
Gft Australia Pty Limited v Collector of Customs [1995] FCA 1087; (1995) 128 ALR 219 (1995) 21 Aar 107 (24 February 1995)

FEDERAL COURT OF AUSTRALIA

GFT AUSTRALIA PTY LIMITED v. COLLECTOR OF CUSTOMS
No. VG74 of 1994
FED No. 68/95
Number of pages - 21
Customs
[1995] FCA 1087; (1995) 128 ALR 219

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COURT

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION
JENKINSON(1), BURCHETT AND O'LOUGHLIN JJ(2)

CATCHWORDS

Customs - assessment of "customs value" - "deductible financing costs in relation to the goods" - meaning of the words in s. 154 "interest payable under a written contract agreement or arrangement under which the purchaser is permitted to delay the payment of the price" - whether applicable to a

later reduction to writing of an originally oral arrangement - discussion of the policy of the provision - whether an amount added to the price in respect of a delay in payment was interest - effect of notation on invoice - weight to be given to the characterisation of a payment in a commercial document not said to be a sham.

Customs Act 1901, ss. 154, 159 and 161

Harnor v. Groves [1855] EngR 71; (1855) 15 CB 667

Masters v. Cameron [1954] HCA 72; (1954) 91 CLR 353
LNC (Wholesale) Pty Ltd v. Collector of Customs (1988) 17 FCR 154
NM Superannuation Pty Ltd v. Young [1993] FCA 91; (1993) 41 FCR 182
Lomax (H.M. Inspector of Taxes) v. Peter Dixon and Son, Limited (1943) 1 KB 671
Bond v. Barrow Haematite Steel Company (1902) 1 Ch 353

HEARING

MELBOURNE, 5 October 1994
24:2:1995

Counsel for the Appellant: Mr R.A. Finkelstein QC with
Dr K. Emerton

Solicitors for the Appellant: Slonims

Counsel for the Respondent: Mr J. Lenczner

Solicitors for the Respondent: Australian Government Solicitor

ORDER

THE COURT ORDERS THAT:
1. The appeal be allowed with costs;

2. The orders made at first instance be set aside, and in lieu thereof it be ordered:
(a) That the decision of the Administrative Appeals Tribunal be set aside;

(b) That the matter be remitted to the Tribunal, differently constituted, for decision according to law;
(c) That each party bear its or his own costs of the appeal from the Tribunal.

NOTE: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

DECISION

JENKINSON J Appeal from an order of a single judge of the court by which an appeal from a decision of the Administrative Appeals Tribunal was dismissed.

2. The Tribunal had reviewed a decision of the respondent ("the Collector") to demand a particular sum as the customs duty payable in respect of goods imported by the appellant into Australia. Section 273GA(2) of the Customs Act 1901 provides:

> "Where a dispute referred to in subsection 167 (1) has arisen and the owner of the goods has, in accordance with that subsection, paid under protest the sum demanded by the Collector, an application may be made to the Tribunal for review of the decision to make that demand and of any other decision forming part of the process of making, or leading up to the making of, that first-mentioned decision."

Such a dispute as is referred to in s.167(1) had arisen after an officer of the Australian Customs Service had given the appellant's customs agent advice that the value of the goods for the purposes of the Customs Tariff Act 1987 was a sum greater than that which the agent proposed as that value. The demand of the Collector for payment was of a sum calculated upon the greater value and the decision to give the advice to which I have referred was treated as a decision forming part of the process of making, or leading up to the making of, the decision to demand that sum. Sub-section 167(1) provides:

> "If any dispute arises as to the amount or rate of duty payable in respect of any goods, or as to the liability of any goods to duty, under any Customs Tariff, or under any Customs Tariff or Customs Tariff alteration proposed in the Parliament (not being duty imposed under the Customs Tariff (Anti-Dumping) Act 1975), the owner of the goods may pay under protest the sum demanded by the Collector as the duty payable in respect of the goods, and thereupon the sum so paid shall, as against the owner of the goods, be deemed to be the proper duty payable in respect of the

> goods, unless the contrary is determined in an action brought in pursuance of this section."

The appellant, "the owner of the goods" within the meaning of the Customs Act 1901 by reason of its having imported the goods, paid under protest the sum demanded by the Collector.

3. Sub-section 13(2) of the Customs Tariff Act 1987 provides:

> "The value of any goods for the purposes of this Act is, unless the contrary intention appears, the customs value of the goods ascertained or determined in accordance with Division 2 of Part VIII of the Customs Act 1901."

4. Sub-section 159(1) of the Customs Act 1901 (which, like the other sections of that Act to be considered in this appeal, is in Division 2 of Part VIII) provides:

> "Unless the contrary intention appears in this Act or in another Act, the value of imported goods for the purposes of an Act imposing duty is their customs value and the Collector shall determine that customs value in accordance with this section."

Sub-section 159(2) provides:

> "Where a Collector can determine the transaction value of imported goods, their customs value is their transaction value."

Sub-section 161(1) provides:

> "The transaction value of imported goods is an amount equal to the sum of their adjusted price in their import sales transaction and of their price related costs to the extent that those costs have not been taken into account in determining the price of the goods."

The matter of the parties' difference is the ascertainment of the "adjusted price" of the goods "in their import sales transaction". In this case the import sales transaction was a contract for sale of the goods by Gruppo Finanziario Tessile S.p.A. to the appellant. Part of the definition of the expression "adjusted price" which sub-section 161(2) contains is in these terms:

> "In this section:
> 'adjusted price', in relation to imported goods, means the price

> of the goods determined by a Collector who deducts from the amount that, but for this subsection, would be the amount of that price, such amounts as the Collector considers necessary to take account of the following matters:
> (a) deductible financing costs in relation to the goods;"

It is provided in sub-section 154(1) that:

> "'deductible financing costs', in relation to goods in a sale, means any interest payable under a written contract, agreement or arrangement under which the purchaser is permitted to delay the payment of the price in return for the payment of that interest (whether or not also in return for an increase in the price or for the payment of an additional amount), being a contract, agreement or arrangement entered into between the purchaser and the vendor or another person in relation to the purchase of the goods, where:
> (a) the interest is distinguished to the satisfaction of a Collector from the price actually paid or payable for the goods;
> (b) if a Collector requires the purchaser to demonstrate to the satisfaction of a Collector that identical or similar goods are actually sold at the last-mentioned price - the purchaser so demonstrates; and
> (c) if a Collector requires the purchaser to demonstrate to the satisfaction of a Collector that the rate of the interest does not exceed the rate of interest in similar contracts, agreements or arrangements entered into in the country where, and at the time when, finance under the first-mentioned contract, agreement or arrangement was provided - the purchaser so demonstrates;"

5. The appellant contends that the price of the imported goods in question - twelve men's suits - included an amount of $206.88 which was interest of the description which that definition of deductible financing costs expresses. But the Collector's demand was for the appropriate percentage of the whole price.

