BURNS . . . . . APPELLANT;
PLAINTIFF,

AND

M.A.N. AUTOMOTIVE (AUST.) PROPRIETARY LIMITED . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *June* 25.

CANBERRA, *Dec.* 16.

Gibbs C.J., Wilson, Brennan, Deane and Dawson JJ.

Contract — Breach — Damages — Sale of goods — Prime mover — Warranty that engine fully reconditioned — Breach — Loss of earnings — Extent of recovery — Mitigation of loss — Purchaser impecunious — Relevance to assessment of damages and mitigation.

In 1977 a road haulier bought a prime mover from a supplier who warranted that its engine had been fully reconditioned. The supplier knew that the buyer intended to use the vehicle in his business and should also have known that he was not in affluent circumstances. The engine had not been fully reconditioned and its faults caused considerable disruption to the buyer's business. In July 1978 the buyer learned that the engine had not been fully reconditioned at the time he bought it and that it was very defective. The vehicle was in such a condition that it could not be used on interstate routes, and until the end of 1979 the buyer used it instead within his own State. He was awarded damages for breach of warranty which included a sum for loss of earnings for the period of four years after the date of purchase upon the footing that it was the period for which the engine would have been expected to operate efficiently if it had been fully reconditioned.

Held, by Gibbs C.J., Wilson, Deane and Dawson JJ., Brennan J. dissenting, that the buyer was not entitled to damages for loss of earnings after July 1978; by Wilson, Deane and Dawson JJ. on the ground that such damages were too remote, and by Gibbs C.J. that it was not reasonable for the buyer to carry on his business with the defective vehicle once he knew that he was operating at a loss and should have known that he had no prospect of making a profit.

Per Gibbs C.J. and Brennan J. A plaintiff who is under a duty to mitigate his loss is not obliged, to reduce the damage, to do what he cannot afford to do, particularly where the plaintiff's financial stringency arose as a matter of common sense, if not of law, solely in consequence of the defendant's wrongdoing.

Clippens Oil Co. Ltd. v. Edinburgh and District Water Trustees, [1907] A.C. 291, at p. 303, and *Dodd Properties v. Canterbury City Council*, [1980] 1 W.L.R. 433, at p. 453; [1980] 1 All E.R. 928, at p. 935, applied.

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Liesbosch, Dredger v. Edison, S.S. (Owners), [1933] A.C. 449, at pp. 460-461, considered.

Per Gibbs C.J. Damage suffered as a result of breach of contract which is reasonably within the contemplation of the parties when the contract was made is recoverable even though the plaintiff's impecunious condition contributed to it.

Monarch Steamship Co. Ltd. v. Karlshamns Oljefabriker (A/B), [1949] A.C. 196, at p. 224, and *Trans Trust S.P.R.L. v. Danubian Trading Co. Ltd.*, [1952] 2 Q.B. 297, at pp. 302, 306, 307, applied.

Liesbosch, Dredger v. Edison, S.S. (Owners), [1933] A.C. 449, at pp. 460-461, considered.

Decision of the Supreme Court of Queensland (Full Court) affirmed.

APPEAL from the Supreme Court of Queensland.

In about July 1977 Robert Burns and M.A.N. Automotive (Aust.) Pty. Ltd. entered into a contract by which the company agreed to sell to Esanda Ltd. for hire to Burns a prime mover and warranted that its engine had been fully reconditioned. The company knew that Burns intended to use the vehicle in his interstate haulage business, and it should also have known that he was not affluent. The engine had not been fully reconditioned and it caused Burns constant difficulty in the conduct of his business. In June 1978 the vehicle broke down. In July 1978 Burns became aware that when he had bought the engine it had not been fully reconditioned and had been very defective. It would then have cost between $7,000 and $8,000 to put the engine in the warranted condition, but Burns could not afford to pay that sum. Thereafter the vehicle could not be used on interstate routes and Burns used it instead on intrastate work. At the end of 1979 it broke down again, and a short time later it was repossessed by Esanda Ltd.

Burns sued the company in the Supreme Court of Queensland for damages for breach of warranty. Moynihan J. awarded him damages which included the sum of $131,000 for loss of earnings. In fixing this sum the judge acted on the basis that if the engine had been fully reconditioned it might have been expected to operate efficiently for about four years. Hence the award was made for the period from July 1977 to July 1981. The company appealed to the Full Court of the Supreme Court (Andrews C.J., Connolly and Macrossan JJ.) which held that Burns could not recover for loss of profits after the condition of the engine had been discovered in July 1978. Their Honours allowed $33,785.26 as loss of profits from June 1977 to July 1978 and in addition a sum of $8,000 for what it would have cost to recondition the engine. Burns appealed to the High Court against the reduction of damages.

J. B. Crowley Q.C. (with him *L. P. L. White*), for the appellant. The buyer was entitled to be put in the same position as if the contract had been performed. The Full Court was wrong to focus on the buyer's lack of reaction to the knowledge that the motor was not fully reconditioned as warranted. The proper test is whether the damages were such as might reasonably be supposed to have been in the contemplation of the parties when they made the contract. On ' at test the buyer's strained financial circumstances should have en taken into account. On the evidence the parties must asonably have had the buyer's circumstances in contemplation at the time of the contract. It was not a separate and concurrent cause extraneous and distinct in character from the contract: *Monarch Steamship Co. Ltd. v. Karlshamns Oljefabriker (A/B)* (1). *Liesbosch, Dredger v. Edison, S.S. (Owners)* (2) was a torts case and is irrelevant to breach of contract. The buyer's impecunious condition was in part caused by the seller's breach of contract. He was locked into his hire-purchase contract and his trucking business and was forced to suffer the losses for which he claims. He did all he could to reduce his loss. The onus is on a defendant who asserts failure to mitigate to show that the plaintiff has acted unreasonably: *T.C. Industrial Plant v. Robert's Queensland Pty. Ltd.* (3). [He also referred to *Perry v. Sidney Phillips & Son* (4); *Beavis v. Apthorpe* (5); *Falko v. James McEwan & Co. Pty. Ltd.* (6).

G. E. Fitzgerald Q.C. (with him *K. C. Fleming*), for the respondent. Consequential losses which are special to the injured party because of his impecuniosity are not recoverable even though reasonably foreseeable. Such losses are as a matter of policy either treated as too remote or as not caused by the guilty party: *Liesbosch, Dredger v. Edison, S.S. (Owners)* (7). [He referred to *Caltex v. The Dredge "Willemstad"* (8); *Candlewood Navigation Corporation Ltd. v. Mitsui O.S.K. Lines Ltd.* (9); *Dodd Properties Ltd. v. Canterbury City Council* (10); *Fox v. Wood* (11) and *Perry v. Sidney Phillips & Sons*.] The most the appellant can recover is the difference between what his net earnings would have been throughout the entire period for which a reconditioned engine would have operated and his actual earnings. The parties cannot have contemplated that he

(1) [1949] A.C. 196, at p. 224.
(2) [1933] A.C. 449.
(3) (1963) 37 A.L.J.R. 289.
(4) [1982] 1 W.L.R. 1297; [1982] 3 All ER 705.
(5) [1963] N.S.W.L.R. 1176.
(6) [1977] V.R. 447.]
(7) [1933] A.C. at p. 460.
(8) (1976) 136 C.L.R. 529, at pp. 554-555, 564-567, 590-591, 606.
(9) [1986] A.C. 1 at p. 25.
(10) [1980] 1 W.L.R. 433; [1980] 1 All E.R. 928.
(11) (1981) 148 C.L.R. 438.

