

IN THE COURT OF APPEAL OF NEW ZEALAND

CA545/2010
[2011] NZCA 340

BETWEEN R J & A M SMALLMON
Appellants
AND TRANSPORT SALES LIMITED
First Respondent
AND GRANT ALAN MILLER
Second Respondent

Hearing: 9 June 2011
Court: Ellen France, Stevens and Wild JJ
Counsel: P J Dale and J Moss for Appellants
P M James and A N Riches for Respondents
Judgment: 22 July 2011 at 1.30 pm

JUDGMENT OF THE COURT

- A The appeal is dismissed.
- B The Appellants must pay to the Respondents costs on a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Stevens J)

Table of Contents

	Para No
An international sale of trucks	[1]
Some further factual background	[8]

<i>Regulatory requirements in Queensland</i>	[8]
<i>Formation of the contract</i>	[9]
<i>Findings on regulation compliance</i>	[16]
<i>Events leading to delivery</i>	[18]
<i>Attempt to secure registration</i>	[20]
High Court judgment	[25]
The issues on appeal	[33]
Applicable legal principles	[35]
<i>Convention articles</i>	[35]
<i>Interpreting the Convention</i>	[38]
<i>Principles to be distilled from art 35(2)</i>	[42]
Submissions of the parties	[49]
<i>Appellants' submissions</i>	[49]
<i>Respondents' submissions</i>	[55]
Our evaluation	[58]
<i>Article 35(2)(a)</i>	[58]
<i>Article 35(2)(b)</i>	[71]
<i>The factual challenge</i>	[73]
<i>Is art 35(2) engaged?</i>	[74]
<i>Quantum of damages</i>	[83]
Result	[84]

An international sale of trucks

[1] The appellants, Mr and Mrs Smallmon, operate a road transport, water and earthmoving business in Queensland, Australia. The Smallmons decided to purchase four trucks for use in their business from a New Zealand company, the first respondent, Transport Sales Ltd (TSL). The owner of TSL is the second respondent, Mr Grant Miller.

[2] The four trucks were Volvo model FM12 and were originally assembled in Australia to comply with the Australian Design Rules (ADRs). At the time of assembly, the compliance plate (certifying that the vehicle was manufactured to comply with the ADRs) was not attached to each truck, as the vehicles were intended for export to New Zealand and required some minor modifications for that market. The trucks were brought to New Zealand and operated (in the case of the four that were the subject of sale) by the dairy company Fonterra. At the time of sale they were owned by a leasing company called Esanda. TSL's role was as sales agent of the used trucks on behalf of the owner. TSL had previously sold used Volvo trucks

to businesses in Australia and the trucks had been successfully imported into Australia and used by the purchasers. By means of an advertisement in an Australian trade magazine, TSL was seeking to continue the sales of these used trucks.

[3] The four trucks were purchased in New Zealand by the Smallmons and shipped to Queensland. After the trucks arrived, the Smallmons experienced a series of problems with the Queensland regulatory authorities. Despite the trucks being roadworthy, the Smallmons were not able to have the trucks registered by Queensland Transport because they did not have a compliance plate attached and because the Smallmons had not obtained an authority to import from the National Transport Department. Eventually, these regulatory authorities agreed to issue exemption permits allowing the Smallmons to use the trucks on a limited basis.

[4] The contract between TSL and the Smallmons did not contain an express term as to the registerability of the trucks in Queensland. At trial, a key issue was whether, and in what circumstances, a seller of goods can be liable for breach of an implied term as to fitness for purpose when the alleged lack of fitness arises not from the physical features of the goods, but as a result of the alleged non-compliance with regulatory requirements in the buyer's country.

[5] In the High Court, French J held that this issue was determined by the application of the provisions of the United Nations Convention on Contracts for the International Sale of Goods (the Convention), notably art 35.¹ This article sets out the primary requirement that a seller in an international transaction deliver to the buyer goods which are of the quantity, quality and description required by the contract. Relevant to this case, art 35(2) establishes that the goods do not conform with the contract (except where the parties have agreed otherwise) unless the goods are fit for the purposes for which goods of the same description would ordinarily be used or fit for any particular purpose expressly or impliedly made known to the seller.

¹ The Convention was adopted into the domestic law of New Zealand by the Sale of Goods (United Nations Convention) Act 1994.

[6] The Judge found that the Smallmons had failed to establish that TSL was liable for breach of an implied term as to fitness for purpose.² The seller was not responsible for compliance with the regulatory requirements of the importing country and there was no basis for finding that TSL knew or ought to have known about the applicable regulatory requirements for trucks in Queensland.³

[7] The Smallmons appeal against this aspect of the decision. At the hearing, their counsel, Mr Dale, abandoned the challenge to the Judge's findings that there was no basis for any claim under the Fair Trading Act 1986 or s 6 of the Contractual Remedies Act 1979.

Some further factual background

Regulatory requirements in Queensland

[8] The essential facts are not in dispute.⁴ Before a truck can be driven on the road in Queensland it must be registered. In order to be registered, a truck must have what are called its "roadworthies". This is a colloquial term for a test undertaken to check whether or not a vehicle complies with the ADRs, which are essentially national standards, broadly similar to a warrant of fitness in New Zealand. A further requirement is that a truck manufactured after a certain date must be fitted with a compliance plate, a metal tag attached to the vehicle at the time of manufacture for trucks being sold in Australia. If the owner wishes to make modifications to the truck, it is permissible to do so as long as the owner obtains a "modification plate".

Formation of the contract

[9] The Smallmons have been in the road transport business in Queensland for about 20 years. In April 2006, Mr Smallmon saw a full page advertisement for the sale of trucks in an Australian trade magazine. It had been placed by TSL, then

² *Smallmon v Transport Sales Ltd* HC Christchurch CIV-2009-409-363, 30 July 2010.

³ At [94]–[100].

⁴ Mr Dale acknowledged at the hearing that apart from one area to be addressed below, there was no real challenge to the factual findings of French J. The central issue is the application of the law in art 35 of the Convention to the facts.

trading as Transport Sales Canterbury Limited. The advertisement showed a photograph of a Volvo truck and gave Mr Miller's contact details in New Zealand. It stated:

Late model 8x4 cab & chassis available. Some on Spring some on Airbag. Most have Alloys and Med km. Prices available ex New Zealand or Landed at Brisbane, Melbourne or Sydney. These trucks are good buying!!!!!!