6. More than half the goods imported by the appellant are purchased from Gruppo Finanziorio Tessile S.p.A. ("Gruppo") in Italy. Gruppo sells expensive clothes : Valentino, Louis Feraud, Ungaro, Armani are examples. The prices are negotiated twice a year, once for spring and summer clothing and once for autumn and winter garb. The negotiating is in two stages. The appellant's sales and marketing representatives deal separately with those of Gruppo's representatives who have responsibility for marketing a particular designer's product. When a price has been agreed for each description of clothing of each designer the appellant's financial controller and his staff undertake the negotiation of what the Tribunal called "the trading terms in respect of the season in question". The

importation in question in this appeal was the subject of an invoice dated 22 January 1992. The evidence clearly showed that the twelve suits to which the invoice relates were for sale by retail in Australia during the spring and summer of 1991-1992, that negotiation and agreement of the prices of clothing for that season, between Gruppo and the appellant, took place in or about July 1990 and that contracts for the supply by Gruppo to the appellant of clothing for that season were made later during 1990. But there was tendered in evidence an agreement in writing dated 1 May 1991 between Gruppo and the appellant which was entitled "distributorship agreement". The distributorship agreement was treated in submission to this court as having application to the importation of the twelve suits, notwithstanding that the contract of sale of the suits by Gruppo to the appellants apparently preceded the making of that agreement. Some of the terms of the distributorship agreement are:

> "1. Appointment
> 1.1 **GFT** hereby appoints **GFT** Australia to be a seller to the wholesale or retail trade for the products in the territory.
> 1.2 **GFT** Australia hereby accepts such appointment and agrees to use its best efforts to develop and promote the sale of the products in the territory."
> The "territory" is Australia and New Zealand)
> "2. Orders by **GFT** Aust and Acceptance by **GFT**
> All orders for the products placed by **GFT** Australia shall be subject to written or cabled acceptance by **GFT** and shall not be binding upon **GFT** Australia unless and until so accepted by it.
> 3. Prices and invoicing
> 3.1 All products shall be sold by **GFT** to **GFT** Australia on an FOB port of exit basis and in the currency which the parties shall mutually agree to from time to time.
> 3.2 **GFT** prices are computed for application to all customers both domestic and international and result from fully co absorbed techniques for all of our raw material inputs, factory labour and overheads, administrative overheads and profit (gross selling prices).
> 3.3 Gross selling prices shall be subject to negotiation by **GFT** Australia each selling season and previous buying levels will be taken into account in the provision of future volume discounts. The availability of volume discounts shall be at the sole discretion of **GFT** and will generally represent the only basis for discounting prices determined under 3.2 above.
> 3.4 Gross selling prices shall not include any of the following,

all of which shall be borne by **GFT** Australia : cost of transportation of the products from the port of exit in Italy to **GFT** Australia, storage costs, maritime and air insurance, ocean or air bills of lading, consular invoices, any applicable sales, use or excise taxes, import duties or surcharges, importer brokerage fees, charges and stamps and any other similar costs incurred in transportation, storage and importation of the products.

3.5 Gross selling prices shall be fixed on the basis that payment will be made within 30 days after delivery at the exchange rate applicable on that date. If extended credit terms are agreed upon, then the gross selling price shall be adjusted in accordance with **GFT**'s forward estimates for movements in international currencies and **GFT** Australia shall pay interest on the gross selling price as adjusted. The interest rate shall be the prevailing interest rate in Italy at the time the products are shipped but may be varied in accordance with alterations brought about by Banker initiatives at any time prior to agreed settlement dates. Withholding taxes, charges and any sums which require to be retained in Australia in relation to interest payments remitted to **GFT** shall form a deduction from all sums remitted.

Delivery

4.1 Delivery of the products shall occur when they are placed into the care, custody and control of the first carrier or forwarder at the port of exit in Italy.

6. Term and termination

6.1 This agreement shall commence on the date first above written.

(That date was 1 May 1991.)

8.4 This agreement sets forth the entire agreement and understanding between the parties relating to the subject matter contained herein and merges all prior discussions between them, and neither party shall be bound by any definition, condition, warranty or representation other than as expressly stated in this agreement or as subsequently set forth in writing and executed by the party to be bound thereby.

9. Applicable Law

This agreement is made pursuant to, and shall be governed by and construed in accordance with the laws of the State of Victoria,

Australia."

The Tribunal's reasons for its decision that the decisions under review be affirmed include the following:

"7. Mr Stafrace has been secretary and finance manager of the applicant company since 1989. He said that the applicant is an importer into Australia of men's and women's wear from a number of different countries. Fifty-five per cent of its imports are purchased either directly or indirectly from Gruppo Finanziario Tessile S.p.A. ('Gruppo') of Turin, Italy. Men's clothes are purchased from **GFT** Uomo ('Uomo'), an operating division of Gruppo; women's clothes are purchased from **GFT** Donna S.p.A. ('Donna'), a wholly owned subsidiary of Gruppo with which we are not here concerned. There are formal distribution agreements between the applicant and Uomo and Donna respectively. The subject goods were purchased from Uomo.
8. Gruppo is both a manufacturer and marketer and has licence agreements with a number of design houses. Uomo comprises different sales and marketing teams representing different design groups. **GFT** Australia deals with teams representing Valentino, Louis Feraud, Ungaro, Armani and Private Label collections.
9. Prices are negotiated twice each year, for the spring/summer range of products and the autumn/winter range, approximately 18 months ahead of the relevant season in Australia. Negotiations take place in Turin and elsewhere. Before leaving for Turin, the sales and marketing staff of **GFT** Australia have examined the domestic market and determined where each range of product is to be positioned in respect of price so as to be competitively saleable in the relevant season.
10. In Turin (or elsewhere) the applicant's sales and marketing teams negotiate with the corresponding teams of each design group and establish a price which is consistent with the proposed market positioning of that range of products. Negotiations are in Australian dollars. Once the price is agreed by sales and marketing staff, Mr Stafrace and his financial staff negotiate separately with the Treasury department of Gruppo for the trading terms in respect of the season in question. Different trading terms may be negotiated with different divisions or subsidiaries of Gruppo: for the spring/summer 1993 season terms of payment for different divisions or subsidiaries ranged from 7 to 180 days. Once negotiated, prices for a season never vary. Despite the

last sentence of paragraph 3.5 of the distribution agreement, set out in paragraph 13 infra, the interest rate has never been varied during the season of operation of a price list. The prime interest rate in Italy at the time of the hearing was around 11 per cent.

