties at 69 South Street and 73 Henry Street pursuant to s 96 of the *Civil Procedure Act 2005*.

The Conduct of the Council Employees

125 It is clear enough on the evidence that storage of vehicles and vehicle parts on the plaintiffs' property at South Street

Quirindi, which was zoned residential, had been known to the Council for some years and at least since mid 2005. The Council approved a development application in respect of a boundary fence, the purpose of which was to hide from view the vehicles stored on the property. That development consent (JB 461) was clearly for "fence only". The consent lapsed on 24 August 2007. It was also well known to Council that the plaintiff's operated a used car business in Quirindi. That business was first operated at Loder Street, however, the property in Loder Street was sold by the plaintiffs to the Council in 2005. It was the sale of that property which led the plaintiffs to transferring vehicles to their property at 69 South Street Quirindi for storage. The plaintiffs sought Council's permission for this activity (see letter dated 30 June 2005 at JB p 600). It is notable that in that letter Mr Rumble advised Council that they were not running a business from the premises as they no longer held a motor dealer's licence or wrecking licence.

126 The plaintiffs had sought permission in 2005 for temporary storage of 20 vehicles on their property at 69 South Street for a period of 12 months (JB 597).

127 The Council was also aware of the plaintiffs' purchase of the property at 73 Henry Street Quirindi to operate their used car business "BL Cars" in 2006. The plaintiff submitted a development application in respect of those premises which was subject to conditions which the plaintiffs had difficulty meeting (see for example the interim occupation certificate dated 1 September 2006 at JB p 605). The plaintiffs were given 12 months to complete the outstanding issues. They were unable to do so, and requested a 12 month extension on 9 August 2007 (JB 609).

128 In approximately September 2008, Mr Prendergast attended the property. The plaintiffs depose that it was Mr Prendergast who suggested they build a fence on the inside of the property to shield the cars. At this time, Mr Prendergast deposed that he believed the best thing was to come to an arrangement with the plaintiffs to manage the situation. Hence, at paragraph 23 of his affidavit, he said to Mr Rumble words to the effect of:

> "We're going to have to do something about all of the cars and junk on 69 South Street. Let's get Henry Street in order and after that we can get together and talk about the issue at 69 South Street."

129 It was for that reason that the plaintiffs were given another 12 weeks to resolve the outstanding issues they had with Council regarding the development application at 73 Henry Street, which required a driveway to be completed before a final occupation certificate could issue.

130 It was when no progress was made by the plaintiffs in respect of their premises at Henry Street, that Mr Prendergast decided to act. It was he who researched the *Local Government Act and Regulations,* and the *EPAA*. He took responsibility for establishing the correct procedures and it was he who decided to serve a Notice of Intention to issue an Order pursuant to the *EPAA* on the plaintiffs in respect of their property at 69 South Street dated 16 December 2008 giving the plaintiffs six days to make representations to Council (JB 701). That led to the order dated 22 December 2008 being served on Mr Rumble (JB 704).

131 There was then some further delay in the Council acting as a result of Mr Van Katwyk being appointed in February 2009 as Director of Environmental Services, in charge of the department that Mr Prendergast was part of. In respect of the various orders served on Mr and Mrs Rumble in July and August 2009, it is clear that Mr Prendergast was responsible for those orders, but that he was reporting to Mr Van Katwyk (see paragraph 38 of the affidavit of Mr Prendergast). Mr Prendergast was also reporting to the General Manager of the Council, Mr Robert Hunt. At paragraph 43 of his affidavit Mr Prendergast stated:

> "At this point it was the attitude of all senior personnel of Council that this time that an order should be made and it should be enforced as soon as possible after the period of compliance lapsed, should there be no compliance."

132 The time was just before 12 August 2009.

133 It was Mr Prendergast who arranged for the police to be present on 13 August 2009 at the time of the trespass. It was he who directed other council employees to break the locks on the gates to the plaintiffs' property, to enter onto the property and to remove the vehicles and vehicle parts from it. In doing so, I find that he acted in a firm manner in the face of clear opposition from the plaintiffs. It was Mrs Rumble who told the police that "nobody will get hurt", and that they would do it "by the book and to the letter of the law". Mr Prendergast was described by Mr Rumble, and I find accurately so, as a "man on a mission".

134 The trespass was extensive, it took place over a period of two days, and involved numerous Council employees and sub-

contractors coming onto the property under Mr Prendergast's direction to physically remove the plaintiffs' property.

