THE MONEY IN THE BRIEFCASE: *FLACK* AND TITLE TO SUE IN CONVERSION

RACHAEL MULHERON*

Chairman, National Crime Authority v Flack started life with a most unusual discovery in a cupboard of certain premises in Sydney, and ended recently when the High Court described it as 'borderline', but decided that it was not a proper vehicle for the grant of special leave to appeal.[1] In the intervening period, the Federal Court[2] and the Full Federal Court[3] had occasion to consider whether a lessee of premises had sufficient title to sue in conversion in respect of goods which were lawfully taken under a search warrant from those premises, and where the ownership of the goods was unknown.

I BACKGROUND

A *Facts*

Mrs Flack rented premises in a Sydney suburb from the New South Wales Department of Housing. She had lived there alone since the death of her husband in 1990. The only people who had keys to the premises, apart from Mrs Flack, were her son, Glen, who visited 'about twice a week' and a neighbour and friend across the street, but who had died in February 1994.[4]

---

* Lecturer, College of Law, University of Notre Dame, Fremantle.

[1] *Chairman, National Crime Authority v Flack* [1999] S125/1998 (Unreported, Gleeson CJ and Gummow J, 14 May 1999) <http://austlii.edu.au/au/cases/cth/high_ct/1999.html> at 5 August 2000 (Copy on file with author) ('*Flack*'). This is a transcript of the leave application.

[2] *Flack v Chairperson, National Crime Authority* (1997) 80 FCR 137 ('*Flack*').

[3] *Chairman, National Crime Authority v Flack* (1998) 156 ALR 501 ('*Flack*').

[4] Hill J at trial stated that Mrs Flack's adult married daughter did not at any relevant time have a key to the premises: *Flack* (1997) 80 FCR 137, 139; however both Foster and Heerey JJ on appeal separately stated that the daughter, Mrs Nichols, did have a key: *Flack* (1998) 156 ALR 501, 502, 507. This point was not at all significant, except insofar as it was relevant to the number of persons who had access to the premises, and to whether it could be said, in that regard, that Mrs Flack had a possessory title.

On 13 April 1994, a search of the premises was undertaken by officers of the Australian Federal Police under a search warrant obtained by the National Crime Authority (NCA). The purpose of the search was to assist an investigation being conducted into possible offences involving the possession of prohibited imports of narcotic goods. The warrant was based on suspicion that Glen Flack had been involved in drug related offences. The search was conducted lawfully, but with somewhat surprising results.

A briefcase containing $433,000, predominantly in $50 notes, was found in a cupboard in the entrance/hallway of the premises. Upon the discovery being made, Mrs Flack was shown the briefcase and contents. Part of the subsequent exchange went as follows:

Mrs Flack:	'Oh my God.'
Detective:	'Is there anything else you can tell us about that?'
Mrs Flack:	'No, nothing. I've never seen it before, I swear.'
Detective:	...'It was up there' [pointing upwards to top half of the cupboard].
Mrs Flack:	'Well I never go up there. I don't need to. That's what I use for the linen press there' [indicated a nearby cupboard].
Detective:	'Have you ever seen anyone go to this cupboard?'
Mrs Flack:	'No, oh, hang on, only Tony who did the painting but I don't know if he was there or not. I doubt it.'[5]

and later on at the same premises:

Mrs Flack:	'What will happen now?'
Chief Investigator:	'Well we'll take the money and the bags and try and work out where it came from. It's obviously very suspicious.'
Mrs Flack:	'Yes certainly it is.'[6]

Evidence from an official of the Reserve Bank showed that at least one of the notes in the briefcase only came into circulation in April 1994. That meant that that note, at least, must have been placed in the bag only a few days before it was discovered and seized. The bag itself was of a kind that had been imported into Australia in January 1993.

[5] Extracted from a conversation reproduced in the judgment of Heerey J: *Flack* (1998) 156 ALR 501, 508.
[6] Ibid 502 (Foster J).

The bag and the contents were taken away in execution of the warrant. However, no person was thereafter charged with any offence. An investigation was undertaken but it did not result in any prosecution being instituted against Glen Flack or anyone else.