Dealer inquiry welcome.

Phone Grant and discuss your requirements.

[10] The advertisement came to Mr Smallmon's attention at a time when the business was looking to upgrade its existing fleet of trucks. Mr Smallmon was aware of another transport operator in Allora, Queensland who had imported two trucks from New Zealand and who had told him they were a good deal. Mr Smallmon thought the other operator's trucks looked "pretty good" and warranted further enquiries of Mr Miller. There followed two phone conversations with Mr Miller, during the course of which Mr Miller confirmed that his company had sold the trucks to the Allora operator, and that he had some Volvo FM12 trucks for sale. The photograph in the advertisement was one of the Allora trucks.

[11] The Smallmons then decided to travel to New Zealand to meet with Mr Miller in August 2006. Before they left Queensland the Smallmons received a telephone call out of the blue from a Mr Kevin Walsh who had been asked by Mr Miller to contact them. Mr Walsh was an ADR compliance engineer. He said he had heard that they were looking at some trucks for sale in New Zealand. He told them that for compliance purposes it was important to look for three things when inspecting the trucks – the exhaust, the seatbelts and a stamp on the fuel tank. Mr Walsh intimated that, if the Smallmons decided to buy the trucks, they could call him, once they returned to Queensland, and he would be happy to attend to the ADRs on their behalf. Mr Walsh did not advise the Smallmons to check whether compliance plates were fitted to the trucks. The Judge found that the most likely explanation for him saying nothing about compliance plates was that he would have

known the plates would be missing but would not have considered it a matter of concern.⁵

[12] The Smallmons duly travelled to Auckland and met Mr Miller at a truck yard where they saw between 20 and 30 trucks on the yard. The Smallmons inspected the trucks in order to see whether they would comply with the ADRs and in particular whether the trucks complied with the three things mentioned by Mr Walsh. During the course of their inspection, the Smallmons noted black plates screwed on the inside door of the trucks. They assumed these were the compliance plates because they were in the same place where in their experience compliance plates are normally located. As part of the Smallmons' business involved the cartage of water, the inspection confirmed that they would in due course need to make some modifications to the trucks so that they could carry water. This would necessitate obtaining modification plates for the trucks in Queensland.

[13] In the High Court, the Judge made factual findings that were described as "common ground".⁶ As these findings were not challenged on appeal, we set them out in full:

- Mr Miller was aware the Smallmons were purchasing the trucks to use in their business, which he knew was based in Queensland and which he knew involved water cartage and landscaping. The Smallmons did not tell him their work sometimes took them into New South Wales.
- The Smallmons told him the reason they wanted to replace their existing fleet was because of the age of the vehicles and the large distances they had travelled.
- They told him they would have to sell their existing trucks to be able to pay for the new ones.
- Mr Miller told them the trucks had been assembled in Australia and exported fully made up to New Zealand and were returned Australian goods.
- Mr Miller stated he had exported trucks to Australia before and had never encountered any problems.
- Mr Miller never gave them any advice on Australian registration requirements and the Smallmons never asked him.

⁵ At [18].

⁶ At [23].

- There was never any discussion of any kind as to what was required in Queensland before the vehicles could be registered.
- Mr Miller told them he could put them in touch with Australian contractors who had brought in the other trucks he had sold to Australians. One was a customs broker, a Mr Tucker, and the other was Mr Walsh who did the ADRs. It is unclear whether Mr Miller actually named the two contractors or just said he would arrange for them to contact the Smallmons.
- At no stage did Mr Miller draw to the Smallmons' attention that the trucks did not have compliance plates.
- Mr Miller never advised the Smallmons they should check out the rules relating to importation and registration.

[14] With respect to the critical question of compliance plates, the Judge found that the parties “were somewhat at cross-purposes”.⁷ So far as Mr Miller was concerned, he was generally aware of the need for compliance plates, but was not aware that it was a pre-requisite for registration in Australia. He also knew the trucks he was selling did not have compliance plates and believed the Smallmons must have appreciated that because that was the reason they needed to engage the services of Mr Walsh. The Smallmons thought (erroneously) that the trucks did have compliance plates attached and that Mr Walsh’s function was to do the modification plates and the roadworthies.

[15] At the end of the meeting in Auckland, the Smallmons orally agreed to purchase four trucks for the sum of NZ\$72,000 per truck. A deposit of ten per cent was payable immediately, with the balance payable before the trucks left New Zealand. Mr Miller agreed that TSL would arrange and pay for the trucks to be cleaned and to be shipped to Brisbane. The parties did not enter into a written contract. Soon after the Smallmons paid the ten per cent deposit. On 31 August 2006 they received an invoice from TSL for the balance of NZ\$259,220.00 and that amount was paid on 18 September 2006.

⁷ At [24].

Findings on regulation compliance

[16] Because of their centrality to the issues in dispute, we also deal with the Judge's findings on the question of responsibility for compliance with the regulatory requirements in Queensland.

[17] The Judge referred to the Smallmons' contention in parts of their evidence that, as well as paying for cleaning and shipping, "Grant and his guys" were to arrange for the roadworthies and everything else up to the point when the Smallmons would take the trucks to be registered.⁸ The reference to "his guys" was to Mr Walsh who had already telephoned the Smallmons and to a Mr Tucker, a customs broker to whom we will refer later. Despite this claim, the Smallmons accepted at the hearing that Mr Walsh and Mr Tucker were in fact their agents and not Mr Miller's agents.⁹ These two were "his guys" only in the sense that Mr Miller had recommended them and put them in touch with the Smallmons. Importantly, the Judge noted that in cross-examination, the Smallmons had agreed it was "their responsibility to attend to roadworthies and registration once the trucks arrived in Brisbane".¹⁰ Mr Miller testified that he was not aware of what formalities would be required to get the trucks registered in Queensland¹¹ and had not made any enquiries about the Australian requirements because under the contract he did not have anything to do with that side of things.