The Plaintiffs' Conduct

135 The plaintiffs took advantage of the Council's dilatory approach to zoning law compliance, by storage of a large number of vehicle wrecks and vehicle parts on their property which they knew was zoned residential. There was no basis whatsoever for them holding a belief that they could store an unlimited number of vehicles on that property for an unlimited period of time. They had undertaken, in June 2005, to temporarily store 20 vehicles for a maximum of 12 months only.

136 Mr Prendergast told Mrs Rumble in March 2008 that the zoning of their family home did not allow for a car and wrecking yard, and that evidence was not challenged.

137 In about September 2008 Mr Prendergast gave evidence that he spoke to Mr and Mrs Rumble at 69 South Street about vehicles that were located there that appeared to be for sale, namely, they had dollar figures painted on their windscreens. Again, that evidence was not challenged. The reason proffered for their presence was that they were being detailed as the Council would not allow detailing to take place on their commercial premises at 73 Henry Street.

138 In November 2008 the plaintiffs sent to the Council the documents which are referred to above and which were said to evidence that Mr and Mrs Rumble were citizens of the "Independent Sovereign State of Australia" and exempt from Local Government rates, inter alia (MP3). The Council responded by a letter dated 12 November 2008 advising that it did not "recognise any of the information submitted" and would exercise its powers and authority that it derived from the *New South Wales Local Government Act 1993*" (JB 696). When served with the Notice of Intent to Serve an Order on 5 August 2009, Mr and Mrs Rumble told Mr Prendergast that their property was part of the "Independent Sovereign State of Australia" and they did not recognise the *Local Government Act*. It could be reasonably inferred that such conduct would only harden Council officers' resolve to thereafter enforce compliance of the relevant zoning laws.

139 Curiously, the notice erected by the plaintiffs on all four gates to their property, referred to in paragraph 48 above, and purporting to be signed by the "Secretary of State by her seal on 21 January 2005", listed prominently under the heading "Rulings by High Court of Australia" a number of relevant authorities relating to the common law of trespass, and damages therefore.

140 I find that the Council was invited by either Mr or Mrs Rumble to ensure there was a police presence at the property on 13 August 2009 when one of them said to Mr Prendergast:

> "Make sure you bring the police when you come to enforce the order tomorrow." (See paragraph 46, affidavit of Mr Prendergast)

That evidence was not challenged.

141 I also find that Mr and Mrs Rumble clearly refused permission for the Council officers to enter onto their property, and clearly made it known that anyone who did so would be charged with trespass. They sought the police to intervene to avoid the trespass and were refused. Once the trespass took place, they acted passively to avoid an escalation of the incident.

Failure by the Plaintiffs to Comply with the Subpoena for Production of Documents, and Partial Response to Notice to Produce

142 On 27 April 2012 the defendants filed a Subpoena for production of documents which was served on the plaintiffs. That Subpoena sought production of documents described as follows:

> "2. All records relating to or touching upon the derivation of or earning of an income by you in the period from 1 July 2004 to date including, but not limited to, cashbooks, books of account, bank passbooks, cheque books, bank statements, taxation returns, all documents recording the purchase and sale of motor vehicles and motor vehicle components, parts and accessories."

143 The Subpoena was addressed to Mr Robert George Rumble, and when called upon at the commencement of the hearing, counsel for the plaintiffs responded:

> "There's no response. We say it was insufficient conduct money tendered for the production of the documents." (T14.22)

144 When informed by the Court that it would take a dim view if there was some technical reason why the Subpoena was not being complied with, the recipient being a party to the proceedings, Counsel for the plaintiffs proffered that Mr Rumble had no documents to produce other than what had already been produced to the Court under a Notice to Produce, and that as the plaintiffs conducted what was "essentially a cash business", the categories of documents asked for, going back to 2004, do not exist. Mrs Rumble produced a passbook into which the proceeds of her disability pension were paid, otherwise, there were no documents responding to the Subpoena, which is Exhibit 17.

145 On 11 May 2002 the solicitors for the defendants had served a Notice to Produce on the plaintiffs requiring them to produce inter alia documents required to be kept by the plaintiffs pursuant to the *Motor Dealers Act 1974*. It was pursuant to this notice that two documents were produced including the Form 2 (Dealers and Wholesalers Register) (Exhibit 15).