Mrs Flack requested that the bag and contents be returned to her. The NCA refused, and claimed that Mrs Flack did not have sufficient title to sue for it. Initially the response was that the goods might be needed in evidence in contemplated proceedings against Glen Flack, but three and a half years following the seizure of the 'evidence', that excuse had worn a little thin. Hill J admonished that the statutory powers of the Australian Federal Police to seize and retain goods for a reasonable period did not authorise continued retention beyond the time necessary for investigation or prosecution.[7]

B *Tort of Conversion*

Mrs Flack instituted proceedings against the NCA and the Commonwealth for the return of the briefcase and the money contained in it, pleading a cause of action in conversion. As Dixon J stated in *Penfolds Wines Pty Ltd v Elliott*:[8]

> The essence of conversion is a dealing with a chattel in a manner repugnant to the immediate right of possession of the person who has the property or special property in the chattel. ... An intent to do that which would deprive 'the true owner' of his immediate right to possession or impair it may be said to form the essential ground of the tort.[9]

It is not necessary for the purposes of the tort that the plaintiff have legal title to the chattel; rather, the tort depends upon proof of a 'possessory title'. In order to maintain a title to sue in conversion, possessory title is as good as legal title, as against all the world except the true owner of the chattel. Thus, Mrs Flack's cause of action did not depend upon proof of her ownership of the briefcase and money—indeed, she admitted that she did not own them and had not known of their existence—it depended upon her right to their possession.[10]

C *Finders and Conversion*

When asked by Gleeson CJ at the special leave hearing to explain the basis of the NCA's claim to keep the briefcase and money, counsel for the NCA acknowledged that the NCA had a duty to return the goods to the true owner, or in certain circumstances, to the possessory owner, but had no duty to return it to anyone other than

---

[7] *Flack* (1997) 80 FCR 137, 141.
[8] (1946) 74 CLR 204.
[9] Ibid 229, cited in *Flack* (1997) 80 FCR 137, 141 (Hill J).
[10] Although money as currency cannot be converted, the $433,000 in this case was contained within a specific receptacle, and was thus the proper subject matter of a conversionary action: Francis Trindade and Peter Cane, *The Law of Torts* (3rd ed, 1999) 138.

those persons.[11] The true owner's identity was not (and was unlikely ever to be) known, and Mrs Flack, it was said, did not have a possessory title.

In that regard, this case was strictly not one of the so-called 'finder cases', for as Hill J noted:

> These cases proceed, it was said, and I think correctly, upon the basis that what has been found has theretofore been lost or abandoned by the true owner and has not come into the possession of any other person. So, the finder of a wallet on the street would be entitled to retain it as against all but the true owner. But where the finder comes upon the goods in the premises of another the question is more difficult, for the title of the finder will be subject to any prior possessory title. ... It is the case of the [NCA] that the briefcase was never in the prior possession of Mrs Flack.[12]

However, the question as to what is necessary to constitute a prior possessory title has arisen for consideration in the 'finder cases', hence their interest in this fact scenario. Two of these cases, contrasting in their conclusions, received some attention in the various judgments of the Federal Court, and are summarised in the Table below:

TABLE 1 RELEVANT 'FINDER CASES'

Case	Facts	Finder	Other Party	Who prevailed?
Parker v British Airways Board [1982] 1 QB 1004	Airline passenger in airline's international executive lounge at Heathrow Airport found gold bracelet lying on the floor.	Passenger	Airline as lessee	Finder
South Staffordshire Water Coy v Sharman [1896] 2 QB 44	Defendant employee of plaintiff, employed to remove mud from the bottom of a pond situated on land occupied by the plaintiff, found two rings embedded in the mud.	Employee	Water company as occupier of the premises	Occupier[13]

[11] *Flack* [1999] S125/1998 (Unreported, Gleeson CJ and Gummow J, 14 May 1999), above n 1. In this transcript of the leave application, at page 4-5 Mr Porter QC clarified: 'we are only too happy to hand this money over to the true owner. We might well ask him a number of questions about how he acquired it, but we are only too happy to hand it to him.'

[12] *Flack* (1997) 80 FCR 137, 143.