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would not only earn a reduced income but actually incur an operating loss and continue to use the vehicle at a loss until it was repossessed. [He referred to *Clarke v. Shire of Gisborne* (12).]

J. B. Crowley Q.C. in reply.

Cur. adv. vult.

Dec. 16.

The following written judgments were delivered:—

GIBBS C.J. This is an appeal from a judgment of the Full Court of the Supreme Court of Queensland which allowed an appeal from a judgment of Moynihan J. and reduced the damages awarded for breach of warranty from $220,122.90 to $70,253.06.

For present purposes it is sufficient to state the facts briefly as follows. In about July 1977 the appellant and the respondent company entered into a contract by which the respondent agreed to sell to Esanda Ltd. (a finance company) for hire to the plaintiff a diesel prime mover and warranted that the engine of the prime mover had been fully reconditioned. The respondent knew that the appellant intended to use the prime mover in a business of interstate haulage, and should also have known that the appellant was not in affluent circumstances. The cash price for the vehicle shown in the hire-purchase agreement was $31,000. The engine had not in fact been fully reconditioned and it caused the appellant constant difficulty in the conduct of the haulage business. In June 1978 the prime mover broke down and in July 1978, when the appellant saw the engine stripped down, he became aware, if he did not already suspect, that the engine when he bought it had not been fully reconditioned and was in a very defective state. It would have cost $7,000-$8,000 at that time to put the engine into the warranted condition, but the appellant could not afford to pay that sum. The respondent would do nothing to rectify the state of the engine either then or later, although pressed by the appellant to do so. The appellant carried out certain repairs to the engine and had to borrow further money ($1,400) from Esanda Ltd. for that purpose. Thereafter the condition of the prime mover was such that it could not be used in the business of interstate haulage and the appellant used it instead in cartage in central Queensland. In November 1979 the prime mover finally broke down and it was later repossessed by Esanda Ltd. At all times after July 1977 the business of interstate haulage and that of carting had been carried on by the appellant at a loss.

(12) [1984] V.R. 971.

The learned trial judge awarded as damages $2,122.90 in respect of towing charges, mechanical repairs and the purchase of parts. He further awarded an amount of $131,000 for "loss of earnings", $2,000 for nervous stress and $85,000 interest. In fixing the sum for "loss of earnings", the learned trial judge acted on the basis that if the engine had been fully reconditioned it could have been expected to operate efficiently "for of the order of four years covering of the order of two hundred thousand miles". He awarded $85,000 as loss of earnings for the period from July 1977 to October 1979 and $46,000 for the period from November 1979 to July 1981. It is common ground that there were errors of computation in arriving at these figures, induced no doubt by the vague and unsatisfactory evidence. The interest awarded represented an amount arrived at by applying a rate of 6 per cent for the period from July 1977 to July 1981 and at a rate of 12 per cent from 1 August 1981 until the date of judgment.

The Full Court held that the appellant could not charge the respondent with any loss of profits incurred after the condition of the engine had been discovered in July 1978. Their Honours allowed $33,785.26 as the loss of profits from July 1977 to June 1978 and allowed in addition a sum of $8,000 representing what it would have cost to recondition the engine and further sums totalling $2,122.90 in respect of the items which the learned trial judge had awarded for towing charges, repairs and parts. They disallowed the amount awarded for nervous stress, holding that it had not been proved that the nervous condition from which the appellant later suffered was attributable to the breach of warranty. They also reduced the amount of interest awarded because, in their Honours' view, the action had taken an unexplained and inordinate length of time to come on for trial after the close of pleadings in 1980; they allowed interest at 12 per cent for five years.

There can be no doubt that it was within the reasonable contemplation of the parties at the time when the contract was made that if the warranty was broken the appellant might lose the profits which he might otherwise have made in the business of an interstate haulier. According to the finding of the learned trial judge, the appellant might have been able, with the use of a prime mover whose engine had been fully reconditioned, to earn such profits for four years. The appellant had made known to representatives of the respondent the purpose for which he intended to use the vehicle, and if the engine was not in a fully reconditioned state a loss of profits was a serious possibility at the time when the contract was

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made. In accordance with the rule in *Hadley v. Baxendale* (13), as explained in *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.* (14); *C. Czarnikow Ltd. v. Koufos* (15) and *Wenham v. Ella* (16), any loss of profits proved to have resulted from the fact that the engine was not fully reconditioned would, subject to the considerations which I am about to mention, be recoverable as damages for breach of warranty.

The learned judges in the Full Court of the Supreme Court restricted the damages for loss of profits to the loss incurred in the period which ended in July 1978. Connolly J. (with whom Andrews C.J. agreed) said that the case was not one of mitigation of damage but that by July 1978 the appellant's damages had fully materialized; he said that it was obvious that the vehicle should then have been either made good or sold, and that the appellant was not entitled to charge the respondent with losses which he need not have incurred. Macrossan J. said that the decision of the appellant to carry on without a full reconditioning or replacement of the engine, after its full state had been revealed to him in July 1978, should be regarded as not directly attributable to the original breaches or as being too remote.

With all respect, I consider that this is a case in which it is necessary to consider whether the appellant did what he could to mitigate the damage caused by the breach of warranty. As I have said, a loss of profits for the four years during which the reconditioned engine could probably have been used was within the reasonable contemplation of the parties as a consequence of a breach of the warranty. Notwithstanding the much criticized decision in *Liesbosch, Dredger v. Edison, S.S. (Owners)* (17), any damage which resulted from a breach of the contract, and was reasonably within the contemplation of the parties when the contract was made, is recoverable even though the appellant's impecuniosity contributed to it: *Monarch Steamship Co. Ltd. v. Karlshamns Oljefabriker (A/B)* (18); *Trans Trust S.P.R.L. v. Danubian Trading Co. Ltd.* (19). However, the appellant was bound to take all reasonable steps to mitigate the loss, and one course open to him to mitigate the damage, if he could have afforded to take it, was to have the engine reconditioned or to buy another to replace it. However, his impecuniosity prevented him from taking that course. The question arises whether it should be held that the appellant is

(13) (1854) 9 Ex. 341 [156 E.R. 145].
(14) [1949] 2 K.B. 528.
(15) [1969] 1 A.C. 350.
(16) (1972) 127 C.L.R. 454.
(17) [1933] A.C. 449.
(18) [1949] A.C. 196, at p. 224.
(19) [1952] 2 Q.B. 297, at pp. 302, 306, 307.

debarred from claiming such part of the damages as is attributable to his failure to take the necessary steps in mitigation, when he was unable to take those steps because of his lack of means.

That question must be answered in the negative. In *Liesbosch, Dredger v. Edison, S.S. (Owners)* (20) Lord Wright, in dealing with the effect of impecuniosity in the assessment of damages in tort, drew a distinction between the measure of damages and the victim's duty to minimize damage. After referring to a passage from the speech of Lord Collins in *Clippens Oil Co. Ltd. v. Edinburgh and District Water Trustees* (21), which indicates that a wrongdoer is liable for the consequences flowing from his wrongful act notwithstanding that the victim was unable, by reason of lack of funds, to take the steps necessary to mitigate the loss, Lord Wright went on to say (22):

> "But, as I think it is clear that Lord Collins is here dealing not with measure of damage, but with the victim's duty to minimize damage, which is quite a different matter, the dictum is not in point."