146 The defendants contended that the assertion by the plaintiffs that they operated a cash business (see for example T38.36), their failure to comply with a Subpoena which is an order of the Court, and their late production of the Form 2, together with their later assertion to be, as citizens of "ISSA", exempt from Commonwealth Taxation legislation, had the following ramifications:

(1) First, the defendants were unable to verify, by reference to any business documents, the list of collector vehicles and the list of other vehicles which were Exhibits D and E in the proceedings, so as to challenge the plaintiffs' oral assertions of purchase price paid in respect of each of the 56 vehicles referred to.

(2) Secondly, these were matters that reflected on the credit of both the plaintiffs, so adversely that they could not be believed in respect of other aspects of their evidence, particularly with respect to any aggravating factors that allegedly arose from the trespass upon their property.

147 The plaintiffs were given an opportunity at the conclusion of the hearing on 28 May 2012 to make further written submissions in respect of the effect of noncompliance with the Subpoena on the plaintiffs' credit. The plaintiffs submitted that, to the extent that Mrs Rumble had exhibited to her affidavit some invoices in respect of the vehicles in Exhibits D and E, that the breach was a technical one in that the plaintiffs had not furnished those documents again. The plaintiffs also submitted that "it may be that the Subpoena was objectionable, but the point was not taken".

148 I find that the plaintiffs deliberately failed to comply with the Subpoena served on them, and deliberately withheld any financial records of their business, together with documents recording the purchase and sale of motor vehicles, motor vehicle components, parts and accessories to impede the defendants' conduct of its case. For example, the explanation given by Mrs Rumble to the question

> "Q: Why didn't you bring the documents that you knew existed and which fell within the Subpoena, why didn't you bring them?
>
> A: I forgot them."

was reflective of a deliberate effort to impede the defendants' prosecution of its defence.,

149 In relation to the documents referred to in the Notice to Produce, it was submitted on behalf of the plaintiffs that the 2nd plaintiff, Mr Rumble, "made considerable effort to comply with" the notice overnight. This was done after the first day of the hearing when it became clear that the Court took a dim view of the plaintiffs' non-compliance with a Court Order. The plaintiffs went on to submit that the motor dealers' documents had, at best, a tangential link to income derivation and were but "one component of ascertaining any profit". I find that submission entirely disingenuous, given the non-production of any financial documents by the plaintiffs.

150 The effect of these matters is that I have treated with considerable caution the evidence of the plaintiffs in this matter, and where their evidence is not supported by contemporaneous records, I have treated it as unreliable.

Plaintiffs' Failure to Comply with Commonwealth Taxation Legislation

151 The offer for the plaintiffs to file further submissions at the conclusion of the hearing extended to their failure to comply with the Commonwealth Taxation Legislation. Mrs Rumble gave evidence that there was no bank account for the business because it was a cash only business (T110). Notwithstanding that she was a partner in that business, when asked whether any business activity statement was ever lodged with the Australian Taxation Office, with respect to monies received for the

disposal of vehicles as demonstrated in Form 2, Mrs Rumble answered "I'm not sure" (T115.46).

152 Mr Rumble gave evidence of non-compliance with the Commonwealth Taxation legislation as outlined in paras 80, 81 and 92 above.

153 On the basis of that evidence, I raised with Counsel for the plaintiffs in final submissions (T248-249) the Court of Appeal's judgment in *Matar v Jones [2011] NSW CA 304* to enable the plaintiffs to make submissions in relation to it.

154 Whilst *Matar* was a claim for personal injury damages, it is authority for the proposition that failure to comply with taxation legislation is a matter that goes to credit (referring to the Court of Appeal's decision in *AMP General Insurance Limited v Kull [2005] NSWCA 442*). Although the Court went on to hold that the plaintiff was entitled to have taken into account evidence of earnings that were not disclosed for that purpose, subject to reduction for income tax that should have been paid, the appropriate course was for the Registrar of the Court to refer the judgment to the Commissioner of Taxation for consideration, following the South Australian Full Court's decision in *Giorginis v Kastrati [1988] 48 SASR 371*.