Events leading to delivery

[18] In September 2006, the Smallmons were contacted by Mr Tucker, the person Mr Miller had recommended they should engage to take care of the arrangements for importing trucks into Queensland. Mr Tucker explained to the Smallmons the various matters that needed to be undertaken including arranging for the trucks to have a quarantine inspection. He outlined the cost of the services to be provided by his company. There is no dispute that these were paid by the Smallmons direct.

⁸ At [27].

⁹ At [29].

¹⁰ At [30].

¹¹ Accepted by trial counsel for the Smallmons: see acknowledgement recorded by the Judge at [31].

Also during September 2006, the Smallmons spoke again with Mr Walsh, the ADR compliance engineer. They discussed the modifications that they wanted to make to the trucks for water haulage purposes once they arrived in Brisbane.

[19] The four trucks left New Zealand on 29 September 2006 and arrived in Brisbane on 2 October 2006. Upon arrival, the trucks were held in quarantine by the Australian authorities because they were considered to be too dirty. There were delays in securing the release of the trucks, but by 19 October 2006 all four trucks had finally been released from quarantine. The Smallmons then arranged for the modifications to be carried out. It was then a matter for Mr Walsh to obtain modification plates and the roadworthies, which he did.

Attempt to secure registration

[20] On 20 October 2006, Mrs Smallmon attempted to register the first of the trucks at Queensland Transport. She was unable to do so because the truck did not have a compliance plate attached. Moreover, she had no authority from the National Transport Department to import the truck. This turn of events surprised the Smallmons as they had understood that they would not need anything other than the modification plates and the roadworthies.

[21] Subsequently, the Smallmons sought help from Mr Tucker and others (including a lawyer) in an attempt to persuade the Queensland authorities to register the trucks. They were unsuccessful. Eventually, following assistance from the Smallmons' Member of Parliament, Queensland Transport and the National Transport Department agreed to issue the Smallmons with an exemption permit for each of the four trucks. But the exemption permits only allow the Smallmons to use the trucks on a restricted basis. The permits are due to expire on 21 September 2011, although it seems likely that they will be renewed for a further five-year period. The permits are not transferrable, meaning that the trucks cannot be sold. Further, the permits restrict the use of the trucks to Queensland, with the result that they cannot cross the State border into New South Wales, where the Smallmons have about five per cent of their business.

[22] One of the issues in the High Court was why the Smallmons had not been able to register the trucks in Queensland and whether the Australian authorities were correct to decline registration.¹² The evidence was that another operator who purchased similar trucks from TSL only one month earlier had no difficulty whatsoever in obtaining registration in Queensland, despite not being fitted compliance plates and the owner having no authority to import. The same evidence was given by Mr Tucker who had imported similar trucks on many occasions. On this aspect of the case the Judge found:

[49] The evidence established that Volvo trucks of the type purchased by the Smallmons were originally assembled in Australia. According to Mr Tucker's uncontradicted testimony, all the trucks were manufactured to ADR requirements and compliance plates made for the trucks but never attached. This was because the trucks were intended for export to the New Zealand market and required some minor modifications for that market. Mr Tucker testified that he had seen a box containing all the ADR compliance plates for the Volvo trucks that had been exported to New Zealand and the Pacific. He was confident the compliance plates for the Smallmons' trucks would be amongst them. The problem was that Volvo for reasons of its own would not release any of the plates.

[50] In the past, other Australian purchasers of imported Volvo trucks have obtained registration by providing the authorities with what is called a ratings letter from Volvo confirming the "build spec" and a letter of compliance from a compliance engineer. The letter of compliance from the engineer certifies that the vehicle complies with all relevant ADRs applicable as at the date of manufacture.

[51] Through Mr Walsh, the Smallmons had obtained a ratings letter from Volvo and a letter of compliance. However, in their case that was held not to be sufficient. There was evidence that, since their case, another importer of Volvo trucks has been told that any vehicles he wants to bring into Australia in the future must have a fitted Australian compliance plate and that he must apply for vehicle import approval prior to shipping.

[23] Mr Tucker had not advised the Smallmons that they needed an authority to import the trucks to Australia. Moreover, Mr Walsh did not alert the Smallmons about the importance of having fitted compliance plates. The Judge postulated that "for whatever reason the Australian authorities must have either changed their previous enforcement policy or are now wrongly applying the relevant regulations".¹³

¹² At [48].

¹³ At [54].

[24] The evidence in the High Court resulted in the following findings that were not challenged on appeal:

[55] There is no doubt the four trucks do in fact comply with Australian Design Rules and comply with all relevant ADRs applicable as at the date of manufacture. The deficiency lies in the absence of the compliance plates and the absence of an authority to import. Of those two deficiencies, it is the absence of a fitted compliance plate that seems to be the major stumbling block. It is a defect that can never be remedied unless perhaps Volvo released the plates. The trucks cannot be re-made.

[56] While, as I have said, Mr Miller knew the trucks did not have a compliance plate, I accept he would not have appreciated the significance of that, given the fact he had sold other vehicles also without compliance plates and those purchasers had never experienced any difficulty.

High Court judgment

[25] The Judge was required to determine the Smallmons' claim that there had been a breach by TSL of art 35(2) of the Convention on the basis that the trucks were not fit for purposes for which they would ordinarily be used or a particular purpose made known to the seller at the time of contracting. The Judge held that there was no express warranty in the contract between TSL and the Smallmons relating to registrability of the trucks in Queensland.¹⁴ Thus the standards set out in art 35(2), including the requirement that goods be fit for the purposes for which they are ordinarily used, were implied terms that formed part of the contract.¹⁵ The Judge reasoned that trucks are ordinarily used for the cartage of goods on the road. The trucks purchased by the Smallmons were mechanically capable of being driven on the road. The Smallmons contention was that "because the trucks were not registerable at the point of sale, and could never be fully registered, they could not be driven and were therefore not fit for the ordinary purpose".¹⁶

[26] The Judge considered a number of overseas decisions and academic articles. In particular, she referred to the leading cases, including the "New Zealand mussels

¹⁴ At [78].

¹⁵ At [79]–[80].