11. **GFT** Australia has been trading with Uomo at 180 days ex-factory terms for four years. Until mid-1991 it mostly paid on time: since the recession, its customers have had cash flow problems and as a result it has been falling behind in payments to Uomo. Although there is provision for penalty interest for late payment, such interest has never been charged. Early payment is never made; wholesale prices are fixed in advance and all cash flow projections are on the basis of the agreed period for payment.

12. On returning to Australia with price lists, **GFT** Australia staff obtain orders from customers. Orders are then placed with Gruppo, against those orders from customers, in the expectation that all goods imported will be sold. We have no reason to doubt the evidence of Mr Stafrace contained in this and the preceding five paragraphs and we find accordingly.

27. There is no evidence before us as to the terms of any general distributorship agreement between Gruppo and **GFT** Australia for any period before 1 May 1991. No doubt there was such an agreement, but we are unable to make any assumption as to what its terms might have been. Thus, so far as the invoices of 15 April and 12 February 1991 are concerned, we have no evidence as to whether the provision for 180 days was or was not consistent with any such general agreement. However, Mr Stafrace's evidence is and we have found, that dealings between these parties for the last four years have been on 180 day terms.

28. The suggestion is that, so far as it relates to the subject goods and other goods in the same seasonal range, the agreement of 1 May 1991, providing for 30 day terms has been varied by a subsequent agreement for 180 day terms; and by that subsequent agreement, **GFT** Australia has been 'permitted to delay the payment of the price'. As we have said in paragraph 25 supra, we do not consider that the expression 'permitted to delay the payment of the price' is intended to describe that situation.

29. Accordingly, we find that no amount was paid in respect of the subject goods constituting 'interest payable under a written contract, agreement or arrangement under which the purchaser is permitted to delay the payment of the price in return for the payment of that interest'. That being so, the amount of $206.88

> does not constitute 'deductible financing costs' in terms of the definition in sub-section 154(1) of the Act. For the reasons given, the decisions under review will be affirmed."

The reasoning on which the Tribunal's decision is based is found in paragraphs 25 and 26, which read:

> "25. It should be noted that the definition of 'deductible financing costs' operates 'in relation to goods in a sale'. The expression 'permitted to delay the payment of the price', must be read in that context, and in the light of the meaning of 'delay' cited in the preceding paragraph. Reading the expression thus, it must, in our view, be intended to refer to the situation where payment for goods in a sale is made late, that is after the period agreed to in the particular contract of sale relating to the particular goods in question. It is not intended to refer to an agreement which varies, in respect of a collection of sales such as the sale of a season's range, the period of payment provided for in a general contract setting out the terms on which goods will generally be sold by the same vendor to the same purchaser.
> 26. Thus, in the present case, were payment to be made under one of the invoices of 15 April and 12 February after the agreed period of 180 days, and were interest to be charged at 1.5 per cent per month, in accordance with the endorsement on the invoice, that interest would be 'payable under a written contract, agreement or arrangement under which the purchaser is permitted to delay the payment of the price in return for the payment of that interest', and, as a consequence, such interest would be correctly included as 'deductible financing costs'."

The Tribunal having interpreted the definition of "deductible financing costs" thus, it is understandable that no conclusion was stated by the Tribunal as to whether a contract for the sale of goods made before 1 May 1991 could be in any way affected by the operation of clause 3.5 of the distributorship agreement.

7. I can find nothing in that agreement to support a conclusion that clause 3.5 had any application to a contract for the sale of goods made before 1 May 1991. The findings of the Tribunal which I have set out are consistent with the formation of the contract for sale of the twelve suits in steps, and on terms, similar to the steps in which, and to the terms of which, contracts for the sale of goods by Gruppo to the appellant could be expected to be formed after 1 May 1991. (There was a good deal of evidence, about the formation in 1992 of such contracts in respect of the spring and summer season of 1993, which fulfilled that expectation.) But, as the Tribunal pointed out, no evidence was adduced as to the terms of any agreement, of the kind which was made on 1 May 1991, in force before 1 May

1991.

8. It is, I suppose, possible that the contract for the sale of the twelve suits was made after 1 May 1991, notwithstanding that so late a contract is inconsistent with the tenor of Mr. Stafrace's evidence. Among the documents in evidence before the Tribunal was a letter dated 25 June 1991 from the appellant's customs agent, Pace Trade & Tariff Pty. Ltd., to the officer of the Australian Customs Service by whom the advice about value was given, Mr. Bowden. The letter is expressed to be an attachment to the application for advice and asserts that a number of documents are attached to the letter. One of the documents is described as "Copy of a purchase order from **GFT** Australia to **GFT**". No document answering that description was in evidence before the Tribunal. If the contract were made after 1 May 1991, the only documentary records of its terms are inconsistent with the application of the last sentence of clause 3.5 of the distributorship agreement, as will hereafter appear.

9. The findings of the Tribunal which are set out in paragraphs 7-12 of its reasons, quoted above, include a reference to price lists (see paragraph 12). The price list for the spring and summer season of 1991-1992 was in evidence before the Tribunal. It contained no reference to interest. It specified a unit price for many kinds of clothing, including a unit price of each of the twelve suits which are the subject of the invoice dated 22 January 1992. Exactly the same unit prices ($320.54 and $332.72) are specified on the invoice. Each kind of clothing is identified by a model number, in the price list and on the invoice. The invoice states the model number, the unit price, the number of suits of that model included in the invoice (2 of one model and 10 of another), the total payable in respect of each model, and the total payable under the invoice. Below that total is the following : "The above prices are inclusive of 5.5% interest due on delayed payment terms, equal to AUD$206.88". Each of the two unit prices with which the invoice is concerned is stated in the price list inclusive of interest. The Tribunal's finding, in paragraph 10 of its reasons, that "the interest rate has never been varied during the season of operation of a price list" seems inconsistent with any supposition that either before or after 1 May 1991 any effect was given to a provision such as is expressed in the first clause of the last sentence in clause 3.5 of the distributorship agreement : "The interest rate shall be the prevailing interest rate in Italy at the time the products are shipped". Each unit price in a price list includes an amount in respect of interest, according to the uncontradicted evidence of Mr. Stafrace, which the Tribunal accepted. At the time the unit price is entered in the price list the time of shipping is about 18 months in the future. It seems highly improbable that the parties to the sales of clothing over four years have invariably prophesied correctly "the prevailing interest rate in Italy" so far in the future. If the statement in paragraph 10 of the Tribunal's reasons - "Once negotiated, the prices for a season never vary" - could be understood, not only as a statement of historical fact, but also as a finding that it was a term of each contract of sale made before 1 May 1991 that the price should be as stated in the price list, this court would be in a position to consider the application to the twelve suits of s.161 (1) on that basis. But it is clear from paragraph 27 of those reasons that no such a finding was made.