155 In their supplementary submissions, the plaintiffs distinguished *Matar v Jones* on the basis that this was not an exercise where the Court was asked to assess diminished earning capacity. It was submitted that in this case, the plaintiffs did not contradict earlier representations to the ATO and there was no evidence of underpayment of what was legally owed. Hence, they submitted the basis for referral does not exist. I do not accept that submission. In fact, the plaintiffs conducted a cash business, the Form 2 demonstrated substantial income from that business, albeit over three financial years, and Mr Rumble admitted that he considered himself not bound by the Commonwealth Tax Legislation. The failure by the plaintiffs to comply in any way with their tax liabilities is a matter that goes to their credit and discredits their evidence in a significant manner.

156 In particular, I do not accept the following evidence of Mrs Rumble:

(i) That following her conversation with Mr Stewart in 2005 they had consent of Council to store as many vehicles as they liked for as long as they liked at 69 South Street.

(ii) That the property at 69 South Street was not used for the purpose of repairing and selling vehicles. This evidence was contradicted by Mr Prendergast who observed Mr Rumble carrying out repairs on a vehicle there (at a time when there were other vehicles displaying dollar amounts on their windscreens), the unchallenged evidence of Mr Robertson and the letter dated 14 September 2008 from their own solicitors referred to in para 41 above.

(iii) That she sought an extension of time from Mr Prendergast on or after 5 August 2009, and that she she tried to telephone the General Manager of the Council, Mr Hunt.

(iv) That she feared for her safety, and the safety of her children as a result of the presence of the police officers at the property on the morning of 13 August 2009, when the evidence established that either she or her husband had requested the Council to bring the police with them that day.

157 In respect of Mr Rumble's evidence I do not accept:

(i) His evidence at paras 13 and 18 of his affidavit, as referred to in paras 53 and 54 above.

(ii) Para 21 of his affidavit, as referred to in para 55 above.

(iii) Para 67 of his affidavit as referred to in para 59 above.

(iv) His evidence that he attempted to have a meeting with Mr Hunt at the Council, after receiving the notice of order on 5 August 2009.

Assessment of Damages for Trespass

158 The defendants acknowledge that the tort of trespass to land is actionable per se in the absence of damage, relying on *Plenty v Dillon & Ors (1991) 171CLR 635*. The defendant submits that as no damage was sustained to the land upon which the trespass occurred, it was appropriate to award nominal damages only to acknowledge the landowners' right to exclude a trespasser from the property, referring to *Grant v Brewarrina Shire Council [No. 2] [2003] NSW LEC 54 per Lloyd J at [36, 37, 43-45]*. As Lloyd J pointed out at [43], the term "nominal damages" does not mean small damages (as per the *The Mediana [1900] AC 113 at 116,* per Lord Halsbury LC).

159 *Plenty v Dillon* was a case involving police officers who trespassed upon the plaintiff's land purporting to serve process. Gaudron and McHugh JJ said at 654-655:

> " ... Once a plaintiff obtains a verdict in an action of trespass, he or she is entitled to an award of damages. In addition, we would unhesitatingly reject the suggestion that this trespass was of a trifling nature. The First and Second Respondents deliberately entered the Appellant's land against his express wish. True it is the entry itself caused no damage to the Appellant's land. But the purpose of an action for trespass to land is not merely to compensate the plaintiff for damage to the

> land. That action also serves a purpose of vindicating the Plaintiff's right to the exclusive use and occupation of his or her land. Although the First and Second Respondents were acting honestly in the supposed execution of their duty, their entry was attended by circumstances of aggravation. They entered as police officers with all the power of the State behind them, knowing that their entry was against the wish of the Appellant and in circumstances likely to cause him distress."

160 So too here. The trespass was not of a trifling nature at all. It involved the Council officers and their sub-contractors breaking into the plaintiffs' property against their express wishes and over a period of two days, entering onto the land for the purpose of removing the plaintiffs' goods from it. It was a trespass not authorised by law by a local government authority, accompanied by police officers. Both, Mr Rumble, as the owner of the property, and Mrs Rumble, as a long-term occupant of it, are entitled to damages for the trespass. This is not a case like *Grant v Brewarrina Shire Council (No. 2)*, or *Port Stephens Shire Council & Anor v Tellamist Pty Limited [2004] NSWCA 353*, which the defendants also relied on as binding to the extent of the awarding only of nominal damages. Each case can be distinguished on its facts. The authorities relied on by the plaintiffs, namely, *New South Wales v Ibbett (2006) 231 ALR 485* and *Kuru v The State of New South Wales (2008) 236 CLR 1*, which involved trespass by police officers in the purported execution of their duties, can also be distinguished. Here there was no threat of violence, and, due to the attitude of the plaintiffs, no escalation of the incident. In the circumstances I propose to allow compensatory damages to each plaintiff for trespass in the sum of $10,000.