The reason for this distinction is not altogether clear and the distinction has not always been observed: see, e.g., *Martindale v. Duncan* (23). However, a plaintiff's duty to mitigate his damage does not require him to do what is unreasonable and it would seem unjust to prevent a plaintiff from recovering in full damages caused by a breach of contract simply because he lacked the means to avert the consequences of the breach. There are in the present case, the additional features that the financial difficulties of the appellant were largely brought about by the actions of the respondent in supplying him with a defective engine and refusing properly to rectify the defects, although the respondent should have known that the appellant lacked the financial resources that would have enabled him to pay to have the engine reconditioned. I respectfully agree with the statement of Megaw L.J. in *Dodd Properties v. Canterbury City Council* (24):

> "A plaintiff who is under a duty to mitigate is not obliged, in order to reduce the damages, to do that which he cannot afford to do: particularly where, as here, the plaintiffs' 'financial stringency,' so far as it was relevant at all, arose, as a matter of common sense, if not as a matter of law, solely as a consequence of the defendants' wrongdoing."

(20) [1933] A.C., at pp. 460-461.
(21) [1907] A.C. 291, at p. 303.
(22) [1933] A.C., at p. 461.
(23) [1973] 1 W.L.R. 574, at p. 577; [1973] 2 All E.R. 355, at p. 358.
(24) [1980] 1 W.L.R. 433, at p. 453; [1980] 1 All E.R. 928, at p. 935.

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Further, in *Perry v. Sidney Phillips & Son* (25), Kerr L.J. said:

> "If it is reasonably foreseeable that the plaintiff may be unable to mitigate or remedy the consequence of the other party's breach as soon as he would have done if he had been provided with the necessary means to do so from the other party, then it seems to me that the principle of *The Liesbosch* (26) no longer applies in its full rigour."

There are other cases that support the view that a defendant cannot rely on the plaintiff's failure to mitigate the consequences of the defendant's wrongful act when that wrongful act itself made it impossible for the plaintiff to take the necessary steps in mitigation: see *Fox v. Wood* (27); *Archer v. Brown* (28) and *Freedhoff v. Pomalift Industries Ltd.* (29).

For these reasons it appears to me that the appellant is entitled to recover whatever damage it has been proved that he suffered by way of loss of profits that would otherwise have been earned during the four years of the effective life of the motor.

However, there is another reason why the appellant did not do all that he reasonably could to mitigate his damage. It was not reasonable for him to carry on his business with the defective prime mover, once he knew that he was operating at a loss and should have known that he had no prospect of making a profit. As Connolly J. pointed out, this was not a case of a purchaser locked into a business; the appellant was under no compulsion to go on losing money. In the calculation of damages it was not wrong to hold that the respondent should not be charged with actual losses incurred by the appellant after June 1978, although the appellant was entitled to any loss of profit suffered after that date, if such loss was proved.

The evidence given on the issue of damages was confused and imprecise. The learned trial judge substantially accepted the evidence of Mr. McMillan, the owner and operator of a prime mover and trailer, who gave estimates of the earnings and running costs of conducting a haulage business. Oddly enough, the figures for earnings and costs were substantially the same, and any profit lay in the amount described by Mr. McMillan as payable by way of wages; the appellant would in effect have been paying wages to himself. Those amounts were estimated by Mr. McMillan to be 6 cents per kilometre in 1978-1979, 7.62 cents in 1979-1980 and 8.75 cents in

(25) [1982] 1 W.L.R. 1297, at p. 1307; [1982] 3 All E.R. 705, at p. 712.
(26) [1933] A.C. 449.
(27) (1981) 148 C.L.R. 438, at pp. 445-446.
(28) [1985] Q.B. 401, at pp. 417-418.
(29) (1970) 13 D.L.R. (3d) 523, at pp. 532-533.

1980-1981. If one accepts the estimate of the learned trial judge that a reconditioned motor would have been capable of operating for 200,000 miles (320,000 kilometres) the loss of profits over the whole period might have amounted to about $25,600, although it would of course have been necessary to make some reduction from that sum to take account of contingencies that might well have affected the appellant's capacity to earn profits. Mr. McMillan's figures took account of depreciation at the rate of 20 per cent and made provision for the replacement of the prime mover at the rate of 0.5 or 0.6 of a cent per kilometre. Since the appellant was paying hire-purchase charges, these figures for depreciation and replacement could perhaps be regarded as an addition to profit. On this vague evidence the amount of lost profits might have been estimated as high as $44,600 less a reduction for contingencies. There was no evidence to enable a finding to be made as to the extent to which the residual value of the prime mover was reduced by the fact that it had not been reconditioned in the first place. However, in assessing damages it was necessary to add $10,386 representing the actual loss for the first operating year. On this basis nothing would be added for the cost of reconditioning the engine. The maximum figure that might be arrived at by this method (about $55,440) exceeds the total amount awarded by the Full Court after the special items are deducted, i.e. $41,785 ($33,785 plus $8,000). However, the maximum figure must, as I have said, be reduced for contingencies, and the matter lies so much in the realm of speculation and estimation that I find it impossible to say that the total amount awarded by the Full Court was less than that to which the appellant was proved to have been entitled. The truth is that the evidence is such that the assessment of damages in the present case is little better than guesswork. I do not consider that there should be a new trial to give the appellant an opportunity to prove more exactly the amount of his loss; the onus was on him to prove his case at the trial.

It was clear and indeed undisputed that the award made by the learned trial judge was manifestly excessive and that the Full Court was therefore entitled to fix the amount of damages for itself. Although in doing so they proceeded on a basis different from that which I have suggested is correct, it has nevertheless not been established that the amount awarded was insufficient to cover the damages properly recoverable by the appellant.

I consider that the Full Court were justified, for the reasons which their Honours gave, in declining to award anything for nervous stress and in reducing the amount of interest awarded.

I would dismiss the appeal.

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Wilson J. Deane J. Dawson J.

WILSON, DEANE AND DAWSON JJ. On the trial of an action for damages for, inter alia, breach of contract, the appellant secured an award of $220,122.90 against the respondent. The learned trial judge found that in or about July 1977 the parties had entered into a contract whereby the respondent agreed to supply to a finance company for hire to the appellant a M.A.N. diesel prime mover vehicle. It was in respect of a warranty that the engine of the vehicle had been fully reconditioned that the respondent was found to be in breach.

The damages awarded by the trial judge consisted almost wholly of the lost profits which the appellant might have been expected to earn as a self-employed truck operator over a period of four years, the assumed useful life of the engine as warranted, and the interest allowed thereon. Although both liability and damages were in issue at the trial and were the subject of appeal to the Full Court of the Supreme Court of Queensland, the respondent did not pursue the question of liability in that appeal. The Full Court unanimously allowed the appeal on damages and substituted an award of $70,253.06. That sum was intended to represent, apart from interest, the full cost the appellant would have incurred in bringing the prime mover up to its warranted state by having the engine reconditioned together with any profits he would have earned during the period of about a year from the time when the hiring commenced. By the expiration of that period it was manifest that the prime mover, with its unreconditioned engine, was completely unsuitable for the purpose of capital city haulage for which the appellant had bought it and its use for that purpose was abandoned. Special leave to appeal was granted by this Court on the understanding that the decision of the Full Court involved an important question of law related to the effect that a failure to mitigate the damage flowing from a breach of contract might have on an award of damages when the failure is due to the impecuniosity of the injured party. As will be seen, however, it is our view that the appeal falls to be determined on a consideration of the facts of the case without regard to that question. What is now in issue is the claim of the appellant that, in addition to the amounts awarded by the Full Court, he is entitled to receive compensation for the full profits he would have earned if he had used a reconditioned prime mover for the abandoned purpose of capital city haulage for the further three years and, in addition, to be reimbursed for the losses he incurred in the different activity of the intrastate haulage of freight to which he decided to commit the unreconditioned prime mover. It should be added that, although the respondent maintained that the award of damages substituted by the Full Court erred on the side of

generosity, it did not cross appeal and cannot now be heard to complain that the award was excessive.