10. This court may, however, consider the correctness of the construction which the Tribunal gave to the clause, "under which the purchaser is permitted to delay the payment of the price in return for the

payment of that interest", in the definition of "deductible financing costs". The Tribunal points to the circumstance that the definition is expressed to have effect "in relation to goods in a sale". But the definition is drawn to comprehend a written contract, agreement or arrangement between the purchaser and a person other than the vendor. No doubt that was done to comprehend a person who provides the price to be paid to the vendor when the price is due and payable under the contract of sale and who is later reimbursed what he has paid together with interest under the written contract, agreement or arrangement between himself and the purchaser. The purchaser would in those circumstances be "permitted to delay payment of the price" by him, although the price would have been paid to the vendor by the other party to the contract agreement or arrangement without any "delay". That consideration, and the indication which paragraph (a) of the definition gives that no restricted conception is intended of what may be identified as interest, leads me to the conclusion that the delay contemplated by the definition is not only such a delay as follows the time which is fixed, by the contract which is the import sales transaction in relation to the goods, as the time for payment of the price. The word "price" is defined in s.154. It is unnecessary for present purposes to set out the whole of the definition. I set out part:

> "(a) all payments that have been made, or are to be made, directly or indirectly, in relation to such goods, by or on behalf of the purchaser:
> (i) to the vendor;
> (ii) to any person related to the vendor unless a Collector is satisfied that the vendor has not derived and will not derive any direct or indirect benefit from the payment;
> or
> (iii) to any other person for the direct or indirect benefit of the vendor;
> in accordance with the contract of sale;"

That part of the definition, like the definition of "adjusted price" given by sub-section 161(2), makes it clear, in my opinion, that the word "price" where it first and second appears in the definition of "deductible financing costs" is used in its defined sense. If a contract of sale of goods makes provision for payment of $100 on delivery of the goods and further provision for payment of $150, instead of $100, in the event that the purchaser elects to make payment after, but within 60 days after, delivery of the goods, and the purchaser makes that election, the word "price" where it first and second appears in the definition comprehends the payment of $150. The sum of $150 answers the definitional words "an amount determined by a Collector ... to be the sum of all payments that have been made ... in relation to such goods, by ... the purchaser ... to the vendor". The sum of $50, being interest payable under a term of the contract under which the purchaser is permitted to delay the payment of the price, that is the $150, in return for the payment of the $50, is "deductible finance costs" which sub- section 161(2) directs the Collector to deduct from the $150 to ascertain the "adjusted price". In the case I have supposed the word "interest" is not used in the expression of the contract, nor is the quantum of what I have characterised as interest proportioned to the extent of the delay. The same sum of $50 is payable whether payment is made one day or 60 days after delivery.

But the terms of the contract enable it to be seen that the $50 is money payable as compensation for delay beyond the date of delivery in payment of the price and is in my opinion within the meaning of the word "interest". The reasoning of the Tribunal in paragraph 25 of its reasons for decision would lead to a contrary conclusion. That reasoning contributed to the Tribunal's decision, which was in that way marred by error of law, in my opinion.

11. The definition of "deductible financing costs" requires that the interest be "payable under a written contract, agreement or arrangement". If the distributorship agreement of 1 May 1991 be inapplicable, the only writing in evidence in relation to the import sales transaction concerning the twelve suits is the price list for the 1991-1992 spring and summer season and the invoice dated 22 January 1992. Mr. Finkelstein QC, who appeared with Dr. Emerton for the appellant, submitted that on its proper construction the definition of "deductible financing costs" requires only that the contract, agreement or arrangement be in writing, not that the statement of the amount or rate of interest payable or the statement of the permission to delay the payment of the price be in writing. That submission cannot in my opinion be accepted in its entirety. If Gruppo and the appellant made after 1 May 1991 a contract for the sale of goods in accordance with the provisions of the distributorship agreement there would be four steps to consider. First the gross selling price of the goods would have to be agreed : see clauses 3.3, 3.4 and 3.5 (first sentence). If payment more than 30 days after delivery were agreed upon, the "gross selling price as adjusted" would have to be agreed : see the second sentence of clause 3.5. The order for the goods would have to be placed by the appellant and accepted by Gruppo in writing or by cable : see clause 2. Upon that acceptance - the third step - the contract "under" which interest is payable, and "under which the purchaser is permitted to delay payment of the price in return for the payment of that interest", would be made. And that would be so notwithstanding that the amount payable by the purchaser is not then ascertainable. That amount cannot be ascertained until the goods are shipped because the "interest rate .... prevailing in Italy at the time the products are shipped" cannot be certainly known until they are shipped. It is, however, the contract agreement or arrangement which must be written and the contract is made upon the occurrence of the third step. The required writing would be the distributorship agreement and a record of "the gross selling price as adjusted" and the acceptance by Gruppo of the appellant's order. It would not be necessary to prove a written record of the interest rate prevailing in Italy at the time the goods were shipped, notwithstanding that neither the "price", in the defined sense in which that word is first and second used in the definition of "deductible financing costs, nor the amount of the interest payable under the contract can be established without a finding as to what that interest rate was.

12. In the case of the twelve suits, however, the findings of the Tribunal suggest - and I will for the present assume - that Gruppo and the appellant made a contract for the purchase of the suits upon acceptance of the appellant's order for a price calculated by reference to the 1991-1992 spring and summer season price list, a document in existence before the contract was made and, unlike any order or acceptance of order, in evidence before the Tribunal. Each unit price in the price list includes an amount for interest. But no evidence was before the Tribunal of a writing, in existence when the contract was made, constituting a provision of the contract about interest. It could safely be inferred that a list of the unit prices negotiated between marketing and sales representatives of the

parties (called in the subsequently executed distributorship agreement "gross selling prices") was compiled, but no evidence of the contents of that list was adduced. If before 1 May 1991 it was the practice to adjust those gross selling prices by reference to Gruppo's "forward estimates for movements in international currencies" (see clause 3.5 of the distributorship agreement), a comparison of the gross selling prices list and the price list which was in evidence would not enable the amount of interest to be ascertained. The difference of unit price of a suit in each list would, or might, be part interest and part adjustment by reference to estimates of movements in currencies. (Mr. Stafrace's evidence seems to suggest that it was in the negotiation of gross selling prices, not in the negotiation of adjusted selling prices, that adjustment was made in accordance with forward estimates of currency movements, because delivery and payment 30 days thereafter were events approximately 18 months in the future. But there is no finding by the Tribunal on the point.)