Aggravated Damages

161 In *NSW v Ibbett (2006) 229 CLR 638 at [31],* the High Court described aggravated damages as:

> "Aggravated damages are a form of general damages given by way of compensation for injury to the plaintiff, which may be intangible, resulting from the circumstances and manner of wrongdoing, referring to *Uren v John Fairfax & Sons Pty Ltd [1966] 117 CLR 118 at 129-130."*

162 The plaintiffs claim aggravated damages, given the circumstances in which the Council officers came to carry out the trespass on their land. The aggravating factors were said to be, first, the high-handed manner in which the Council issued Orders against them in contravention of the enabling legislation (the EPAA), the patent invalidity of those notices, the purported reliance upon delegation of authorities to make orders which were patently ultra vires, the presence of the police at the time of entry as a mark of authority which had no basis, the effect on the plaintiffs and their family members who were, it was alleged, embarrassed and humiliated by aspects of the trespass and conduct by the Council's officers, and the effect of the trespass on Mrs Rumble's health, which, she claimed, led her to being on a disability pension as a result of the trespass.

163 Only some of this is made out on the evidence. For example, the police were in attendance as a result of the invitation by the plaintiffs to Mr Prendergast to ensure that they were present on the morning of 13 August 2009. There is no evidence other than Mrs Rumble's assertion that the matter had any effect on any of the members of her family. The contention that she was on a disability pension as a result of the trespass was not supported by any medical evidence whatsoever. The impact on the plaintiffs as claimed by them is outlined in paras 32-36 and 65 above.

164 In Luntz, Assessment of Damages for Personal Injury and Death, 4th Ed, para 1.7.10, the learned author states:

> "Aggravated damages may be awarded where the defendant has acted with contumelious disregard of the plaintiff's rights, in an insulting or highhanded way or with malice ...
>
> The additional factor, which is required, is that such conduct must have increased the plaintiff's suffering."

165 As Windeyer J recognised in *Uren v John Fairfax & Sons Pty Limited*, a defamation case, at p 151, in theory, aggravated damages are "compensatory because the more insulting or reprehensible the defendant's conduct, the great the indignity which the plaintiff suffers" and the greater the outrage to the plaintiff's feelings. Here, I find that the defendant Council did act in a high-handed manner towards the plaintiffs. That the senior staff of the Council was prepared to issue orders to the plaintiffs purporting to be pursuant to the *EPAA*, which effectively led the Council's employees to unauthorised entry onto the plaintiffs' property, was highhanded in that it was reckless, particularly as there was no evidence that the Council at any time sought legal advice about its position or its entitlements. Rather, it was left to Mr Prendergast to trawl the legislation and to draft the relevant orders. He was clearly ill equipped for that task.

166 However, the plaintiffs here, by their continuing non-compliance with the zoning laws which were well known to them, attracted the attention of the Council.

167 I am not satisfied, therefore, that either plaintiff suffered indignity, embarrassment or outrage, to an extent that would warrant an award of additional compensatory damages by way of aggravated damages in the circumstances here. I would not base any such award on any reaction by the plaintiffs brought about by virtue of their membership of "ISSA" as outlined above and their espousal of beliefs based on that membership. I am therefore not prepared to award aggravated damages to either plaintiff.

Exemplary Damages

168 The purpose of exemplary damages is that they are awarded to punish and deter - see *NSW v Ibbett* per Spigelman CJ *at* [38]. In *Lamb v Cotogno (1988) 164 CLR 1,* the majority referred to an oft-cited description of exemplary damages contained in *Mayne & McGregor On Damages, 12th Ed, 1961 (pg 196):*

> "Such damages ... can apply only where the conduct of the defendant merits punishment, which is only considered to be so where his conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like, or, as it is sometimes put, where he acts in contumelious disregard for the plaintiff's rights."