¹⁶ At [81].

case” in the Bundesgerichtshof (German Supreme Court),¹⁷ the “Italian cheese case” (Court of Appeal, Grenoble, France),¹⁸ and *Medical Marketing v Internazionale Medico Scientifica* (Federal District Court, Louisiana, United States).¹⁹ The Judge concluded that the following principles emerged from the authorities:²⁰

- i) As a general rule, the seller is not responsible for compliance with the regulatory provisions or standards of the importing country even if he or she knows the destination of the goods unless:
 - a. The same regulations exist in the seller’s country.
 - b. The buyer drew the seller’s attention to the regulatory provisions and relied on the seller’s expertise.
 - c. The seller knew or should have known of the requirements because of special circumstances.

Special circumstances may include:

- i. The fact the seller has maintained a branch in the importing country.
- ii. The existence of a long-standing connection between the parties.
- iii. The fact the seller has often exported into the buyer’s country.
- iv. The fact the seller has promoted its products in the buyer’s country.

[27] In terms of interpretation of the Convention, the Judge held that under art 7 recourse to domestic law is prohibited.²¹ This conclusion was not challenged by the Smallmons on appeal.

[28] In the High Court it was common ground that the registration requirements in Queensland are different to those prevailing in New Zealand. It was also common

¹⁷ “New Zealand Mussels Case” (8 March 1995) VIII ZR 159/94, Bundesgerichtshof, Germany. A translated version of this case can be found online at the CISG Database: www.cisg.law.pace.edu.

¹⁸ *M Caiato Roger v La Société française de factoring internationale factor France “S.F.F.” (SA)* (13 September 1995) 93/4126, Cour d’appel, Grenoble, France. A translated version is available at the CISG Database.

¹⁹ *Medical Marketing International Inc v Internazionale Medico Scientifica s.r.l.* (17 May 1999) Civil Action No. 99-0380 Section “K” (1), District Court for the Eastern District of Louisiana, United States. This too can be found at the CISG Database.

²⁰ At [83].

²¹ At [86].

ground that at no stage did the Smallmons ever raise the issue of registration requirements with Mr Miller. Further, there was no evidence that Mr Miller knew what the registration requirements were in Queensland.²² Accordingly, for the Smallmons to establish a breach of art 35(2)(a), it could only be on the grounds that Mr Miller and TSL ought to have known about such requirements because of special circumstances.

[29] On this issue the Judge held:

[94] What is alleged to amount to special circumstances are the facts that Transport Sales advertised in Australia and that Transport Sales had exported trucks previously into Australia. The evidence established that prior to the Smallmon transaction, Transport Sales had exported seven Volvo trucks into Australia.

[95] As the authorities make clear, these are circumstances capable of amounting to special circumstances.

[96] However, in my view, they are outweighed by two other considerations. The first is the terms of the advertisement which stated “landed” at Brisbane. The second is that Mr Miller expressly recommended Australian contractors who would be able to assist the Smallmons with importation and ADR compliance. He was thereby delineating the parties’ respective responsibilities, as well as delineating his own field of expertise and knowledge, and in my view in those circumstances it would be wrong to say that Mr Miller or Transport Sales ought to have known.

[30] The Judge also held that the same considerations apply under art 35(2)(b) dealing with any particular purpose made known expressly or impliedly to the seller at the time of contract, except where the circumstances show that the buyer did not rely, or it was unreasonable for him to rely, on the seller’s skill and judgment. Here, the Smallmons had made known to Mr Miller that they wanted to use the trucks in Australia so that use in Australia could be said to be a particular purpose.²³

[31] The Judge concluded on this point:

[99] ... the circumstances show it was unreasonable for the Smallmons to rely on Transport Sales’ skill and judgment. The Smallmons were experienced transport operators. They were in a much better position to know the registration requirements of their own country than Mr Miller. The fact the trucks did not have compliance plates was not hidden from them, but was there to be seen. As experienced transport operators, they could be

²² At [92].

²³ At [98].

expected to be able to identify a compliance plate. Further, Mr Miller recommended they engage specialist contractors, which they did. Significantly, Mrs Smallmon agreed with the proposition that the purpose of inspecting the vehicles was to see if they complied with ADRs and that at that stage they were acting on advice from Mr Walsh.

[100] In those circumstances, any reliance placed on Mr Miller's expertise or knowledge or that of his company about the regulatory requirements in Australia would not in my view be reasonable.

[32] As a result the Judge concluded that the Smallmons had failed to establish a breach of art 35(2) of the Convention on the part of Mr Miller or TSL.

The issues on appeal

[33] The central issue is the application of art 35 of the Convention to the sale of the four trucks by TSL to the Smallmons. There was no express provision in the contract that the trucks would in fact be registrable in Queensland. Hence there was no question of breach of art 35(1).²⁴ So the first question is: was there an implied term of the contract that the trucks met the requirements for registration in the buyer's home state, when the seller was located in a different country? The second question is: which of the parties had responsibility for obtaining registration of the four trucks in Queensland?

[34] These questions involve the application of the provisions of art 35(2) of the Convention to the facts of the case as outlined above. Accordingly, we will first consider the principles arising from art 35(2) as derived from the international jurisprudence in the form of cases and articles. We will then provide our evaluation of the facts in the light of those principles.

²⁴ Article 35(1) provides that:

“(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.”

Applicable legal principles

Convention articles

[35] There are three relevant articles: arts 7, 8 and 35(2). Article 7 provides:

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

[36] Because the intent and conduct of the parties to the contract is in issue, art 8 is also relevant. Article 8 states:

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

[37] The key articles are arts 35(2) and 35(3), which provide:

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

- (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;
- (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

Interpreting the Convention

[38] New Zealand acceded to the Convention, which opened for signature on 11 April 1980 and entered into force on 1 January 1988, on 22 September 1994. As noted, the Convention was enacted for New Zealand by the Sale of Goods (United Nations Convention) Act 1994.²⁵ The aim of the Convention was to seek to achieve the harmonisation and unification of trade law regarding international sales of goods.²⁶

[39] Counsel for the Smallmons properly acknowledged that resort to authorities dealing with domestic law is not permissible. This follows from the requirement in art 7, dealing with the interpretation of the Convention, to have regard to “its international character and to the need to promote uniformity in its application and the observance of good faith in international trade”. Thus the Convention is to be given an autonomous interpretation requiring the Convention to be interpreted exclusively on its own terms and applying Convention-related decisions in overseas jurisdictions.