13. These difficulties could not in my opinion be overcome by having regard to an invoice in the form of the invoice dated 22 January 1992. That document enables the amount of interest to be ascertained, but it came into existence long after the contract was made. It contains an assertion by one of the parties as to what the terms of the contract relating to interest provided. But it does not prove, or even suggest, that those were terms of a written contract. Contrary to Mr. Finkelstein's submission, if all the terms of the contract enable the amount of interest payable to be ascertained at the time the contract is made, then those terms must be in writing : if they are not, then it follows that the contract was not a written contract.

14. Mr. Finkelstein's alternative submission was that the invoice was one of the documents constituting the contract. Authorities were cited to show that where parties contract in circumstances indicating their expectation that a document containing express terms (commonly terms limiting liability for damage) will be later forwarded by one party to the other or, in the case of a document containing a party's standard terms, will be treated as containing terms of their particular contract, the law fulfils the expectation by holding the terms in the document to be terms of the particular contract. The principles underlying those authorities might well be applied to support a conclusion that the words, "All sales are subject to retention of title of our goods whilst payment or any part thereof is not completed", which appear on all the invoices which were in evidence, constituted a term of each contract for the sale of clothing by Gruppo to the appellant. But the statement on the invoice dated 22 January 1992, "The above prices are inclusive of 5.5% of interest due on delayed payment terms, equal to AUD$206.88", is shown conclusively by the evidence, and by the Tribunal's findings, to be an assertion of part of what had been agreed in the making of the contract months before the invoice was prepared. I agree with the conclusion of the learned judge who heard the appeal from the Tribunal's decision that the invoice does not constitute part of a written contract.

15. It may be said that the words "written contract agreement or arrangement" ought to be so construed as to comprehend a contract agreement or arrangement of the terms of which a written record exists at the time when the Collector determines the customs value of the goods, whether or not the contract agreement or arrangement was made in writing. The provisions contained in paragraphs (a), (b) and (c) of the definition of "deductible financing costs" might be thought a sufficient armoury by resort to which the Collector could adequately protect the revenue against

fraud. The facts of this case provide an illustration, it may be said, of the advantages of giving the words "written contract agreement or arrangement" a construction apt to comprehend the diverse modes of recording commercial transactions.

16. The Tribunal's findings strongly suggest - and the transcript of evidence tends to confirm - that the appellant was honestly seeking to comply with the requirements of the customs law. But paragraphs (a), (b) and (c) of the definition in my opinion make it clear that the legislature had well in mind the proclivity of some importers to defraud the revenue. Contemporaneity of transaction and written record of transaction affords a measure of protection against the kind of fraud likely to be attempted in relation to the ascertainment of deductible financing costs. In those circumstances the words "a written contract agreement or arrangement" ought in my opinion to be given the meaning they ordinarily have in legal usage : a contract agreement or arrangement constituted by writing. Perhaps it might be permissible - it is unnecessary to express an opinion - to allow the words to comprehend an oral contract agreement or arrangement of the terms of which the parties make a written record immediately after the contract, agreement or arrangement has been made. But I do not consider that a document, such as the invoice dated 22 January 1992, which is intended to be made - and is in fact made - long after the making of the contract to which it relates, forms part of that "written contract", within the meaning of those words in the definition.

17. The learned judge from whose judgment this appeal is brought affirmed the Tribunal's decision because he held that no interest was payable under the contract of sale of the goods. His Honour founded that conclusion on a statement in Halsbury (4th ed) vol. 32, para. 106:

> "Interest is the return or compensation for the use or retention by one person of a sum of money belonging to or owed to another". His Honour considered that Parliament had used the word in that sense in the definition of deductible financing costs. He observed:
> "The facts of this case as found by the Tribunal disclose that the parties negotiated a unit price for the subject goods based upon the understanding that payment would not be required until 180 days after the date of the invoice. Such a procedure is obviously contemplated by paragraph 3.5 of the distribution agreement. It can be inferred for present purposes that the unit price was greater than it would have been if the agreement had been for payment within 30 days after delivery. The unit price agreed between the parties was not variable. The same price was payable whether the applicant paid for the subject goods on receipt of the invoice or on any other day within the 180 day period agreed. As payment was not due until the expiration of the 180 day period, it is difficult to categorise the addition to the purchase price as either money paid for the use of money or for not extracting repayment of a debt nor as the return or compensation for the use or retention by the purchaser of money belonging to or owed to the vendor.

> In these circumstances, on the facts as found, it is my opinion that the sum sought to be deducted cannot properly be described as 'interest'."

18. The statement in Halsbury is taken from the judgment of Rand J in Re Farm Security Act 1944 (1947) SCR 394 at 411. But Halsbury has omitted a word in the judicial statement, which has between the two words "belonging to" and the words "or owed" the word ",colloquially,". Also omitted by Halsbury are the words "in a general sense", by which Rand J prefaced the statement. If land is sold under a contract which provides that the purchase price be paid over a period by instalments, each comprising part of the purchase price and interest on the balance unpaid from time to time, there is a sense in which that balance is not owed to the vendor, for the contract has provided that it shall not be due or payable until future instalments successively fall due and payable. Nor does the unpaid balance belong to the vendor. But in a colloquial sense that unpaid balance, part of the price of the land of which possession has passed, may be said to belong to the vendor, as well as to be owed to him. Speaking of Division 2 of Part VIII of the Customs Act 1901, in LNC (Wholesale) Pty. Ltd. v. Collector of Customs (1988) 17 FCR 154, Davies and Einfeld JJ in whose reasons Sweeney J concurred, observed (at 164):

> "(T)he legislation provides a basis of valuation that is less theoretical and more practical than the Brussels Definition of Value. Primacy is given to the price actually paid or payable adjusted in accordance with a number of simply stated rules. It is appropriate in the application of these rules to eschew technicality and subtlety and to take a practical commercial view of transactions."

19. The content of paragraphs (a) and (b) of the definition of deductible financing costs suggests a legislative intention to give the word "interest" a meaning apt to comprehend a wide range of commercial arrangements in relation to "import sales transactions". In my opinion the meaning of the word in the definition is wide enough to comprehend that part of the "price" (in the defined sense) of the twelve suits which exceeded the price which would have been payable under a contract providing for payment within 30 days of delivery, except any component of that part which was added to the 30 day price (before any addition for interest) by reason of estimation of currency fluctuation between 30 days and 180 days after delivery.