It is necessary to recount in some detail the material facts as found by the trial judge. The appellant intended, to the knowledge of the respondent, to use the vehicle in cartage work mostly between the east coast capitals Brisbane, Sydney and Melbourne, particularly from Brisbane to Melbourne and return, with occasional extensions to Adelaide. He expected to work initially on a sub-contract basis towing trailers for others until he could afford to acquire his own trailer. Then he would work on his own behalf. The respondent, by its servants, represented to the appellant that the engine had been fully reconditioned. That representation was false. The engine gave trouble right from the start. On the appellant's first trip, in August 1977, it used an exceptional amount of fuel and at the conclusion of the journey the vehicle was out of action for four days while the fuel pump and injectors were repaired or replaced at the cost of the respondent. Thereafter the appellant resumed using the vehicle on interstate journeys but his difficulties continued. The engine lacked power and had developed a knock, and the oil consumption was unduly high with smoke being blown out of the breather pipe. He repeatedly complained to the respondent's service staff and eventually arrangements were made for the vehicle to go back into the workshop for checking. However, before that arrangement took effect the appellant was returning to Brisbane when the vehicle broke down near Warwick and had to be towed to the respondent's workshop. Repairs were carried out for which an account was rendered to the appellant. When the repairs had been completed a servant of the respondent, accompanied by the appellant, took the vehicle for a test drive. After travelling a short distance the engine overheated and it was discovered that there was no water in the cooling system. Water was put in and the vehicle was returned to the workshop. During the return drive the appellant detected some abnormality in the sound of the engine's operation and expressed his concern as to the consequences of the overheating. A check was made for any water leaks but the respondent refused to take the matter any further. These events occurred in November 1977.

The appellant resumed interstate haulage but the engine continued to give trouble. There was a chronic lack of power and overheating was a problem. The appellant had to stop frequently to check the water, and if necessary wait until the motor had cooled down in order to replenish the water supply. The difficulties were exacerbated by up-hill running and on occasions he took a longer route to his destination in order to avoid hills. The engine suffered

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from a condition known as blow-back which was a cause or symptom of lack of power.

In March 1978 the appellant acquired the use of a trailer and commenced to operate on his own account obtaining work through loading agents. The prime mover continued to be troublesome in the manner we have indicated. In June 1978 it broke down and was towed to a workshop in Oxley. There the top part of the engine was dismantled, revealing cracks in the head, a cracked valve, bent push rods and other abnormalities. The oil contained water and there was a build-up of sludge consistent with "by-pass" as a consequence of worn rings in the motor. The appellant had to buy a new head and have other repairs carried out for which purpose he had to borrow a further $1,400 from the finance company. From time to time the appellant pressed the respondent to rectify the engine but without result. The trial judge was satisfied that the difficulties which the appellant encountered were a direct consequence of the engine not having been fully reconditioned and of its being driven without water in the cooling system during the test drive in November 1977.

The repairs effected at Oxley made the prime mover serviceable but the appellant considered it to be unfit to engage in the interstate haulage for which he had intended it and for which it had previously been used. He commenced carting freight in the form of machine parts to coal mines in central Queensland. This did not require the strict adherence to timetables as was the case with interstate work. The engine continued to suffer from lack of power but there were no major problems. Finally, in November 1979, the vehicle broke down near Oakey Creek mine after approximately 90,000 miles of operation. The appellant had fallen behind in his payments to the finance company and the prime mover was repossessed on 4 December 1979.

As we have said, the bulk of the damages awarded by the trial judge consisted of an estimation of the earnings which the appellant had lost through being unable to operate an interstate haulage business over the assumed life of a fully reconditioned motor together with interest on that sum. The actual finding of the trial judge as to the operation of the prime mover had the engine been fully reconditioned was that it would have operated efficiently and effectively, in the work for which the appellant intended it, for a period of the order of four years covering approximately 200,000 miles.

In the amended statement of claim the appellant detailed his claim for lost earnings as follows:

Loss of earnings July 1977 to October 1979 inclusive	$97,135.27

Loss of earnings November 1979 to July 1981 inclusive	$51,686.50

In his reasons for judgment the trial judge, having described the details of the claim, continued:

> "I turn then to the claim for loss of earnings. As appears from the extract from the statement of claim which I have set out above, these are calculated in respect of two periods. Up to the date of repossession by the finance company for the first period and up to the date of the life of a fully reconditioned engine to determine the extent of the second period. I am satisfied that the life of a fully reconditioned engine would be up to and including July 1981. I am also satisfied that, had the vehicle operated as it should, the plaintiff would have had a regular business between the eastern state capitals and Adelaide as I have previously mentioned and that he would have operated it profitably. Evidence was given, and I accept it, by Mr. Robert McMillan. Mr. McMillan is a truck operator who has kept extensive records of costs and earnings in respect of the operations of a prime mover during the periods with which I am concerned. Evidence of costs and actual and potential earnings is contained in Exhibits 13, 14, 15, 16, 17 and 18 and also in the evidence of the plaintiff. I substantially accept that evidence. It was rightly submitted for the defendant that so far as loss of earnings are concerned the plaintiff is really claiming a loss of opportunity and the figures contended for must be looked at with care. Both sides argued on the basis that the damages in respect of this component are not susceptible to precise calculation. It seems to me that it may be unduly optimistic to say that the plaintiff would have been in constant work for the whole of the period which is really the basis contended for by the figures claimed. I will allow loss of earnings for the first period claimed in the amount of $85,000 and $46,000 in respect of the second."

In the exercise of his statutory discretion in accordance with the provisions of s. 72 of the *Common Law Practice Act* 1867 (Q.), as amended, his Honour then awarded interest in the sum of $85,000. In the course of argument on this appeal, counsel for the appellant informed the Court that the trial judge had overlooked a variation to the loss of earnings claimed by the appellant as it appeared in an answer to interrogatories which was received into evidence. He tendered a statement which, after allowing for a corresponding discount percentage to that allowed by the trial judge, showed a total award for loss of earnings covering both periods of $108,554 and interest of $74,800.

In the Full Court, Connolly J. (in whose judgment Andrews C.J. concurred) accepted the proposition there advanced for the respondent that it was not reasonably foreseeable that a person in the position of the appellant, exercising good commercial sense, would

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persist over a period of years with a prime mover which, to his knowledge, was not as represented and which did not meet his requirements. If that knowledge existed soon after he took delivery of the vehicle in August 1977 then the appropriate measure of damages would be the cost of fully reconditioning the engine together with the profits lost whilst the work was carried out, subject perhaps to additional considerations arising from the impecuniosity of the appellant causing the repair work to be delayed. However, his Honour reasoned that on the evidence the appellant should not be held to be fixed with knowledge of the respondent's breach of warranty until July 1978 when he saw the engine with its head removed after the vehicle had been towed into Oxley. Thereafter, the appellant must have known that nothing short of full reconditioning would suffice to solve his problem. The respondent's breach of warranty was plain. By that time the appellant's damage had fully materialized. He had abandoned the business of hauling between capital cities for which he had hired the vehicle. In these circumstances, Connolly J. held that any damages claimed in respect of loss of earnings after July 1978 were too remote. His Honour accepted the appellant's calculation of lost profit from July 1977 to June 1978 in the sum of $33,785.26, added some minor cost items not in dispute, allowed $8,000 as the cost of fully reconditioning the motor and interest in the sum of $26,344.90 making a total award of $70,253.06. An award by the trial judge of $2,000 for nervous stress was disallowed by Connolly J. because, assuming that it was recoverable, the evidence did not show that it was attributable to the breach of warranty in July 1977. The third member of the Full Court, Macrossan J., also held that after the full state of the engine was revealed to the appellant in July 1978, the decision to carry on without a full reconditioning or replacement led to continued losses which were not attributable to the breach of warranty. In substance, his Honour's views corresponded with those of Connolly J.