[13] This decision has been cited as authority for the proposition that the finder of goods will not acquire a sufficient interest in the goods to sustain an action in conversion if the finder, as an employee, acquired custody of them by reason of his employment. He takes possession not for himself but for his employer. See John Fleming, *The Law of Torts*, (9th ed, 1998) 75, who states that this was indeed not the ratio of *Sharman*, but that this proposition has been followed and applied subsequently. See, for example, *City of London Corporation v Appleyard* [1963] 1 WLR 982.

D *Possessory Title and Conversion*

In order to establish a possessory title on the part of an owner/occupier of premises (X) where goods are found, sufficient to enable X to sue in conversion, it is possible to extract from the judgments of the Federal Court at first instance and on appeal that the following conditions must be satisfied:

1. the goods the subject of the action have not been lost or abandoned;
2. X is in possession of land, and all things on the land; and
3. X does not require knowledge of those things on the land.

If satisfied, then X is entitled to the possession of things on the land, as against anyone other than the true owner, so that X can maintain an action in conversion against a person who finds goods on the property and takes them away.

II THE DECISION

The trial judge Hill J held that Mrs Flack had sufficient title to sue in conversion. All other elements of the tort had been made out.[14] The Commonwealth was ordered to deliver up to Mrs Flack the briefcase and cash. This order was affirmed by a majority of the Full Federal Court.

The discussion will proceed having regard to each of the three conditions referred to above.

A *Goods Not Lost or Abandoned*

At the very commencement of the judgment, Hill J noted that the monies and the suitcase 'have evidently not been abandoned'.[15] Additionally, the fact that the briefcase was 'fairly obviously... not lost or mislaid but deliberately placed in the cupboard by the owner or previous possessor' did not deny Mrs Flack a possessory right.[16]

B *In Possession of Land and All Things On It*

In order for Mrs Flack to sue successfully in conversion, then that which she possessed had to include the goods found. After analysing extracts of the judgment of Lord Russell CJ in *South Staffordshire Water Co v Sharman*,[17] Hill J concluded that the proper construction of that decision was that a person in possession of land is

[14] That is, subject matter could be converted, a conversionary act occurred by the refusal of the NCA to deliver the goods upon demand, and there was the requisite intent on the part of the NCA to deny Mrs Flack's right to possession of the briefcase by that refusal.
[15] *Flack* (1997) 80 FCR 137, 138. Such a finding was important, as a finder of a chattel obtains no rights to it *unless* the chattel has been abandoned or lost, and he takes it into his control: at 144.
[16] *Flack* (1998) 156 ALR 501, 511 (Heerey J).
[17] [1896] 2 QB 44.

entitled, as against anyone other than the true owner, to the possession of things *attached to* or *under* the land (which His Honour took to refer to fixtures), plus something found *on* the land but not attached to it,[18] such as the briefcase in the instant case.

The relevant test to be applied when determining whether a person in Mrs Flack's (X's) position had possession of the briefcase and its contents is whether X manifested an intention to exercise control over the goods.[19] The test as to whether the occupier has a possessory title has to be satisfied at that point in time immediately prior to the discovery of the chattel, ie immediately prior to the discovery of the briefcase containing the cash.[20]

How does X manifest an intention to exercise control? According to Hill J, there are two theories of possession. The first states that the right to possession depends upon an intention to exclude others from the premises. The second theory states that it depends upon an intention to exercise dominion over particular chattels. The second theory would presumably require that Mrs Flack, as the person asserting possession, show knowledge of the existence of the article in question so as to demonstrate the intention to control.[21] But Mrs Flack did not know of the briefcase.

Hill J preferred the first theory.[22] In the circumstances of the case, Mrs Flack could exclude all others from her house. That right was inherent in her position as lessee. Tamberlin J, on appeal, also appeared to reject the second theory above, noting that the notion of a person intending to exercise possession or control over an article of which he was at all times unaware is 'somewhat artificial'.[23] Therefore, it followed that the ability on Mrs Flack's part to exclude others from the property included the ability to exclude others from all goods which were in or on her property.[24]

The nature of the premises where the goods are located was also acknowledged to be a factor of 'considerable importance'[25] when determining whether Mrs Flack had a possessory title. At first instance, Hill J drew a distinction between a person who occupies premises to which the public has unrestricted access, and private premises:

> It is a characteristic of possession that the possessor be in a position to exercise control over that which is possessed and assert a general right to do so. In public premises, such as a shop or airport lounge, the owner/occupier of the premises is a fortiori not in a position to exercise control over goods which may happen to come onto the premises.... That will be a question of fact.