20. Error of law underlay the Tribunal's decision to affirm the Collector's decision. Sub-section 44(4) of the Administrative Appeals Tribunal Act 1975 confers on this court a discretionary power to "make such order as it thinks appropriate by reason of its decision". The evidence before the Tribunal could not in my opinion sustain a finding that the contract under which the interest was payable was a contract wholly in writing or a contract the terms of which concerning interest were in writing. Sub-section 44(5) contemplates an order that the Tribunal's decision be set aside and a re-hearing by the Tribunal be had, with the hearing of further evidence. In this case it may be that the

appellant cannot prove a written contract of the description specified in the definition of deductible financing costs. But the opportunity should be afforded it. I would order that the appeal be allowed and the orders at first instance be set aside, that the decision of the Administrative Appeals Tribunal be set aside, that the case be remitted to that Tribunal for hearing and decision according to law, and that further evidence be received on that hearing. I would order that each party abide its own costs of the appeal and of the proceeding in this court out of which the appeal arose.

BURCHETT AND O'LOUGHLIN JJ This appeal concerns the question whether the appellant, an importer of garments from Italy, is entitled, in respect of certain transactions, to have their "adjusted price", which is utilized in the assessment of customs duty, reduced by certain amounts calculated and paid as interest for the delay of the due date of payment for a period of 180 days.

2. The assessment of the "customs value" of goods is the subject of a web of provisions in ss. 154, 159 and 161 of the Customs Act 1901. Those sections require, in appropriate cases, the calculation of an "adjusted price" by the deduction, from the price of goods otherwise determined, of "deductible financing costs in relation to the goods" (s. 161(2)). In order to apply this provision, it is necessary to understand the expression "deductible financing costs", which is defined in s. 154(1) as follows:

> "154.(1) In this Division, unless the contrary intention appears:
> . . .
> 'deductible financing costs', in relation to goods in a sale, means any interest payable under a written contract, agreement or arrangement under which the purchaser is permitted to delay the payment of the price in return for the payment of that interest (whether or not also in return for an increase in the price or for the payment of an additional amount), being a contract, agreement or arrangement entered into between the purchaser and the vendor or another person in relation to the purchase of the goods, where:
> (a) the interest is distinguished to the satisfaction of a Collector from the price actually paid or payable for the goods;
> (b) if a Collector requires the purchaser to demonstrate to the satisfaction of a Collector that identical or similar goods are actually sold at the last-mentioned price - the purchaser so demonstates; and
> (c) if a Collector requires the purchaser to demonstrate to the satisfaction of a Collector that the rate of the interest does not exceed the rate of interest in similar contracts, agreements or arrangements entered into in the country where, and at the time when,

> finance under the first-mentioned contract, agreement or arrangement was provided - the purchaser so demonstrates".

3. The circumstances in which the question arises are stated, but not very clearly, in the evidence of the appellant's company secretary, Mr Stafrace, and in the findings of the Administrative Appeals Tribunal, from which an appeal was brought initially to a Judge of this Court, who dismissed it. Mr Stafrace's general truthfulness does not seem to have been under challenge, and in any case the Tribunal, having summarized his evidence in six paragraphs of its reasons, concluded: "We have no reason to doubt the evidence of Mr Stafrace contained in this and the preceding five paragraphs and we find accordingly." What emerges is that the appellant, which is indirectly a wholly owned subsidiary of Gruppo Finanziario Tessile S.p.A. ("Gruppo") of Turin, Italy, acts as distributor in Australia of Gruppo garments. It has done so for some years. The prices at which particular summer or winter ranges of garments are to be purchased have regularly been negotiated about 18 months in advance in Turin. Contracts are then concluded with retailers in Australia and, when the requirements are known, orders are placed with Gruppo at the previously agreed prices and upon the previously agreed terms.

4. Mr Stafrace described the negotiation process in Turin as involving two stages. During the first stage, a base price is established, which would be the price applicable to a purchase not upon terms of any extended credit, that is to say, upon an invoice payable within thirty days, and without allowing for exchange rate fluctuations that might affect the Australian dollar and the Italian lire. The second stage then involves negotiations with the Treasury Department of Gruppo, which attempts to forecast currency movements 18 months ahead, and, if credit terms are sought by the appellant, also attempts to forecast prevailing interest rates in Italy 18 months ahead, and any further currency movements during the period of the extended credit. For some years, the appellant and Gruppo have negotiated on the basis that, instead of invoices being payable within thirty days, credit will be extended so that they will be payable within 180 days, interest being charged at the anticipated Italian interest rate in 18 months time. On this basis, a price in Australian dollars is fixed for each category of garment, Gruppo (which is an immense concern, with an annual turnover exceeding $1 billion) taking the risk of exchange and interest rate fluctuations - and, of course, standing to gain from them, if favourable to it.

5. There was put in evidence, and seemingly assumed by all parties to be relevant, a distributorship agreement between the companies made 1 May 1991. But the goods with which the case is concerned were invoiced to the appellant on 22 January 1992, the date or approximate date of their delivery. It is plain from the evidence that they must have been ordered, or at least that the terms upon which they were sold must have been agreed, well before the coming into existence of the distributorship agreement. This is because, as we have said, prices and terms of payment were negotiated 18 months in advance. In any case, the distribution agreement of 1 May 1991, while it envisaged a two staged negotiation similar to that described by Mr Stafrace, made a provision for the fixing of an interest rate in respect of extended credit terms different from that which he described. The relevant clause is cl. 3.5, which reads as follows:

> "Gross selling prices shall be fixed on the basis that payment will be made within 30 days after delivery at the exchange rate applicable on that date. If extended credit terms are agreed upon, then the gross selling price shall be adjusted in accordance with (Gruppo's) forward estimates for movements in international currencies and **GFT** Australia shall pay interest on the gross selling price as adjusted. The interest rate shall be the prevailing interest rate in Italy at the time the products are shipped but may be varied in accordance with alterations brought about by Banker initiatives at any time prior to agreed settlement dates."

6. There is no evidence whether, prior to 1 May 1991, there was any agreement in writing covering the distribution of Gruppo's products by the appellant in Australia. But even if there was an agreement in the same terms, so far as concerns the ascertainment of prices, on the evidence any such agreement was mutually departed from.

7. The invoice in question in this case, dated 22 January 1992, refers to twelve men's garments, the style numbers and cloth types of which are specified together with prices totalling $3,968.28. The printed invoice form contains the notation: "General sales conditions are stated on our order confirmation." Typed in are additional notifications:

> 1. Against a reference on the form to payment, "180 DAYS FROM INVOICE DATE END OF MONTH"; and
> 2. After the prices for the twelve garments and the total, "THE ABOVE PRICES ARE INCLUSIVE OF 5,5% OF INTEREST DUE ON DELAYED PAYMENTS TERMS, EQUAL TO AUD $206.88 ALL SALES ARE SUBJECT TO RETENTION OF TITLE OF OUR GOODS WHILST PAYMENT OR ANY PART THEREOF IS NOT COMPLETED."