In this Court counsel for the appellant argued that the Full Court failed to apply the established rule governing the assessment of damages in cases of breach of contract, namely, that the injured party is to be put into the position in which he would have been if the representation had been true. He argued that had the engine been fully reconditioned as warranted, the appellant could have expected to have four years or 200,000 miles of profitable interstate haulage. He was therefore entitled to receive as compensation for the breach of warranty all the net profits he could have expected to receive during those four years and, in addition, reimbursement of the losses he actually suffered in the two years during which he

persisted in operating his business at a loss. We digress to mention that counsel for the respondent has drawn attention to some curious features of the evidence upon which the appellant's hypothetical profit expectations were based and which may cast doubt upon the accuracy of his computations but it is not necessary to pursue that aspect of the case.

Counsel for the appellant correctly states the general rule of the common law which forms the starting point of a consideration of the assessment of damages. In *Robinson v. Harman* (30) Parke B. expressed it as being that "where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed". See also *C. Czarnikow Ltd. v. Koufos* (31). However, the submission overlooks the fact that the general principle is limited by the rule laid down by the Court of Exchequer in *Hadley v. Baxendale* (32), that is to say:

> "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

These well-known principles have been discussed by Gibbs J. (as his Honour then was) in *Wenham v. Ella* (33). His Honour reminds us that the rule in *Hadley v. Baxendale* was expounded in *C. Czarnikow Ltd. v. Koufos*, where Lord Reid said (34):

> "The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation."

This was a straightforward contract leading to the acquisition by the appellant of a chattel on hire-purchase. Within a month of his taking possession of the vehicle the appellant returned it to the respondent for repair or replacement of the fuel pump and injectors. His evidence was that he was then told by a servant of the

(30) (1848) 1 Ex. 850, at p. 855 [154 E.R. 363, at p. 365].
(31) [1969] 1 A.C. 350, at pp. 400, 414, 420.
(32) (1854) 9 Ex. 341, at p. 354 [156 E.R. 145, at p. 151].
(33) (1972) 127 C.L.R. 454, at pp. 471-472.
(34) [1969] 1 A.C., at p. 385.

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respondent that the engine had not been fully reconditioned. Had he established a breach of warranty at that time, the measure of damages would have been the cost of then reconditioning the engine, about $7,000, together with the resultant loss of profits whilst the vehicle was out of action. The Full Court may have been generous in their approach to the appellant's case in holding that it was not until July 1978 that he was fully apprised of the deplorable state of the engine; on the other hand, the holding may reflect a sensitive appreciation of the difficulty faced by the appellant in his struggle to make a success of the new venture with no financial resources behind him and his consequent inability to face the reality of his situation. But by July 1978 that reality could be disguised no longer.

We have given careful attention to the sad history of the appellant's experiences with the prime mover but in our opinion the Full Court's decision is not open to attack. It was not a case where the appellant was locked into a situation from which he could not escape, as was the case, e.g., in *Doyle v. Olby (Ironmongers) Ltd.* (35) and in *Gould v. Vaggelas* (36). In each of those cases the injured party was tricked into buying a business and in such cases different considerations may apply. The appellant accepted in July 1978 that he could no longer carry on interstate haulage operations. He decided to commit the vehicle to the less demanding and less profitable operation of carting machinery parts to coal mines in Queensland. If he was then unable to have the engine fully reconditioned, he could have terminated the hiring. Clause 5 of the hire-purchase agreement expressly secured to him the right to terminate the hiring at any time by returning the vehicle in accordance with s. 12 of the *Hire Purchase Act* 1959 (Q.). There is no reason to suppose that he could not then have received adequate compensation by appropriate action against the respondent.

Furthermore, we think, with respect, that Connolly J. was correct in saying that this was not a case of mitigation of damage at all. It called simply for a determination of that point in time, beyond which any damage suffered by the appellant could not be said to have been within the reasonable contemplation of the parties as flowing from the breach. The effect of impecuniosity upon an injured party's obligation to mitigate the damage flowing from a breach of contract was indeed irrelevant to that question. It may have been a relevant consideration if the Full Court had found that the appellant was to be fixed with knowledge of the breach of warranty in August 1977 or at the latest after the breakdown in

(35) [1969] 2 Q.B. 158.

(36) (1985) 157 C.L.R. 215.

November 1977. In substance their Honours held that the stage at which the appellant's position had finally crystallized from the point of view of the assessment of damages under the ordinary principles of contract law was reached in July 1978. By then, the damages had come home in that it was obvious that the vehicle should either have been made good or the appellant's possession of it relinquished. Connolly J. aptly summed up the matter by saying:

> "The respondent [the appellant in this Court] was not, in my judgment, entitled to hang on and charge the appellant with the profits of a business which he himself had abandoned and with losses which he need never have incurred."

Three other matters remain to be mentioned. First, the appellant argues that the Full Court should not have disallowed the sum of $2,000 awarded by the trial judge in respect of nervous stress. But, in our opinion, there is no sound basis for maintaining this item in the appellant's favour. On the evidence, nervous stress did not become manifest until after July 1978. As Connolly J. observed, "assuming this head of damage to be recoverable, it is not convincingly shown to be attributable to the breach of warranty in July 1977". Secondly, there is the question of interest. The Full Court noted the inordinate length of time the action had taken to come to trial, for which no explanation was offered, but nevertheless allowed interest at 12 per cent for five years on the total amount of damages. It is argued for the appellant that the interest so allowed was inadequate. That award of interest was made in the exercise of a discretionary judgment. The appellant has failed to identify any basis upon which this Court could properly interfere with it.

Finally, the appellant argued that since the respondent had abandoned its appeal to the Full Court on the question of its liability, the Court erred in failing to deprive it of some portion of its costs of the appeal. This again was a matter within the discretion of the Full Court and we are not persuaded that the Court's exercise of discretion miscarried. We would not vary the order.

We would dismiss the appeal.

BRENNAN J. In the Supreme Court of Queensland the appellant, an owner-driver of a vehicle engaged in haulage, was awarded damages against the respondent, a seller of prime movers and other vehicles. The action arose out of the supply by the respondent of a prime mover which the appellant took on hire-purchase from a finance company, Esanda. The appellant's statement of claim alleged that the respondent warranted, inter alia, that the engine of the prime mover had been reconditioned and that the prime mover was fit for the purpose of transporting heavy loads over long

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distances and that the warranties were broken. Alternatively, it was alleged that the respondent by its servants negligently made representations to the same effect and that the representations were false. In awarding damages, the learned trial judge did not distinguish between the cause of action in contract and the cause of action in tort. In the Full Court, Connolly J., with the concurrence of Andrews C.J., reviewed the assessment of damages as for breach of warranty and Macrossan J. accepted, for the purposes of appeal, that the measure would not have been different as between the alternative causes of action. In argument in this Court, the parties have proceeded on the footing that the case is one of breach of warranty. It is unnecessary to consider any other cause of action. (No claim was made in deceit or under s. 6(1) of the *Hire Purchase Act* 1959 (Q.).) The trial judge awarded $220,122.90 damages. The Full Court allowed the respondent's appeal and reduced the award to $70,253.06. On appeal to this Court, the appellant seeks a virtual reassessment of his damages, though not to the full amount awarded by the trial judge. The respondent, without accepting the Full Court's assessment, submits that $70,253.06 is more than sufficient to cover any proper assessment of the appellant's damages and seeks an order dismissing the appeal. There is no cross appeal. The respondent did not challenge its liability in damages for breach of warranty either in the Full Court or on the appeal to this Court.