²⁵ The Act came into force in 1995, pursuant to the Sale of Goods (United Nations Convention) Act Commencement Order 1995.

²⁶ Peter Schlechtriem and Petra Butler *UN Law on International Sales: The UN Convention on the International Sale of Goods* (Springer, Heidelberg, 2009) at [1]. This text also provides useful commentary on art 35(2)(a) as it applies to public law provisions of particular countries at [139]. For a useful discussion of the Convention see: Peter Winship “Changing Contract Practices in the Light of the United Nations Sales Convention: A Guide for Practitioners” (1995) 29 *International Lawyer* 525; Karina Winsor “What is the CISG?” [2011] *NZLJ* 31.

[40] As urged by the late Professor Peter Schlechtriem, recourse to domestic law must be avoided:²⁷

In reading and understanding the provisions, concepts and words of the Convention, recourse to the understanding of these words and the like in domestic systems, in particular the domestic legal system of the reader, must be avoided. This seems to be self-evident, but experience shows that practitioners and scholars tend to understand words and concepts of the Convention according to their familiar domestic law.

[41] We therefore propose to consider only the international authorities and articles in interpreting art 35(2).²⁸

Principles to be distilled from art 35(2)

[42] We have already referred at [26] above to the distillation of the applicable principles by French J. Counsel for the Smallmons accepted at the hearing that this was an accurate summary. We consider that this concession was properly made. We need only offer some brief elaboration, making specific reference to the leading international decisions. The international jurisprudence concerning art 35(2) has established that, generally, the seller is not responsible for compliance with the regulatory provisions or standards of the importing country. The seminal case is the New Zealand mussels case,²⁹ where the Supreme Court of Germany stated that a buyer cannot expect compliance with the specialised public law provisions of the buyer's own country.³⁰ More recently, case law emanating from the Oberster Gerichtshof (the Supreme Court of Austria) confirms that a seller cannot be expected to know all of the rules of the buyer's country or the country of usage, and that the standards of the seller's country specify the standard of ordinary usage.³¹ Just because the seller knows generally of the buyer's country or the country where the

²⁷ Peter Schlechtriem "Requirement of Application and Sphere of Applicability of the CISG" (2005) 36 VUWLR 781 at 789–790.

²⁸ As did French J in the High Court at [82].

²⁹ "New Zealand mussels case" (8 March 1995) VIII ZR 159/94, Bundesgerichtshof, Germany. A translation can be found at the CISG Database.

³⁰ At bb).

³¹ (13 April 2000) 2 Ob 100/00w, Oberster Gerichtshof, Austria; (27 February 2003) 2 Ob 48/02a, Oberster Gerichtshof, Austria; (25 January 2006) 7 Ob 302/05w, Oberster Gerichtshof, Austria; (19 April 2007) 6 Ob 56/07i, Oberster Gerichtshof, Austria at [1.2]. This line of jurisprudence suggests that it is incumbent upon the buyer to incorporate the regulatory provisions of their country into the contract. Translations of these cases can be found at the CISG Database.

goods are destined, that does not place upon the buyer an obligation to comply with the regulations of that country.³²

[43] The German Supreme Court did, however, identify certain situations where the requirements of the buyer's country can be taken into account. These are when the relevant regulatory standards of the buyer's country:³³

- (a) exist in the seller's country as well; or
- (b) the buyer has pointed them out to the seller and thereby relied on and was allowed to rely on the seller's expertise; or
- (c) the relevant provisions in the anticipated export country are known or should be known to the seller due to the particular circumstances of the case.

[44] The German Supreme Court went on, in statements not directly necessary to the reasoning, to list different circumstances in which a court might find that the seller knew or ought to have known the relevant public law provisions of the buyer's country. These circumstances included that the seller had a branch in the buyer's country; the seller already had a business connection with the buyer for some time; the seller often exports to the buyer's country; or the seller has promoted his or her products in that country.³⁴

[45] In the United States, the District Court for the Eastern District of Louisiana essentially adopted the reasoning of the New Zealand mussels case.³⁵ The Court stated that the decision of the German Supreme Court was authority for the proposition that the seller was not obligated to supply goods that conformed to public law provisions of the buyer's country. The exception was when, due to special circumstances, "such as the existence of a seller's branch office in the buyer's state", the seller knew or ought to have known of the regulations at issue. Case law

³² (27 February 2003) 2 Ob 48/02a, Oberster Gerichtshof, Austria.

³³ "New Zealand mussels Case" at bb).

³⁴ Ibid at ccc).

³⁵ See *Medical Marketing International Inc v Internazionale Medico Scientifica s.r.l.* (17 May 1999) Civil Action No. 99-0380 Section "K" (1), District Court for the Eastern District of Louisiana, United States, which can be accessed at the CISG Database.

in France has also shown that the business relations of the parties may be important in determining non-conformity pursuant to art 35.³⁶ These cases encourage the conclusion that the existence of such “special circumstances”³⁷ may lead to the seller being liable for breach of public law and regulatory requirements in the buyer’s country.³⁸

[46] The international authorities and articles support the proposition that the seller will not be liable for goods that do not conform to the regulatory provisions or standards of the buyer’s country unless the seller knew or ought to have known of the requirements because of special circumstances. It seems that this principle can apply to the provisions of both art 35(2)(a) and 35(2)(b).

[47] With respect to proof of particular circumstances, the examples identified in the cases and the literature include the seller maintaining a branch in the buyer’s country, a long-standing business connection between the parties, the seller making regular exports to the buyer’s country and the provision of goods in the buyer’s country. These are illustrative of the factors that may enable a buyer to establish liability on the seller, despite the general principle to the contrary. Where the reasonableness of the buyer’s reliance on the seller’s skill and judgment is in issue under art 35(2)(b) , the seller may be able to point to proof of such special circumstances.

[48] Finally, we note that the existence of an opportunity by the buyer to inspect the goods before the contract is entered into may be relevant to the analysis. In the “Frozen chicken legs case”, the Audiencia Provincial de Granada (an appellate court

³⁶ *M Caiato Roger v La Société française de factoring international factor France “S.F.F.” (SA)* (13 September 1995) 93/4126, Cour d’appel, Grenoble, France. A translation of this case can be found at the CISG Database.