169 In *Ibbett*, Spigelman CJ described the purpose of such damages as:

> "39. This is the same as a three-fold statement of purpose by Lord Devlin in *Rookes v Barnard [1964] AC 1129 at 1228:*
>
> > " ... to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it."
>
> 40. Insofar as a purpose of an award of damages is to condemn conduct, it does not necessarily require subjective advertence to wrongdoing. Nor, in my opinion, even if the purpose should now be restricted to "punishment" and "deterrence", is any such restriction required.
>
> 41. The state of mind of the defendant is always relevant (see *Port Stephens Shire Council & Anor v Tellamist)*. In *Lamb v Cotogno supra at 13* the High Court indicated that actual subjective advertence to wrongdoing is not necessary by applying a test extending beyond "intention" to "recklessness". The latter does not require "consciousness of wrongdoing". There is no reason to interpret the High Court's reference to recklessness as requiring conscious recklessness."

170 The Chief Justice went on to approve statements made by Owen J, with whom Dixon CJ agreed in *Fontin v Katapodis [1962] 108 CLR 177* to the effect that exemplary damages may be awarded "where the defendant has acted in a high-handed fashion or with malice".

171 Spigelman CJ went on to say:

> "Conduct which is "high-handed" is not necessarily knowingly wrongful."

172 The High Court, in affirming the Court of Appeal's decision, held that the State was vicariously liable for the conduct of the police officers giving rise to the award of exemplary damages. In the present case, the Council by its employee, Mr Prendergast, acted in a highhanded manner towards the plaintiffs and their rights. He was reckless in his approach to the composition of the various orders served on the plaintiffs and his supervisors, including the General Manager Mr Hunt, as senior staff of the Council, were reckless in overseeing what he was doing. This case is therefore distinguishable from *Port Stephens Shire Council & Anor v Tellamist Pty Ltd*, supra.

173 The Council acted in direct contravention of the *EPAA* in trespassing on the plaintiffs' residential property. I do not accept the defendants' submission that, had they complied with the Act, they would have been entitled to enter onto the plaintiffs' land. At the very least, they would have required a Court Order or Search Warrant to do so.

174 I do not accept the defendants' submissions to the effect, first, that the guiding mind of the Council was not aware of its actions and therefore not liable for exemplary damages and secondly, there is no purpose in awarding such damages because Mr Prendergast no longer is employed by the Council.

175 In *Grant v Brewarrina Shire Council [No. 2],* Lloyd J said at [40]:

> "In any event, in determining the appropriate amount of exemplary damages the court must avoid the temptation to be extravagant: *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd (1985) 155 CLR 448 at 463 per Gibbs CJ. An additional sum by way of exemplary damages should be awarded when the compensatory damages (including aggravated compensatory damages) are insufficient to punish and deter or to serve any of the other purposes of such an award: Rookes v Barnard [1964] AC 1129 at 1227-8 (HL)* per Lord Devlin."

176 This is a case where the Council acted in a highhanded manner towards the plaintiffs, its conduct in carrying out the trespass was egregious and the Court should mark its disapproval of that conduct and the need to deter it from repeating such conduct by an award of exemplary damages. For those reasons I award each plaintiff the sum of $10,000 exemplary damages in addition to the compensatory damages referred to above.

Damages For Conversion

177 Having wrongfully removed the plaintiffs' property from the land, the plaintiffs are entitled to damages for conversion. The measure for damages for conversion is the market value of the goods, determined at the time or date of the conversion. There are considerable difficulties in assessing what that value is in this case. Counsel for the plaintiffs described it as the "rather vexed question of the conversion" and conceded that the evidence in relation to this subject was deficient (T246.15).

178 The plaintiffs' evidence comprised a schedule compiled by Mrs Rumble which became Exhibits D and E in the proceedings. Exhibit D listed seven vehicles described as "collector vehicles" and annexed to the schedule was a description of each vehicle with an assertion of the price paid in respect of each vehicle. That bundle of documents contained no primary documents as to price paid other than one invoice for a vehicle purchased on 13 March 1997 which gave a unit price in Japanese yen.

179 Exhibit E was a schedule of 49 vehicles. It also comprised a bundle of documents which contained photographs, details, eg chassis numbers, assertions as to amounts paid and expenses incurred in bringing the vehicles to Quirindi and in some cases, assertions as to valuation. Wherever there was an assertion as to valuation, it referred to the valuation of the vehicle if money was spent on it to bring it up to registrable condition. I therefore discount any reference to valuation in Exhibit E.