The evidence reveals, not always with clarity, the sorry experience of the appellant in the carrying on of his one-man haulage business. The learned trial judge (Moynihan J.) found that the appellant, proposing to acquire a prime mover for work between Brisbane, Sydney and Melbourne and occasionally Adelaide, made known his requirements to the respondent's salesmen. His Honour found that:

> "The implications of this proposed use in terms of the capacity and suitability of any particular prime mover for the purpose was well understood among those familiar with the trucking industry, including those of the defendant's servants with whom the plaintiff dealt . . ."

The respondent by its servants expressly represented that the engine of the prime mover they supplied had been fully reconditioned and (as I understand his Honour's finding) they impliedly warranted that the prime mover was fit for the work proposed. They knew that the appellant depended on the prime mover to earn his income. Presumably the warranties were given in consideration of the appellant's entering into an agreement with Esanda for the hire-purchase of the prime mover which Esanda purchased from the respondent. That was in or about July 1977. The warranties were

broken. The engine had not been reconditioned and the prime mover was not suitable for the proposed work.

The engine lacked power and consumed more diesel fuel and oil than a reconditioned engine would consume. The appellant brought the prime mover back to the respondent's workshop shortly after he acquired it. Some repairs were effected but indications of wear in the engine persisted. The prime mover broke down in November 1977 and was towed to the respondent's workshop for repairs. The respondent's servant drove it without water, overheated the engine and caused further damage. In June 1978 it broke down again. It was repaired by another firm and made sufficiently serviceable to do haulage work that did not involve adherence to timetables. At that time, if not before, it was obvious that the engine had not been reconditioned and was, as Connolly J. said, "in a deplorable condition". It would have cost $7,000 to $8,000 to recondition the motor in July 1978. As inter-capital haulage requires adherence to timetables, the appellant obtained alternative work for the prime mover, hauling supplies to coal mines in central Queensland. In January 1979, the appellant had fallen behind in his payments under the hire-purchase contract and the vehicle was repossessed by Esanda. The appellant arranged for a revision of the contract and reacquired possession of the vehicle in April 1979. In November 1979 it finally broke down. It had travelled approximately 90,000 miles in the twenty-eight months or thereabouts of the appellant's operation. On 4 December 1979, the appellant again being in default in his payments under the hire-purchase agreement, Esanda repossessed the vehicle. Its engine had then been removed. Its purchase price in July 1977 was $31,000. After allowing for payments made and for interest and other charges, the net amount owing to Esanda on 4 December 1979 was $36,948.89. Esanda resold the vehicle in May 1980 for $6,000 which, after deducting repossession charges, was credited to the appellant's account, leaving a net indebtedness of $31,644.84.

Moynihan J. found that if the prime mover had answered the warranties given, it would have operated efficiently throughout an operating life of four years "covering of the order of two hundred thousand miles", and would have been fit for the purpose of inter-capital haulage. He awarded damages based on, but not precisely conforming with, the appellant's calculation of the profits which the appellant would have made during the four years of efficient working life had the prime mover answered the warranties, increased by losses which the appellant had actually incurred in using the prime mover. The other components of the award need not concern us for the moment. In the Full Court, loss of profits and

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incurred losses were allowed only until July 1978. At that stage, as Connolly J. found:

> "the respondent must have known that the engine required full reconditioning and that the appellant's breach of warranty meant that he had not really got the engine for which he had contracted and which was fit for the purpose for which he was using the vehicle. If the engine had then been fully reconditioned, the respondent would have been restored to his proper position if he received the cost of reconditioning, the cost of the various repairs and loss of profit to that date. The only reason this was not done was that the respondent could not afford it."

His Honour said:

> "This is not a case of mitigation of damage at all. By July 1978, the respondent's damages had fully materialized. It was obvious that the vehicle should have been either made good or sold. The respondent was not, in my judgment, entitled to hang on and charge the appellant with the profits of a business which he himself had abandoned and with losses which he need never have incurred."

The profits to which his Honour refers were the profits of the inter-capital haulage business for which the vehicle was not fit and the losses to which his Honour refers were the losses which the appellant incurred in using the vehicle for hauling supplies to the central Queensland coal mines. Those profits would not have been lost and those losses would not have been incurred if the warranties had not been broken. Whether there were profits to be made from inter-capital haulage was a question open to dispute, but the damages claimed by the appellant included profits which would have been earned in inter-capital haulage and the manner of their calculation was accepted by the learned trial judge and the Full Court. Leaving aside for the moment any obligation on the plaintiff to mitigate his damage, the only grounds on which the loss of profits or losses incurred after July 1978 might not be recoverable are remoteness and causation.

In contract, the starting point of a consideration of the assessment of damages is the general principle that the plaintiff is to be placed in the same situation as if the contract had been performed: *Wenham v. Ella* (37). The general principle is qualified so as to limit recovery to loss actually resulting which "was at the time of the contract reasonably foreseeable as liable to result from the breach", foreseeability depending on the knowledge of the parties (or of the party who later commits the breach) either imputed or actual:

(37) (1972) 127 C.L.R. 454, at pp. 460, 471.

Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.; Coulson & Co. Ltd. (38). The two parts of the rule in *Hadley v. Baxendale* (39) treat of remoteness according to whether the knowledge on which foreseeability depends is knowledge of "the usual course of things" (which is imputed) or knowledge of other circumstances which make a breach liable to cause more loss (which must be actual knowledge). Provided a loss is foreseeable by reason of one or other kind of knowledge it is not essential to identify which kind establishes foreseeability: cf. *Wenham v. Ella* (40). In this case, the respondent knew that the prime mover was to be used by the appellant in inter-capital haulage in order to earn his income. I should have thought that it was manifest to the respondent that if the warranties were broken it was likely that the appellant would lose income which he would have earned and would incur costs that he would not have incurred if the prime mover had answered the warranties. Assuming, consistently with the Full Court's view, that the appellant would have earned profits, it was foreseeable that they would have been earned for the period during which the prime mover would have been fit for the purpose of inter-capital haulage had it been powered by a reconditioned engine. Moynihan J. found that period to be four years or, perhaps, four years or the time taken to travel 200,000 miles whichever was the sooner. Losses actually incurred are in a different situation. Was it foreseeable that the appellant would persist in the incurring of losses during the whole of that period once it was obvious that he was engaged in a loss enterprise? In other words, do foreseeable losses stop short of the losses incurred at the stage when the injured party, acting reasonably, would mitigate the losses resulting from the breach of warranty? When an act on the part of the person to whom a warranty is given is needed to put an end to losses resulting from breach of the warranty, foreseeability provides no different limitation on damages from the limitation which is imposed by a failure to act reasonably in mitigation of damage. A party who, when he gives a warranty, has such knowledge that he can foresee that the loss which will result from a breach of the warranty will continue until the other party acts to stop the loss, can foresee that the loss will continue until it is reasonable to expect that the injured party will act to stop it. Foreseeability extends until it would be unreasonable for the injured party to fail to act to mitigate his loss, and the onus of proving such a failure is on the party in breach.