³⁷ The term “special circumstances” was used in *Medical Marketing International Inc v Internazionale Medico Scientifica s.r.l.* to describe the circumstances in which the seller knew or ought to have known of the regulations at issue. French J also used the term in the High Court decision (see [26] above). “Special” in this case simply means that particular circumstances exist that warrant the imposition of liability on the seller, due to actual or deemed knowledge on the part of the seller.

³⁸ For useful academic commentary see Ingeborg Schwenzer “Section II. Conformity of the goods and third party claims – Art 35” in Ingeborg Schwenzer (ed) *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd ed, Oxford University Press, Oxford, 2010) at [17]; see also commentary on art 35 at “UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Good – 2008 revision” UNCITRAL <www.uncitral.org>.

in Spain) seemed to uphold the principle that the seller is not expected to know the public law provisions of the buyer's country or the ultimate destination of the goods.³⁹ It was also material in this case that the buyer had had an opportunity to inspect the frozen chicken legs, further pushing responsibility for non-conformity with regulatory provisions towards the buyer. Hence the fact of inspecting the goods may well be relevant to the particular circumstances of the case.

Submissions of the parties

Appellants' submissions

[49] For the appellants, Mr Dale emphasises that the problems with registration in Australia were unforeseen by both the buyers and the seller, and are the result of "unusual rulings" by the regulatory authorities in Australia. But counsel submits that art 35(2) of the Convention places the risk of non-registration with the seller.

[50] Counsel submits that the seller is liable under art 35(2)(a) because the inability to register the trucks means that they are not fit for purpose. He submits that it is sufficient for the Smallmons to prove that the trucks could not be registered, as was the case. It is not necessary for the buyers to go on and prove that the seller ought to have known of the unusual circumstances in Queensland that prevented registration. This is because art 35(2)(a) itself puts the seller at risk. Any principle from the international jurisprudence that the seller is not responsible for compliance with regulatory requirements in the buyer's country is a general one only and open to proof to the contrary.

[51] Counsel further submits that it was not necessary for the Judge to go on and consider art 35(2)(b) because this sale did not involve the making known by the buyers to the seller of any "particular purpose". Accordingly, no issue arises as to whether or not it was reasonable for the buyers to rely on the seller's skill and judgment about the regulatory position in Australia.

³⁹ "Frozen chicken legs case" (2 March 2000) 546/1999, Audiencia Provincial de Granada, Spain. Commentary on this case can be found at the CISG Database, where a link to a translated version exists.

[52] As to the question of “special circumstances”, Mr Dale submits that the existence of such does not arise under art 35(2)(a). This is because there is no reference to this concept in the text of the article. Counsel draws a distinction between the text of the two provisions, noting that art 35(2)(b) alone refers to circumstances showing that the buyer did not rely, or it was unreasonable for him to rely, on the seller’s skill and judgment.

[53] By way of fall-back position Mr Dale submits that, if it is necessary for the Smallmons to establish special circumstances, there were such circumstances in this case. They comprised the fact that the seller had previously exported trucks into Australia and promoted the sales of trucks by advertisement in Australia. The trial Judge erred in finding that such special circumstances were outweighed by the twin factors of the reference in the advertisement to “landed in Brisbane” and the recommendation by Mr Miller to the Smallmons of two Australian advisers who could assist with importation of the trucks and registration.

[54] The one factual aspect that Mr Dale advances is that the Judge was wrong to ignore the Smallmons’ evidence to the effect that “Grant [Miller] and his guys” were to arrange for the obtaining of the roadworthies and everything else up to the point of the Smallmons taking the trucks along to have them registered. Mr Dale submits in this context that at the trial counsel for the respondents never directly put to the Smallmons the proposition that “Grant did not say he would take care of everything”. These submissions therefore involve a challenge to the Judge’s conclusion that the Smallmons “agreed it was their responsibility to attend to roadworthies and registration once the trucks arrived in Brisbane”.⁴⁰ A further aspect of this challenge is counsel’s submission that there was no proper pleading by the respondents that neither the engagement of Messrs Walsh and Tucker, nor any other factual aspects, resulted in responsibility for registration of the trucks in Queensland being placed on the Smallmons.

⁴⁰ At [30].

Respondents' submissions

[55] For the respondents, Mr James relies on the international authorities and articles as supporting the principle applicable to art 35(2)(a) and (b) that the seller is not responsible for compliance with the regulatory provisions or standards of the buyers' country. Despite this being a general principle, he submits it applies for the seller's benefit in this case.

[56] Further, Mr James submits that the circumstances relied on by the buyers as special circumstances showing that the seller ought to have known about the regulatory impediments in Queensland are not decisive: the general principle continues to apply in the seller's favour. Mr James refers to the portions of the evidence supporting the trial Judge's factual findings to this effect.

[57] As an alternative argument, Mr James refers to factual findings that support the conclusion that art 35(2) is not engaged at all, because the parties have agreed otherwise. Mr James submits that this proposition was sufficiently signalled in the pleadings to be available to support the judgement in the High Court on this additional basis.

Our evaluation

Article 35(2)(a)

[58] Article 35(2) is premised on the fact that the parties have not agreed otherwise. As stated in the text by Schlechtriem and Butler:⁴¹

Article 35(2) ... sets out what reasonable parties would have agreed upon had they put their mind to it. This is important since it means that the first inquiry has to be what the parties agreed upon and only if that inquiry is not satisfactory is Article 35(2) ... applicable.

[59] With respect to the first inquiry, the Judge found that there was no express term in the contract relating to the registrability of the trucks in Queensland. This

⁴¹ Peter Schlechtriem and Petra Butler, *UN Law on International Sales: The UN Convention on the International Sale of Goods*, at [135].

finding was not challenged on appeal. The next question concerns any terms to be implied under art 35(2). Here the starting point is that the goods must be fit for purpose.