180 Of the 46 relevant vehicles in Exhibit E, six of the vehicles (those numbered 5, 6, 10, 12, 16 and 22 in the schedule) have no supporting documentation whatsoever to confirm the price said to have been paid for them. Of the vehicles in Exhibit D, Mr Rumble asserted the purchase price claimed was within his knowledge because he paid it. Notwithstanding this, Mr Rumble could not say when the vehicles were purchased, although some were purchased many years ago. They were not purchased for resale.

181 The Court will not accept mere assertions of purchase price in the absence of any documentary corroboration, particularly given the unsatisfactory evidence as to whether any primary documents exist at all in the form of invoices, receipts and books required to be kept under the *Motor Dealers Act 1974*. Were it not so, all of those documents would have been produced by the plaintiffs pursuant to the Subpoena and Notice to Produce referred to above.

182 Further, the Court does not accept that the estimates of the costs incurred in bringing the various vehicles to Quirindi, being costs of fuel and accommodation involved in that process, are reflective of the market value of any of the goods as at the date of conversion. Those costs represented an overhead of the business in acquiring the goods. I therefore disallow any award for those costs.

183 Mrs Rumble made further calculations which she compiled in the schedule which became Exhibit F, which incorporated the vehicles listed in both Exhibits D and E. In summary, the claim for the value of the vehicles as at 13 August 2009 was in respect of the "collector vehicles" $34,500 and for the other vehicles $59,105.95 (including the sum of $14,618.05 pick up fees). This brought the total claim by the plaintiffs for damages for conversion to $93,605.95.

184 The defendants relied on two valuations prepared Mr M Russell on behalf of Manheim Pty Limited. Those valuations were dated 5 July 2011 and 25 August 2011 were admitted over objection and became Exhibits 29 and 30 in the proceedings respectively. Those valuations do not correlate directly with the vehicles listed in either Exhibit D, E or F. Further, the valuations are given as an estimation of the gross amount that could be realised from a properly advertised and conducted public auction to be held at the date of valuation, with the seller being compelled to sell with the sense of immediacy on an as is, where is basis for the asset to be removed from site.

185 Notwithstanding that a forced sale is not a proper basis for assessing market value for the purpose of damages for conversion, I allowed the valuations as opinion evidence based on the specialised knowledge of Mr Russell, based on his training and experience, given those assumptions, pursuant to s 79 of the *Evidence Act* 2005. The valuations were therefore admitted as a guide only. On my calculation, the valuations total $12,100, although a number of the vehicles listed in Exhibits D and E were not available for inspection by the valuer.

186 There are two other relevant matters. First, by paragraph 14(d) of its defence, the Council has offered to return the vehicles to the plaintiffs. In fact, it did allow the plaintiffs access to the Council storage facility for removal of parts on some vehicles (JB 488). There is authority for the proposition that a plaintiff in an action for damages for conversion cannot be compelled to take goods back - see *Kidman v Farmer's Centre Pty Limited [1959] Qd R 8 at 11,* referred to in *The Law of Torts, 4th Ed, R P Balkin and J L R Davis at para 4.41*; see also, *Fleming's "The Law of Torts", 10th Ed at [4.260].* Secondly, the plaintiffs also had a duty to mitigate their damages. The plaintiffs did nothing to mitigate its damages here, instead it has acquired more vehicles and parts thereof and accumulated them on the property at 69 South Street Quirindi.

187 The final factor to take into account is the purpose for which the plaintiffs could have held these vehicles in any event. It is a reasonable inference to draw from the available evidence, given that none of the vehicles were subject to any process of being brought into a registrable state, that the plaintiffs purchased the wrecks for the purpose only of breaking them down for spare parts as and when required. Whilst that may or may not have been a profitable process for the plaintiffs, and Mr Rumble certainly expressed his indignity at the concept that someone would call his goods rubbish, it must be taken into account in assessing what damage the plaintiffs have suffered. It is for the plaintiffs to prove their case, and the valuation evidence they rely on falls well short of the mark of proving their case as claimed.

188 As set out above, I am not prepared to allow any award of damages for the cost of acquiring the vehicles or parts thereof, by allowing an estimate of fuel and accommodation costs. Further, I am not prepared to accept on face value without primary evidence the mere assertions as to purchase price paid by Mr Rumble in respect of each and every one of the vehicles in question. Notwithstanding that, the goods have a market value, as evidenced by Exhibits 28 and 29, and doing the best I can on the available evidence before me, and doing justice to both parties, I assess damages for conversion of the plaintiffs' property in the sum of $25,000. This can be apportioned as $12,500 to each plaintiff.