(38) [1949] 2 K.B. 528, at p. 539.
(39) (1854) 9 Ex. 341, at pp. 354-355 [156 E.R. 145, at p. 151].
(40) (1972) 127 C.L.R., at p. 472.

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Unless the respondent showed that the appellant unreasonably failed to avoid the losses incurred after July 1978, those losses were as foreseeable after July 1978 as they were before.

Apart from foreseeability (in the sense explained in *Victoria Laundry* (41)), a plaintiff must show that the loss he seeks to recover results from the breach of contract relied on. If the loss results from some extraneous factor, the plaintiff fails to establish the essential causal link between the breach and the loss. It is in reference to this link that it is appropriate to consider *Liesbosch, Dredger v. Edison, S.S. (Owners)* ("*The Liesbosch*") (42). According to Kerr L.J. (*Perry v. Sidney Phillips & Son* (43)) the authority of what Lord Wright said in *The Liesbosch* is consistently being attenuated in more recent decisions of the Court of Appeal. Whether that be so or not, there is no reason why Lord Wright's speech should be regarded as expressing a general principle limiting the assessment of damages in contract or tort. His Lordship was dealing with an assessment of damages allegedly suffered by the owners of a dredge which was sunk by the negligence of the defendant's steamship. The dredge had been committed to a contract between the owners and the Harbour Board of Patras for the construction of piers and quay walls at Patras. There was no doubt that the owners were entitled to recover the cost of obtaining another dredge to carry out the dredging work involved in performing their contract. A suitable dredge, the *Adria*, was hired but the plaintiffs incurred an extra expense in working the *Adria* above the expense which would have been incurred had they purchased a dredge. The question was whether the extra expense was recoverable. The owners incurred the extra expense because they were unable, by reason of impecuniosity, to finance the purchase of a dredge. Lord Wright held against the owners, saying (44):

> "But the appellants' actual loss in so far as it was due to their impecuniosity arose from that impecuniosity as a separate and concurrent cause, extraneous to and distinct in character from the tort; the impecuniosity was not traceable to the respondents' acts, and in my opinion was outside the legal purview of the consequences of these acts."

His Lordship was prepared to hold that the owners' financial embarrassment was too remote to be regarded as a consequence of the tort, but he preferred to regard it "as an independent cause" (scil., of the extra expense incurred by the owners in working the

(41) [1949] 2 K.B. 528.
(42) [1933] A.C. 449.
(43) [1982] 1 W.L.R. 1297, at p. 1307; [1982] 3 All E.R. 705, at p. 712.
(44) [1933] A.C., at p. 460.

Adria). Both remoteness and causation are matters of fact: see his Lordship's observation as to remoteness in *Monarch Steamship Co. Ltd. v. Karlshamns Oljefabriker (A/B)* (45); *Wenham v. Ella* (46) and his Lordship's view of the facts in *The Liesbosch* do not compel a similar finding in other cases. There is no justification for treating impecuniosity in the present case as being either an extrinsic cause of lost profits after July 1978 or as making those profits too remote. In this case, the cause of the loss of profits from inter-capital haulage after July 1978 was the same as the cause of the loss of profits prior to that time, namely, the unfitness of the prime mover for the purpose. The appellant's decision to engage in supply haulage to central Queensland coal mines was taken in consequence of the unfitness of the prime mover for the warranted purpose. The reasonableness of the decision is critical to the question of mitigation but it is no novus actus which breaks the chain of causation between the breach of warranty and the lost profits and losses incurred after July 1978. The finding of fact which Lord Wright was prepared to make in *The Liesbosch* cannot be made here. The appellant's impecuniosity in this case was itself caused by or contributed to by the breach of warranties which founded the action. The appellant's losses incurred prior to July 1978 would have diminished any capacity he might otherwise have had to outlay $7,000 or $8,000 to have the engine reconditioned. The reasoning in *The Liesbosch* cannot be applied to such a case: *Fox v. Wood* (47).

The limitation placed on the recovery of loss resulting from breach of contract when the loss would have been avoided by the injured party taking reasonable steps to mitigate the loss is not so draconian as to deny recovery to an impecunious victim who, if he were not impecunious, could have avoided the loss but who, being impecunious, has suffered it. The general principle, applicable as well in contract as in tort, is stated by Lord Collins in *Clippens Oil Co. Ltd. v. Edinburgh and District Water Trustees* (48):

> "It was contended that this implied that the defenders were entitled to measure the damages on the footing that it was the duty of the company to do all that was reasonably possible to mitigate the loss, and that if, through lack of funds, they were unable to incur the necessary expense of such remedial measures the defenders ought not to suffer for it. If this were the true construction to put upon the passage cited, I think there would be force in the observation, for in my opinion the wrong-doer must take his victim talem qualem, and if the position of the latter is aggravated because he is without the

(45) [1949] A.C. 196, at p. 223.
(46) (1972)127 C.L.R., at p. 466.
(47) (1981) 148 C.L.R.438, at p. 446.
(48) [1907] A.C. 291, at p. 303.

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means of mitigating it, so much the worse for the wrong-doer, who has got to be answerable for the consequences flowing from his tortious act."

The Liesbosch did not impair the authority of this principle, though it has sometimes been thought to do so: see *Martindale v. Duncan* (49). In *The Liesbosch* Lord Wright referred to Lord Collins' dictum with approval but distinguished it as applying to mitigation, not to causation or remoteness, as Cantley J. and Megaw and Donaldson L.JJ. observed in *Dodd Properties (Kent) Ltd. v. Canterbury City Council* (50).

The possible choices which confronted the appellant when he discovered in July 1978 that the engine which had been warranted reconditioned was in fact in a deplorable state were fourfold: to complain to the respondent and request it to recondition the engine, to deliver the prime mover to Esanda and terminate the hire-purchase agreement, to pay sufficient to repair the engine to a condition where the vehicle could be used for haulage work on a reduced scale, or to pay the full cost of reconditioning. Consider each of those choices. The first was not available. Though the appellant sought redress from the respondent it was refused. The respondent's mechanics were called to inspect the engine when it was dismantled in July 1978, but redress was not forthcoming. The second option would have left the appellant without any prospect of working his way out of the Esanda debt. In July 1978 his total liability to Esanda stood at $34,622.15. If the prime mover as warranted had been worth $31,000 in July 1977, it is unlikely that its resale with known defects in July 1978 would have brought enough to discharge the debt which the appellant would have owed Esanda if he had terminated the hire-purchase agreement and Esanda had resold the vehicle. However, it was reasonable to try to haul supplies to the central Queensland coal mines in an effort to earn sufficient to pay out the hire-purchase liability. That was the third choice and the one he took: by revising the hire-purchase agreement in July 1978, he obtained the money to pay for the needed repairs and he thus obtained a chance to use the vehicle profitably. The fourth choice would have involved an outlay of $7,000 to $8,000 which he did not have. He was not bound to take

(49) [1973] 1 W.L.R. 574, at p. 577; [1973] 2 All E.R. 355, at p. 358.

(50) [1980] 1 W.L.R. 433, at pp. 443, 453, 459; [1979] 2 All E.R. 118, at p. 125; [1980] 1 All E.R. 928, at pp. 935, 941.

it. I would apply to this case what Megaw L.J. said in *Dodd Properties* (51):

> "A plaintiff who is under a duty to mitigate is not obliged, in order to reduce the damages, to do that which he cannot afford to do: particularly where, as here, the plaintiffs' 'financial stringency,' so far as it was relevant at all, arose, as a matter of common sense, if not as a matter of law, solely as a consequence of the defendants' wrongdoing."