[60] Then there is the principle that, under art 35(2) of the Convention, in an international sale of goods generally the seller is not responsible for compliance with the regulatory provisions or standards of the buyer's country. Here, it was common ground that the registration requirements for trucks in Queensland were different to those applicable in New Zealand. Further, at no stage prior to contracting with TSL did the Smallmons raise the issue of registration requirements with Mr Miller. The Judge found (and this was not challenged on appeal) that there was no evidence that Mr Miller knew what the registration requirements were in Queensland.⁴²

[61] For the purposes of the application to the facts of the principle governing regulatory requirements, we are satisfied that difficulties experienced by the Smallmons in registering the trucks in Queensland could fairly be characterised as part of the public law or regulatory requirements of the buyer's country. As noted at [20] above, the reasons why the first of the trucks could not be registered were that it did not have a compliance plate attached and the absence of an authority to import. Both of these factors are quintessentially issues for the regulatory authorities, including Queensland Transport and the National Transport Department, in Australia. It follows that, unless particular circumstances can be shown by the Smallmons to demonstrate that Mr Miller knew or ought to have known about either of these requirements, the claim under art 35(2) must fail. As already noted, there was no evidence Mr Miller actually knew about either requirement.

[62] On the question of whether he ought to have known about them, the particular circumstances identified by the Judge as relevant to the analysis are: first, the advertising of trucks for sale in Australia by TSL and, second, the fact that, prior to the sale to the Smallmons, TSL had sold seven used Volvo trucks to buyers in Australia.⁴³ The Judge correctly observed that these factors are "capable of

⁴² Judgment of French J at [92].

⁴³ At [94].

amounting to special circumstances”.⁴⁴ But, like the Judge, we are satisfied that neither of these circumstances, nor any other factor, is sufficient to justify a departure from the general principle under art 35(2) because TSL ought to have known about the regulation provisions or requirements governing registration of the trucks in Australia.

[63] With respect to the promotion by TSL of trucks for sale in the Australian trade magazine, we do not consider much weight, if any, can be placed on this factor. In the advertisement the seller made no promises about registration or the provision of services to achieve registration in Queensland. As noted by the Judge, the advertisement offered shipping prices ex New Zealand or landed at Brisbane (or elsewhere), indicating that the seller’s role ceased at the latest upon delivery by ship onto the wharf at Brisbane.

[64] The fact that TSL had previously exported seven Volvo trucks to Australia likewise can have little weight as a particular circumstance in overcoming the general principle. First, in all previous sales to Australia, Mr Miller was not aware that the buyers had encountered any problems with the import regulations, or in achieving registration in Queensland. The regulatory authorities had facilitated the registration process, despite the trucks not having compliance plates attached and the owners not having an authority to import.

[65] It was against this background and state of Mr Miller’s knowledge that the sale to the Smallmons took place. Mr Miller expressly recommended to the buyers two expert Australian contractors, Messrs Walsh and Tucker, who could assist with the importation, ADR compliance and registration processes. We agree with the Judge’s view that Mr Miller was thereby delineating the respective responsibilities of the parties to the contract. At the same time, Mr Miller was informing the buyers about the limits of his own expertise and knowledge about regulatory requirements within Australia.

⁴⁴ At [95].

[66] Another circumstance that we consider to be material is the knowledge and experience of the Smallmons. As the Judge found,⁴⁵ they were experienced transport operators. Hence they were in a much better position than Mr Miller to know the registration requirements of their own country. Moreover, having received preliminary expert advice from Mr Walsh about matters to watch out for, they had the opportunity to (and did) inspect the four trucks in New Zealand. The fact that the trucks did not have compliance plates on them was not kept from them. It was there for them (and anyone else) to see. The Judge was satisfied that, given their experience, they could be expected to be able to identify the presence or absence of a compliance plate. We agree.

[67] Counsel for the Smallmons also relies on the “Frozen pork case”⁴⁶ as authority supporting the proposition that the trucks were non-conforming under art 35(2)(a) because they could not be registered in Australia. The “Frozen pork case” involved the sale of meat foodstuffs at risk of contamination and subject to regulatory provisions in Europe, including the country of ultimate consumption, which had prohibited the sale of these goods. The German Supreme Court found that the goods did not conform with the contract within the meaning of arts 35(1) and 35(2)(a), as the meat was not resalable. The appellants submitted that this case formed a contrary principle to that espoused in the New Zealand mussels case. We do not agree. The contaminated state of the pork product sold led to the issue of protective regulations. In our case, the regulations that were the source of the problems for the Smallmons well pre-dated the sale and importation of the trucks.

[68] As the German Supreme Court stated in the “Frozen pork case”:⁴⁷

It is true that a seller is generally not liable for the goods meeting the public law regulations valid in the country of consumption. In this case, however, the product itself caused the issuance of protective regulations under public law, and not only in the ultimate buyer’s country (Bosnia-Herzegovina), but also throughout the entire European Union, including the country of origin, Belgium.

⁴⁵ At [99].

⁴⁶ “Frozen pork case” (2 March 2005) VIII ZR 67/04, Bundesgerichtshof, Germany. Translation available at the CISG Database.

⁴⁷ At [I].

[69] The German Supreme Court went on to state that under art 35 (1)(a) the circumstances in the seller's country are generally controlling as the seller cannot be expected to know all relevant provisions in the buyer's country or in the country of the ultimate consumer. The situation is only different if the regulatory or public law provisions in the seller's and buyer's country are the same, or if the seller is familiar with such provisions of the buyer's country due to particular circumstances. In our view, this case does not support the appellant's case. The fact that it involved goods destined for human consumption and suspected of being contaminated (as compared with fully-functioning trucks) further distinguishes it from the present case.

[70] For all of the above reasons, we are satisfied that there is no proper basis upon which the Smallmons can establish that the general principle does not apply on the ground that Mr Miller ought to have known about the regulatory standards or requirements of Australia.

Article 35(2)(b)

[71] The Judge also analysed the facts by applying art 35(2)(b).⁴⁸ She did so on the basis that the buyers made it known to Mr Miller that they wanted to use the trucks in Australia. That could be said to be a particular purpose in terms of art 35(2)(b).

[72] Such analysis calls for an assessment of whether there were circumstances that show that the buyers did not rely, or that it was unreasonable for them to rely, on the seller's skill and judgment. The same facts as described above were used by the Judge to support the conclusion that the buyers did not so rely, it being unreasonable for them to have done so in all the circumstances. We agree with that conclusion.