Defence Under S731 of the Local Government Act 1993

189 As outlined in para 4 above, the 2nd to 5th defendants and 7th to 9th defendants plead an immunity from personal liability pursuant to s 731 of the *LGA*. The section provides as follows:

> "731 Liability of councillors, employees and other persons
>
> A matter of thing done by the Minister, the Director-General, a council, a councillor, a member of a committee of the council or an employee of the council or any person acting under the direction of the Minister, the Director-General, the council or a committee of the council does not, if the matter or thing was done in good faith for the purpose of executing this or any other Act, and for and on behalf of the Minister, the Director-General, the council or a committee of the council, subject a councillor, a member, an employee or a person so acting personally to any action, liability, claim or demand."

190 The onus of proof as to good faith is on the defendants - see *Bankstown City Council v Alamdo Holdings Pty Ltd (2005) 223 CLR 660 at [47]* (in relation to s 733 *LGA)*. None of the individual defendants, being employees of the Council, or its subcontractors were challenged on their evidence. I therefore find that what they did in relation to the trespass to the plaintiffs' property on 13 and 14 August 2009 was done in good faith and was done by them acting under the direction of Mr Prendergast, for whom the 1st defendant was vicariously liable. I therefore find that they are not personally liable in any way to the plaintiffs in respect of the plaintiffs' claims against them.

191 I further find that the immunity in s 731 applies to Mr Prendergast on the basis of the evidence set out in para 109 above, which was not challenged by the plaintiffs. The test to be applied in assessing whether a defendant acted in good faith is an objective one - see *Mid Density Developments Pty Ltd v Rockdale Municipal Council (1993) 44 FCR 290*. Notwithstanding my comment about Mr Prendergast in para 164 above, I find that he was acting in good faith so as to engage the immunity pursuant to s 731.

The Cross Claim

192 As the plaintiffs did not contest the Cross Claim, I am bound to find for the Cross Claimant in respect of it. The plaintiffs have requested separate judgments and as the property at 73 Henry Street was owned by both Mr and Mrs Rumble, and the property at 69 South Street owned by Mr Rumble alone, the Cross Claim has to be apportioned between them.

193 Calculated to 21 May 2012, the Cross Claim for outstanding rates against 69 South Street Quirindi was the sum of $13,299.27. That amount is to be set off against the verdict and judgment in favour of Mr Rumble.

194 As at 21 May 2012, the Cross Claim in respect of outstanding rates for 73 Henry Street Quirindi was the sum of $15,266.30. Half of that amount ($7,633.15) is to be further set off against the verdict and judgment in favour of Mr Rumble. The balance is to be set off against the verdict and judgment in favour of Mrs Rumble.

Conclusion

195 I therefore assess the damages in favour of each plaintiff to be the sum of $32,500. In respect of the Cross-Claim, I enter a verdict and judgment for the Cross Claimant in a total of $28,565.57, and apportion that sum against the judgments of both plaintiffs as set out above.

196 For the reasons set out in paragraphs 151 to 155 above, I also refer this judgment to the Registrar of the Court for referral to the Commissioner of Taxation for consideration.

Orders

(1) Verdict and Judgment for the 1st Plaintiff, Mrs Rumble, against the 1st Defendant in the sum of $24,866.85.

(2) Verdict and Judgment for the 2nd Plaintiff, Mr Rumble, against the 1st Defendant in the sum of $11,567.58.

(3) 1st Defendant to pay the costs of the Plaintiffs in the claim against it.

(4) Verdict for the 2nd, 3rd, 4th, 5th, 7th, 8th and 9th Defendants.

(5) No order as to costs of the proceedings brought by the plaintiffs against the 2nd, 3rd, 4th, 5th, 7th, 8th and 9th Defendants.

(6) Verdict for the Cross Claimant on the Cross Claim, and Judgment on the Cross Claim which has been reduced to Nil by way of the set off pursuant to s 96 of the *Civil Procedure Act 2005* referred to above.

(7) The Cross Defendants to pay the costs of the Cross Claimant on the Cross Claim.

(8) Parties to have liberty to apply on seven days notice in respect of any of the costs orders made above.

(9) The exhibits to be returned.

(10) I direct that this Judgment be referred to the Registrar of the Court for referral to the Commissioner of Taxation for consideration as set out in para 192 above.