---

[18] *Flack* (1997) 80 FCR 137, 145.
[19] Ibid 147 (Hill J). See also *Flack* (1998) 156 ALR 501, 514 (Tamberlin J), 510 (Heerey J), 506 (Foster J).
[20] *Flack* (1998) 156 ALR 501, 510 (Heerey J), 514 (Tamberlin J).
[21] *Flack* (1997) 80 FCR 137, 146.
[22] Ibid.
[23] *Flack* (1998) 156 ALR 501, 514.
[24] *Flack* (1997) 80 FCR 137, 147 (Hill J).
[25] *Flack* (1998) 156 ALR 501, 515 (Tamberlin J).

> It is different in a private house or other non-public area. Ordinarily the owner/occupier in such a case asserts control, not only over the property, but all that is within it.[26]

In *Parker v British Airways Board*,[27] the finder's right to sue for the bracelet's value prevailed because the airline could not show that it intended to exercise control over the lounge and all things in it.[28] Hill J noted that it may be that where the public has access to premises, the occupier might be able to demonstrate an ability to control goods on the premises, but in the facts of that particular case, the airline could not do so. There was no manifest intention to assert custody and control over lost articles.[29] Therefore, no person had possessory title of the bracelet. In those circumstances, the airline passenger, as finder, had a better title to sue than the airline, as occupier of the lounge, indeed had a better title to sue against all persons other than the true owner of the bracelet.

In contrast, where the premises are residential premises of which X has exclusive possession (as owner or as lessee, as in Mrs Flack's case), then the judgments of the Federal Court indicate that an intention to exercise control over the premises and all items in those premises is *presumed*. Since Mrs Flack was the tenant of an ordinary residential house, of which she had exclusive possession in law, that fact was sufficient to establish the requisite manifestation of intention to possess all chattels on the premises.[30] Tamberlin J stated that the notion of a possessory title over the contents of one's home reflected the notion that '[a]n Englishman's home is his castle.'[31]

This *finding* of a presumption in the context of residential premises, in the first place, and the *nature* of the presumption, in the second place, were the two grounds of the special leave application by the NCA to the High Court, and also caused some division of opinion amongst the four Federal Court judges who heard the matter.

(a) *Basis for the Presumption*

Parker concerned goods found in a public place, namely an airport lounge. However, in obiter in that case it was stated that 'an intention [to exercise control] would probably be manifest in a private house'[32] and that 'the occupier of a house will almost invariably possess any lost article on the premises.'[33] As counsel for the NCA noted, the question of possession of items in private houses was almost devoid

---

[26] *Flack* (1997) 80 FCR 137, 146-7.
[27] [1982] 1 QB 1004 ('*Parker*').
[28] This decision has been criticised: see Simon Roberts, 'More Lost Than Found' (1982) 45 *Modern Law Review* 683, 686-8.
[29] *Flack* (1997) 80 FCR 137, 146-7.
[30] *Flack* (1998) 156 ALR 501, 510 (Heerey J).
[31] Ibid 514 (Tamberlin J).
[32] [1982] 1 QB 1004, 1021 (Sir David Cairns).
[33] Ibid 1020 (Eveleigh LJ).

of authority,[34] but that it was a long bow to translate obiter comments from the English decision in *Parker* into a presumption, 'pretty close to an irrebuttable presumption' that applied to residential premises in this country.[35] However, that does indeed appear to be the position now in light of *Flack*, which presumption 'accords with common sense', in the view of Heerey J.[36]

Turning to the nature of that presumption, the judges differed—is it a presumption of fact or of law? If one of fact, could it be rebutted? Table 2 below sets out the findings at first instance and on appeal:

TABLE 2 THE PRESUMPTION IN *FLACK*

Judge	Nature of the presumption in favour of Mrs Flack's possession	Could presumption be rebutted by NCA opposing Mrs Flack's possession?
Hill J	Did not expressly say, but appeared to suggest one of law.[37]	Irrebuttable, hence not applicable.
Heerey J	Again, did not expressly say, but appeared to suggest one of law.[38]	As above.
Tamberlin J	Expressly considered it to be a rebuttable presumption of fact.[39]	Whilst rebuttable, presumption not rebutted. Although an unusual discovery in a private home, there was nothing illicit or illegal in either the briefcase or the money.[40]

[34] In *Armory v Delamirie* (1722) 93 ER 664, a chimney sweeper's boy found a jewel and handed it to an apprentice of a goldsmith to be valued. Under the pretence of weighing it, the latter extracted the stone from its setting and offered the boy one and a half pence for the stone. The boy rejected the offer, and the jeweller refused to return the stone. The boy's possessory title prevailed. Whilst the case concerned residential premises, obviously the case differs from *Flack*, for it did not constitute a dispute between finder and occupier of such premises.

[35] *Flack*, [1999] S125/1998 (Unreported, Gleeson CJ and Gummow J, 14 May 1999), above n 1, 4 (Mr Porter QC).

[36] *Flack* (1998) 156 ALR 501, 511.

[37] *Flack* (1997) 80 FCR 137, 147.

[38] *Flack* (1998) 156 ALR 501, 510.

[39] Ibid 514.

[40] Ibid 515-16.

Foster J	Expressly noted that there is no presumption of law, rather a strong but rebuttable presumption of fact.[41]	Yes, rebutted because when the goods were removed, Mrs Flack did not assert any entitlement to possession consistent with her later demand. Her expressions of 'shock and horror' when she saw the goods in her home meant that a presumption would have imposed on her possession of unwanted goods that she would not have countenanced if she had known of their existence.[42]

This table essentially demonstrates why Foster J was the only judge to find against Mrs Flack's possessory title. However, the remaining members who heard the matter were not unanimous in their reasoning. Given the nature of a special leave application, the question as to whether the presumption is an irrebuttable one at law, or a very strong presumption of fact that will be difficult to rebut, was not answered by the High Court in its dismissal of the application, and must await determination for another day.

(b) *Other Factors Relevant to Possession*

There were a number of features which tended against the presumption of possession on the part of Mrs Flack. These were dealt with as follows:

The keys: At least two other persons had keys to the premises. Heerey J, on appeal, dealt with that point swiftly: 'keys given or lent by an occupier in such circumstances are provided for the recipients' ease of access and not for the purpose of conferring possessory rights over everything on the premises—at any rate, not to the exclusion of, or on an equal basis with, the occupier.'[43]

The statements: Mrs Flack, when first shown the briefcase, made exclamations of anxiety and surprise. It was argued by the NCA that those statements were inconsistent with any intention of Mrs Flack to exercise control over the goods. Not so, said Tamberlin J. They indicated lack of knowledge on her part, but the statements did not amount to a disclaimer of possession.[44]

Lack of access: Mrs Flack admitted that she had not been 'that high up in the cupboard' for about 13 years. However, that did not mean that she relinquished a general intention to exercise control over the house

[41] Ibid 506.
[42] Ibid 506-7.
[43] Ibid 511.
[44] Ibid 515. Also Heerey J at 512.

and everything in it.[45] An owner or lessee may not check under the floorboards of a house or climb into the roof for a substantial period of time, but that does not preclude a general control over all parts of the premises.

The money: Finally, the alleged 'highly suspicious' and unusual character of the briefcase and cash was not inconsistent with a right to possession on the part of Mrs Flack.[46] The discovery of an unusual and valuable article did not determine whether a person had possession. Heerey J also noted that there was no general power of the state, either at common law or under statute, to forfeit goods simply because they appeared 'suspicious'.[47]

It appears, then, that householders do indeed have the benefit of a presumption that they intended to exercise control over all items in the house. At the very least, it is a very strong presumption of fact. It will be consequently difficult to rebut, and the result in *Flack* amply demonstrates that.