The factual challenge

[73] We have considered the evidence touching the question of the responsibility for attending to roadworthies and registration once the trucks arrived in Brisbane. We are satisfied there is clear evidence that both Mr and Mrs Smallmon accepted

⁴⁸ At [97]–[100].

that the parties agreed that these matters were their responsibility. There was thus ample justification for the Judge’s finding on the point. Further, we reject the suggestion by Mr Dale that the negative of the proposition asserted by the Smallmons was not properly put to them. Both the topic generally and the specifics of the issue of responsibility for registration in Queensland were adequately raised at trial by counsel for the respondents. We deal with the pleading point in the next section.

Is art 35(2) engaged?

[74] It remains for us to address the alternative argument raised by the respondents for dismissing the appeal. Such an argument was not dealt with by the Judge. It concerns whether art 35(2) is engaged at all.

[75] We consider that it is open to the respondents to contend that the parties agreed as part of the contract that the buyers would be responsible for obtaining registration of the trucks in Australia. This follows from the factual findings set out below:

- (a) the Smallmons’ acceptance that Messrs Walsh and Tucker were their agents: they were only “his [Mr Miller’s] guys” in the sense that he was the person who recommended them and put them in touch with the Smallmons;⁴⁹
- (b) the Smallmons’ acceptance that it was their responsibility under the contract to attend to roadworthies and registration once the trucks arrived in Brisbane;⁵⁰
- (c) the fact (accepted by the Smallmons) that Mr Miller was not aware of what formalities would be required to get the trucks registered in Queensland and had made no inquiries about the Australian

⁴⁹ At [29].
⁵⁰ At [30].

requirements because under the contract that was not his responsibility,⁵¹

- (d) the Smallmons subsequently worked with Messrs Walsh and Tucker to arrange importation, ADR and registration requirements (including the modifications) in Australia;⁵² and
- (e) the Smallmons' acceptance that TSL's responsibility was limited to cleaning and shipping the trucks: TSL never agreed to arrange importation and registration, as that was the Smallmons own responsibility.⁵³

[76] In our view, this evidence and other findings giving rise to supporting inferences,⁵⁴ provides a proper foundation for the proposition that Mr Miller made no promise as to the registerability of the trucks in Queensland, thereby delineating that he was not accepting any responsibility for this process. In terms of such responsibility, the Smallmons were found to have agreed to such delineation. It follows that any risk that the goods could not be registered must lie with the Smallmons. In terms of the opening words of art 35(2), the parties must be treated as having agreed otherwise. The parties agreed that conforming with the regulatory requirements (including importation and registration) in Australia was the buyer's responsibility.⁵⁵

[77] Having accepted that the Judge's factual findings could not be challenged, Mr Dale responds by contending that the respondents did not adequately plead that the contract placed the responsibility for dealing with importation and registration on the Smallmons. We do not agree.

[78] The Smallmons' statement of claim pleaded that there was an oral contract between the parties with certain express terms. These relevantly included:

⁵¹ At [31].

⁵² At [34]–[35].

⁵³ At [69].

⁵⁴ For example some of the matters listed as common ground set out at [13] above.

⁵⁵ This can be adduced by the parties' intentions: art 8 of the Convention.

- a. The First Defendant agreed to sell to the Plaintiff four Volvo FM12 trucks of a specified type, age and kilometre reading (the Trucks);
- b. The First Defendant would arrange for the export of the Trucks from New Zealand and their importation into Australia, via its agents.
- ...
- d. In consideration for the purchase and export of the Trucks, the Plaintiff would make the following payments:
 - ...
 - iii. The reasonable costs of the First Defendant and its duly authorised agents incurred in the export of the Trucks from New Zealand into Queensland, Australia.

[79] There followed a pleading of a number of terms said to be implied in the contract as a matter of law:

- a. The First Defendant warranted that the Trucks were fit for the purpose of, and intended use by, the Plaintiff in its business;
- b. The First Defendant and its duly authorised agents would exercise reasonable care and skill in carrying out the terms of the contract;
- c. The First Defendant had requisite knowledge and ability in the area of the export of trucks from New Zealand and the import of trucks into Australia, to enable it to import the Trucks into Australia in a manner which would allow for the Plaintiff's full business use and in a timely manner; and
- d. The First Defendant had the requisite knowledge and ability to determine the correct documentation or authorities needed for import of the Trucks from New Zealand into Australia for the Plaintiff's full business use and in a timely manner.

[80] The respondents admitted the agreement to sell the four trucks to the Smallmons. But they denied the allegations as to responsibility to arrange the importation of the trucks into Australia via its agents. In particular, the respondents pleaded relevantly:

- (a) They never agreed to export and import, only shipping with the Plaintiff paying their own agent to attend to import and export.
- ...
- (d) They say the costs were never paid as referred to in (d)(iii). They deny that they needed to pay such costs and say that no claim has [ever] been made for it as it was never agreed to by the First and Second Defendants.

[81] With respect to the implied terms, the pleading in the statement of defence was:

14. THAT they deny each and every allegation contained in paragraph 16 of the Plaintiff's statement of claim and say that no warranty was given as to:-
 - a) Their fitness or purpose;
 - b) That they had the requisite knowledge and ability in the area of the export of trucks from New Zealand and the import of trucks into Australia;
 - c) That they had the requisite knowledge and ability to determine the correct documentation or authorities needed for import of the trucks from New Zealand into Australia.

[82] In the light of the above pleadings, there was a clear engagement by the parties as to where the contractual responsibility lay for arranging importation and registration in Australia. That was a live issue at trial. It was thus open to the Judge to make the findings she did as summarised at [75] above. Therefore, had it been necessary for us to do so we would have been prepared to uphold the respondents' alternative argument that art 35(2) is not engaged.

Quantum of damages

[83] As the Smallmons' arguments as to liability have failed, there is no need for us to deal with any issues of quantum of damages. We note that the Judge did not consider them either, given her findings on art 35(2). Had we been required to do so, it is likely that, given the state of the evidence and the number of questions requiring resolution, we would have sent this aspect back to the High Court.

Result

[84] The appeal is dismissed.

[85] The appellants must pay the respondents costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

Solicitors:
gca Lawyers, Christchurch for Appellants
Saunders & Co, Christchurch for Respondents