As a matter of calculation, $206.88 is in fact 5.5% of $3,761.40, which is the balance of the invoice after deduction of that sum of $206.88. Assuming that the interest for extended credit terms should be related to the full period of the credit, namely 180 days, or as the invoice is not dated on the last day of the month but on 22nd, 189 days, the 5.5% approximates 11% per annum. That, on the evidence, was the approximate prevailing rate of interest in Italy when Mr Stafrace gave evidence in September of the same year, 1992. Indeed, what he said suggested that interest rates in Italy had remained stable for some time, so that a forecast of those rates 18 months ahead may well have been about right. There is, however, no finding, one way or the other, on this.

8. The question on which the fate of the appeal turns is whether the interest referred to in the endorsement on the invoice is "interest payable under a written contract, agreement or arrangement

under which the purchaser is permitted to delay the payment of the price in return for the payment of that interest ... , being a contract, agreement or arrangement entered into between the purchaser and the vendor or another person in relation to the purchase of the goods".

9. The first thing to be noticed about the statutory language is that the "contract, agreement or arrangement" need not be the contract for the purchase of the goods. It may relate only to the grant of permission to delay the payment of the price in return for a payment of interest payable under it, and the concluding words make clear the fact that it need not even be entered into between the vendor and the purchaser. That being so, there is nothing to exclude a contract, agreement or arrangement entered into subsequently to the conclusion of the contract of purchase. It seems to us, therefore, that if the terms for delayed payment of the price endorsed on the invoice varied some earlier term of the agreement, it would be the written arrangement appearing on the invoice that would fulfil the requirements of the statute. If, for example, the agreement entered into 18 months earlier contained no term for retention of title by the vendor during the period of delay before payment, the endorsement on the invoice, once the purchaser accepted the goods without demur, would constitute the relevant written arrangement, if not contract. There is, in fact, no evidence in the case, nor any finding by the Administrative Appeals Tribunal, as to whether or not the agreement concluded in Turin contained either an oral or a written Romalpa clause of the kind typed on the invoice.

10. But a question arises, assuming the endorsement on the invoice merely reflects earlier contractual arrangements, not previously reduced to writing in a form satisfying the definition of "deductible financing costs", whether the endorsement could then constitute "a written contract, agreement or arrangement". There is a distinction between a document which may be described as a written contract because, at the moment when it was signed, a contract for the first time sprang into existence, and a document which may be described as a written contract because it is the record in writing of a contract previously concluded by word of mouth. For some purposes, and in some uses of language, this distinction does not matter, and both may be described as written contracts; but the question is whether both are embraced by the true construction of s. 154 of the Customs Act. That in legal language both types of writing may be described as written contracts is confirmed by the terminology used in a learned article entitled Contracts in Writing by Dr H.K. Lucke (1966) 40 ALJ 265. There (at 265-266) the author states:

> "A document is a written contract when the parties agree - at the conclusion of their contract or afterwards (emphasis added) - that it is to be an authentic and conclusive record of their bargain, 'the final and complete repository of their contractual intentions'",

the concluding words being cited from the judgment of Cussen J (with whom Hodges and Hood JJ agreed) in Cooper and Sons v. Neilson and Maxwell Ltd (1919) VLR 66 at 77. The propriety of Dr Lucke's wide understanding of the expression "written contract" appears clearly in the judgment of Maule J in Harnor v. Groves [1855] EngR 71; (1855) 15 CB. 667 at 674, where that learned Judge

said:

> "The contract between the parties was reduced into writing: and the rule is, that, where a contract, though completely entered into by parol, is afterwards reduced into writing, we must look at that, and that alone, even though part of the terms previously agreed upon are not inserted in the written contract. It is by the written contract alone, - subject, of course, to be interpreted by the usages of trade ... , - that the parties are bound."

11. Granted that when a contract or arrangement, entered into orally, is subsequently reduced to writing accepted by the parties, the document may be described with propriety as a "written contract" or as a "written arrangement", as the case may be, it remains to determine in which sense the language of the definition of "deductible financing costs" should be understood. A relevant consideration is that the narrower construction would exclude a case described as comparatively "common" in the decision of the High Court in Masters v. Cameron [1954] HCA 72; (1954) 91 CLR 353 at 360, that is to say, the case of a binding oral contract by which the execution of a formal document is nevertheless contemplated. We can imagine no reason of policy why Parliament should have had such an intention. If the one type of written contract should confer a right to a deduction, why not the other? Then, it is to be noted that the drafting of the provision, far from suggesting a narrow confinement of the relevant document to a particular type of contract, is sufficiently broad and generous to include a document which is not a contract at all, but only an arrangement. This is in keeping with the view about the breadth of the rules for the ascertainment of the value of goods for customs duty purposes which was affirmed by Davies and Einfeld JJ in their joint judgment in LNC (Wholesale) Pty Ltd v. Collector of Customs (1988) 17 FCR 154 at 164, where they said:

> "It is appropriate in the application of these rules to eschew technicality and subtlety and to take a practical commercial view of transactions. In Inland Revenue Commissioner v. Littlewoods Mail Order Stores Ltd (1963) AC 135 at 153-154, Viscount Simonds, with whom Lord Devlin concurred, referred to the familiar proposition 'that the substance alone of the transaction is to be looked at'. Thus, when the definition of price refers to 'the aggregate of all payments made, or to be made, directly or indirectly, in connection with the goods by the purchaser to or for the benefit of the vendor ... in accordance with the contract', the legislation is looking to what has occurred as a matter of fact, having regard to the substance rather than the form of the transaction, though that is not to deny that the substance of a transaction 'is that which results from the legal

> rights and obligations of the parties ascertained upon ordinary legal principles', per Lord Tomlin in Inland Revenue Commissioners v. Westminster (Duke) (1936) AC 1 at 20-21."

12. In our opinion, accepting that it is appropriate to regard this legislation as taking "a practical commercial view of transactions", rather than being concerned with subtle refinements of legal reasoning, the expression "a written contract, agreement or arrangement" should be understood as referring to an agreement or arrangement, as the case may be, which either appears in written form at its inception or is subsequently reduced to written form.