It would be wrong to find that the course taken by the appellant in having some repairs done to the engine in 1978 was an unreasonable step to take in mitigating his loss unless it appeared that he was bound to suffer further losses when he went back on the road. The respondent, on whom the onus lay, did not establish that fact. The respondent submitted that the appellant was losing money on inter-capital haulage in any event and that he was bound to suffer further losses if he went back on the road. What the respondent failed to show was that the appellant was bound to suffer losses when the prime mover went back on the road after July 1978.

Connolly J. tested the validity of the assessment of loss terminating in July 1978 by postulating an action immediately prosecuted to judgment at that time. A judgment at that time would have yielded no more than $8,000 for the cost of reconditioning and losses already incurred. Of course, the recovery of the cost of reconditioning would make the adoption of the fourth choice the only reasonable step to take, for the appellant would have had in hand the means of putting an end to future losses and restoring the value of the prime mover. The postulate is invalid, however, for the reasonableness of the steps taken to mitigate must be assessed in the light of the appellant's actual financial situation, not by reference to a supposition which puts in his hands the money which he needed but did not have to put an end to the losses inflicted on him.

It follows that the assessment made by the Full Court must be set aside unless the respondent is right in saying that the $70,253.06 awarded by the Full Court is more than sufficient to cover the losses proved. This argument starts by attacking the calculation of losses advanced by the appellant. The Full Court accepted that calculation in toto in respect of the year ended June 1978.

The onus of proving his damages was, of course, on the plaintiff. In the first place, he had to show the period during which the prime mover would have been fit for the purpose of inter-capital haulage if the engine had been a reconditioned engine when the appellant acquired it. Conflicting estimates were given by the appellant and

(51) [1980] 1 W.L.R., at p. 453; [1980] 1 All E.R., at p. 935.

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one of his witnesses, a Mr. McMillan, as to the mileage which a vehicle with a reconditioned engine would be expected to travel before major overhaul. The appellant said 250,000 miles; Mr. McMillan 500,000 to 600,000. If the distance to be travelled each year in the ordinary course of operation was, as both the appellant and Mr. McMillan thought, 100,000 miles (160,000 kilometres), the period during which losses for breach of warranty might be incurred would have been, say, two and a half years or five to six years. Moynihan J., though he accepted Mr. McMillan's evidence, found:

> "Had the engine in truth been fully reconditioned, I am satisfied it could confidently have been expected that it would operate efficiently and effectively in the work for which the plaintiff intended it, of the order of four years covering of the order of two hundred thousand miles."

However his Honour awarded damages assessed in respect of a period of four years from July 1977 and it is by no means certain that his Honour's reference to 200,000 miles was intended as a finding as to the distance which would have been travelled without major overhaul if the prime mover had answered the warranties. His Honour's finding establishes at least a two-year period of recoverable lost profits (and perhaps a four-year period), if any were proved.

In order to establish the profit which could be earned by contract haulage, the appellant called Mr. McMillan who had considerable knowledge and experience of the industry but whose evidence was rather sketchy. Mr. McMillan stated the cost per kilometre for operating haulage vehicles during certain periods between April 1977 and October 1981. He did not state the contract rates which were available to be earned, but the appellant calculated his damages as though the cost per kilometre was the same as the available contract rate. It may be inferred, though evidence must surely have been available to prove the matter, that contract rates could be earned equivalent to the costs of haulage to which Mr. McMillan deposed. This curious equation did not exclude the possibility of some profit, however, for Mr. McMillan's costs included components for wages, hire-purchase or lease payments (unquantified), depreciation (at 20 per cent on a reducing balance) and replacement costs (at 0.5 to 0.6 of a cent per kilometre). The appellant regarded at least some of those items as the profit to be made from carrying on business as an owner-driver of a haulage vehicle. He said in evidence:

> "if he buys a vehicle, he can expect to make a reasonable wage out of it; and at the end of the time, when the vehicle is paid

off, that would be most of his profit at the end of a three year period, if that is what it is over".

When equipment is hired in order to be employed in a profit-making activity, the cost of the hiring (including interest) must be taken to be part of the costs incurred in earning income from the activity and damages for lost profit must be calculated accordingly, though the residual value of the equipment to which the hirer may be entitled goes in enhancement of the profit. But, as *T. C. Industrial Plant Pty. Ltd. v. Roberts Queensland Pty. Ltd.* (52) makes clear, lost profit is not to be diminished by bringing into account a replacement cost for equipment the cost of which is already allowed for in calculating profit; and that is so whether the replacement cost is a provision for future replacement or an allowance for depreciation on equipment previously acquired. When Mr. McMillan allowed for hire-purchase payments, depreciation and replacement costs in his costs of operation, he allowed too much. The explanation may well be that Mr. McMillan was not asked to state either the principle or the detail on which he made his calculation of costs. To calculate lost profits, it would have been necessary to omit the deductions of depreciation and replacement costs and to make an allowance for the residual value of equipment. Mr. McMillan's costs thus contained a true profit element consisting in wages, depreciation and replacement costs, but their quantification is extremely vague.

The evidence does not precisely quantify these items, but on the assumption of an annual distance travelled of 160,000 kilometres the wages component was shown to be of the order of $9,600 per annum until April 1979, increasing thereafter; replacement costs were allowed in the order of $800 to $960 per annum and depreciation was allowed at 20 per cent of the capital cost of a vehicle for the first year, reducing to 16 per cent for the second year and further reducing thereafter. The appellant's vehicle, if it could be assumed to be of an average value (it was acquired by Esanda for $31,000) would have attracted depreciation of the order of $6,000 in one year, $4,800 in the next. Adding all these items together, the lost profits which the appellant might have been thought to have proved in respect of the two years July 1977 to June 1979 — there was no finding that they had been proved — would not have amounted to more than $33,785.26 which the Full Court allowed for lost profits. But the true measure of the appellant's recoverable loss is not the amount of profit which he would have made if the prime mover had answered the warranties. It is the difference

(52) (1963) 37 A.L.J.R. 289.

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between the profit he would have made and the residual value he would have received — for that is what "the machine would have been worth to him if it had been as warranted", to adopt the words of the joint judgment in *T. C. Industrial* (53) — and the profit or loss which he in fact made and the residual value he in fact received — what the machine was in fact worth to him — subject to any adjustment which is attributable to his failure to act reasonably in mitigation of his loss.

According to the slender evidence which his Honour accepted in the absence of cross-examination upon it or the tendering of other evidence to controvert it, the appellant lost $10,386.22 in the period to June 1978 and $19,007.93 in the period to June 1979. There is no finding that it was unreasonable for him to reacquire possession of the vehicle in April 1979. If the whole of the losses incurred were added to what might have been found to be lost profits in respect of the two years July 1977 to June 1979, the aggregate overtops the $33,785.26 allowed by the Full Court. That is without taking account of the difference in residual value of the prime mover. The respondent's argument that the amount allowed by the Full Court is more than sufficient to establish the appellant's recoverable losses therefore fails. In the absence of findings of the facts necessary to quantify the damage according to the principles stated, I see no alternative (unless the parties earlier agree) to remitting the matter to the Supreme Court for the reassessment of damages. In that event I would agree, for the reasons given by the Full Court, that the award of $2,000 for nervous stress should not be allowed. Having regard to the order to be made in accordance with the majority judgment, I do not need to express a view as to costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Henderson Lahey Trout Bernays.*
Solicitors for the respondent, *Patricia Newton and Associates.*

R.A.S.

(53) (1963) 37 A.L.J.R., at p. 293.