C *The Question of Knowledge*

The NCA contended that the briefcase was never in the possession of Mrs Flack, although it was found in her cupboard, because it was hidden there by some unknown person without the knowledge of Mrs Flack. It was argued that there can be no possession unless the supposed possessor is aware of the chattel alleged to have been converted.[48] Hill J, however, held that it is irrelevant whether or not the person who occupies the premises is aware of the existence of the article in or on the property. His Honour held that if the proposition were that easy—no knowledge by the possessor meant that the finder always prevailed—the Court of Appeal could have said so in *Parker*. After all, the airline did not know of the gold bracelet in the airport lounge. That lack of knowledge could have provided a simple basis for a decision against the airline. However, the airline failed to assert a better title to the bracelet, irrespective of its lack of knowledge.[49] This means that *Flack* is authority for the proposition that an occupier of land may have sufficient title to chattels to sue in conversion, notwithstanding that the occupier did not know at the time that the chattel existed and was in his or her possession.[50]

---

[45] Ibid 515.
[46] Ibid 515-16 (Tamberlin J).
[47] Ibid 512.
[48] *Flack* (1997) 80 FCR 137, 142 (Hill J).
[49] Ibid 145-6.
[50] The irrelevance of knowledge was confirmed on appeal: see *Flack* (1998) 156 ALR 501, 510 (Heerey J). See also Gleeson CJ's comments at the special leave application: *Flack* [1999] S125/1998 (Unreported, Gleeson CJ and Gummow J, 14 May 1999), above n 1, 3.

Moreover, in addition to the above, an occupier in Mrs Flack's position did not have to prove that the money did not constitute the proceeds of a crime;[51] or that she had accepted any obligation to keep the goods safe for the true owner; or that she knew who the owner actually was.[52]

D *Remedy*

The person who establishes that goods have been converted is entitled to recover damages for the full value of the chattel converted, damages being a mere substitute for possession.[53] In the circumstances of the particular case, Hill J ordered that, as the briefcase and monies were still held by the Commonwealth, both be delivered up to Mrs Flack, and there was no requirement that damages be ordered in lieu of the goods' return.

III CONCLUSION

In this highly unusual case, it could not be demonstrated that any person (other than the true owner of the money) had any better claim to possession than Mrs Flack did. The decision highlights a division of opinion in respect of the nature of the possession vested in a person who has the exclusive right to occupy a private house because of ownership or lease. All four judges of the Federal Court were prepared to find that, in order to establish possessory title, the owner/occupier must manifest an intention to exercise control over the premises in which the goods are situated, and all items in those premises. Further and importantly, such an intention is presumed if the person has exclusive possession of residential premises.

An important point raised in the special leave application to the High Court was that any such presumption shifted the onus of proof to the NCA to prove that Mrs Flack did not have the requisite intention. Instead, it was argued that in order to establish a title to sue in conversion, and consistently with *Parker*, the onus should have been placed on Mrs Flack to prove that she manifested an intention to possess everything in the house, including the bag and cash. If the onus was upon Mrs Flack, then it was submitted that the only factor in her favour was that the goods had been found in her premises, and that all other circumstances were against her.

---

[51] *Flack* (1997) 80 FCR 137, 149-50 (Hill J). For a discussion of the defence of *ex turpi causa* in the context of this case, see Trindade and Cane, above n 10, 265.

[52] *Flack* (1997) 80 FCR 137, 147 (Hill J).

[53] Ibid 141. Traditionally, an action for the return of a chattel was the province of detinue rather than conversion. In *General & Finance Facilities Ltd v Cooks Cars (Romford) Ltd* [1963] 1 WLR 644, Diplock LJ stated, 'an action in conversion is a purely personal action and results in a judgment of pecuniary damages only' (at 649), and continued, 'On the other hand, the action in detinue partakes of the nature of an action in rem in which the plaintiff seeks specific restitution of his chattel.' However, in the present case, proceedings for return of the briefcase and contents, or damages in lieu, brought in conversion, fell within the Federal Court's accrued jurisdiction: see *Flack* (1997) 80 FCR 137, 139 (Hill J).

Given the short dismissal of the special leave application, such questions about the presumption—should it exist, should it be one of law or of fact, what fact scenario could allow it to be rebutted—all await examination by the High Court in another decision. Nevertheless, *Flack* is useful authority for the proposition that a plaintiff's knowledge about a chattel is not a prerequisite for the establishment of a possessory title in conversion.