13. It has been suggested that the purpose of the requirement of writing is the avoidance of fraud, and that the narrow meaning would assist that purpose. With respect, it seems to us the more obvious purpose is certainty in ascertainment of the relevant terms. It is not a provision that would lend itself to fraud, since the vendor (or, perhaps, some other person) has to agree to be left unpaid for the relevant period, and the interest has to be paid in an identifiable way. The last matter is secured by para. (a), and paras. (a), (b) and (c) appear, on the face of the definition, to be the legislature's intended means of ensuring the provision is not abused. It would be contrary to the normal principles of statutory interpretation to give a revenue provision couched in general language a harsh construction when a more generous construction is open, and to justify doing so by assuming the legislature had a fear of evasion which it did not make express. And the policy arguments are all one way - the provision excludes from the calculation of the value of goods an amount which has nothing to do with value, and plainly ought to be excluded in all cases where its precise amount is clearly ascertained.

14. In the present case, on the findings of the Administrative Appeals Tribunal, there was an agreement under which the purchaser was permitted to delay the payment of the price, in return for the payment of interest, from the normal requirement of payment within thirty days to a date at the end of 180 days (or, according to the invoice, 180 days plus the balance of the month of the issue of the invoice). That agreement does not appear to have been initially committed to writing, but it formed part of the agreement for the supply of the goods, and it was made "in relation to the purchase of the goods". It was committed to writing by the endorsement on the invoice.

15. The Tribunal rejected the appellant's application because it took the view that the relevant "contract, agreement or arrangement under which the purchaser is permitted to delay the payment of the price" refers to a permission to delay beyond a period previously agreed to in a contract for sale. On this understanding, the present case falls outside the provision because the delay was negotiated at the same time as the agreement for sale, and was a delay, not from a previously agreed requirement, but from what would have been the requirement in the absence of the special agreement. It seems to us that the Tribunal's reasoning introduces a severe restriction upon the operation of the provision which: (a) is not suggested by the language; (b) would reflect no discernible policy; and (c) is inconsistent with any sensible understanding of paragraph (a) of the

definition. As to the first of these points, the words of the provision naturally cover a case where in the contract of purchase it is agreed that payment shall be deferred upon payment of interest. As to the second point, as we have said, the obvious policy of the provision is to eliminate a cost which has nothing to do with the value of the goods, but is simply related to the purchaser's method of financing the transaction; there is simply no reason why this policy should be applied to assist a defaulting purchaser, but denied to a purchaser who negotiates precisely the same term at the time of the purchase. As to the third point, it is implicit in paragraph (a) that, without the express statutory provision made by that paragraph, the interest might not in a particular case be distinguished satisfactorily from the price of the goods; but that would only be likely to happen where the agreement to delay payment in return for interest was part of the contract of purchase itself.

16. It follows that in our opinion the decision of the Administrative Appeals Tribunal was tainted by error of law.

17. The learned Judge at first instance dismissed the appellant's appeal upon the basis that the additional sum payable for the extended credit terms was not "interest", a point he acknowledged had not been addressed by the Tribunal. In addition, he held that the invoice could not be said "to be part of a written agreement" or to "create a contractual entitlement on the purchaser's part to delay the payment of the purchase price". He did not discuss the alternative in the statutory definition of a non-contractual arrangement.

18. In our opinion, there is no proper basis to deny the payment of 5.5% the character of interest which the endorsement on the invoice attributes to it. Such a statement on a commercial document, if not held to be a sham, is entitled to have some weight attached to it, although of course it is not conclusive: see the fairly full discussion by Hill J (with whom we agreed) in NM Superannuation Pty Ltd v. Young [1993] FCA 91; (1993) 41 FCR 182 at 198-199. The importance of the form in which the parties cast the transaction, in the case of a commercial transaction for the advance (and retention must be in the same case) of money, upon a payment over and above the amount of the principal, is emphasized by the judgment of Lord Greene MR (with whom MacKinnon and du Parcq LJJ agreed) in Lomax (H.M. Inspector of Taxes) v. Peter Dixon and Son, Limited (1943) 1 KB 671; and see the later decision of the Court of Appeal in Ditchfield (Inspector of Taxes) v. Sharp (1983) 3 All ER 681 at 685. In Lomax (at 675) Lord Greene said:

> "If A. lends B. 100l. on the terms that B. will pay him 110l. at the expiration of two years, interpretation of the contract tells us that B.'s obligation is to make this payment. It tells us nothing more. The contract does not explain the nature of the 10l., yet who could doubt that the 10l. represented interest for the two years? The justification for reaching this conclusion may well be that, as the transaction is obviously a commercial one, the lender must be presumed to have acted on ordinary commercial lines

> and to have stipulated for interest on his money. In the case supposed, the 10l., if regarded as interest, is obviously interest at a reasonable commercial rate, a circumstance which helps to stamp it as interest."

In our opinion the reasoning in this passage clearly applies to the present appeal. The evidence showed that an interest rate of 11% per annum was the prevailing rate in Italy at about the time of the transaction, and that the parties deliberately set out to forecast what the prevailing interest rate would be at the relevant time, and agreed the rate applicable to the contract accordingly. It was so agreed in return for the purchaser being permitted to keep, for 180 days, a payment that might have been demanded upon delivery of the goods. We can see no reason why that transaction should not be regarded as involving interest.

19. The importance of the form in which the parties chose to cast the transaction is illustrated by one aspect of the evidence. Mr Stafrace said that, in addition to fixing an interest rate, the parties also fixed an adjustment to the price itself to allow for expected movements in the exchange rate which determined the value of the Australian dollar when expressed in Italian lire. In the light of the discussion to be found in the judgment of Lord Greene in Lomax, this adjustment would not be interest; but if, in a particular case, the parties chose to reflect the exchange risk involved in the allowance of the extended time by a higher rate of interest, upon the principles laid down by Lord Greene, provided the rate is still a reasonable commercial rate of interest, the whole payment made as interest may be characterized as being in truth interest. Interest, after all, as Farwell J said in Bond v. Barrow Haematite Steel Company (1902) 1 Ch 353 at 363 "is compensation for delay in payment". See also Riches v. Westminster Bank Limited (1947) AC 390 at 400, per Lord Wright; Ridge Securities Ltd v. Inland Revenue Commissioners (1964) 1 WLR 479 at 493; Consolidated Fertilizers Ltd v. Deputy Commissioner of Taxation [1992] FCA 224; (1992) 107 ALR 456 at 461-462.

20. In our opinion, the appeal should be allowed with costs; and the orders made at first instance should be set aside, and in lieu thereof it should be ordered that the decision of the Administrative Appeals Tribunal be set aside, that the matter be remitted to the Tribunal, differently constituted, to be decided according to law, and that each party bear its or his own costs of the appeal from the Tribunal. In so deciding upon the orders in respect of costs, we take account of the appellant's success, but also of its contribution to the confused picture presented to the Administrative Appeals Tribunal, for which it was very largely responsible. It is to be hoped that when the matter is returned to the Tribunal, there will be clearer and more complete oral and documentary evidence on the precise issues of fact in the case.
